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Chapter 3
Child Support

In cooperation with the School of Government, The University of North Carolina at Chapel Hill by
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Chapter 3: **Child Support**

Part 1. Liability and Amount

I. Liability for Child Support

A. Parents Are Primarily Liable for Support

1. Subject to the exceptions discussed in Sections I.B, C, and D, below, the general rule is that only the father and mother are legally responsible for the financial support of a minor child. A judge may not order support to be paid by a person who is not the child's parent or by an agency, organization, or institution standing *in loco parentis* absent evidence and a finding that such person, agency, organization, or institution has voluntarily assumed the obligation of support in writing. [G.S. 50-13.4(b).]
    a. The parents (natural or adoptive mother and father) of a minor child are primarily and jointly liable for the support of their child. [*See Plott v. Plott*, 313 N.C. 63, 326 S.E.2d 863 (1985); *Nisbet v. Nisbet*, 102 N.C. App. 232, 402 S.E.2d 151 (citing *Plott), review denied*, 329 N.C. 499, 407 S.E.2d 538 (1991); *Gunter v. Gunter*, 228 N.C. App. 138, 746 S.E.2d 22 (2013) (**unpublished**) (upholding dismissal of mother's motion for child support from mother's husband at time child was born based on stipulation that he was not the father even though he was listed as father on the birth certificate; to be liable for support, mother's husband would have had to voluntary assume the obligation of support in writing as required by G.S. 50-13.4(b)).]
    b. Although both parents are jointly responsible for the support of their minor child, each parent's legal obligation to support his child depends on the parent's relative ability to provide support. [*See Plott v. Plott*, 313 N.C. 63, 326 S.E.2d 863 (1985) (an equal duty to support does not necessarily mean the amount of child support is to be automatically divided equally between the parties); *Madar v. Madar*, 275 N.C. App. 600, 613, 853 S.E.2d 916, 925 (2020) (quoting *Plott*, 313 N.C. at 68, 326 S.E.2d at 867) (even though both parents have an equal duty of support, "the amount of each parent's obligation varies in accordance with their respective financial resources"); *Boyd v. Boyd*, 81 N.C. App. 71, 343 S.E.2d 581 (1986) (support for minor children is an obligation shared by both parents according to their relative abilities to provide support and the reasonable needs and estate of the child).]
2. The general rule applies to a child born out of wedlock once paternity is established.
    a. After paternity of a child born out of wedlock has been legally established in a civil action under G.S. 49-14, the child's father and mother are liable for the child's

support to the same extent as the father and mother of a legitimate child. [G.S. 49-15, *amended by* S.L. 2013-198, § 23, effective June 26, 2013.]

b. For the effect for support purposes of an affidavit of parentage filed with the district court pursuant to G.S. 110-132 or an affidavit of paternity executed pursuant to G.S. 130A-101(f), see *Paternity*, Bench Book, Vol. 1, Chapter 10.

3. The obligation of parents for support is not affected by agreement of the parents or by other circumstances.

a. A parent's legal obligation to support her minor child may not be waived, released, or contracted away by the child's parents or caretakers. [*See Stanly Cty. Dep't of Soc. Servs. ex rel. Dennis v. Reeder*, 127 N.C. App. 723, 493 S.E.2d 70 (1997) (father's agreement to execute a consent to adopt in exchange for mother's express waiver and relinquishment of past and prospective child support void as against public policy); *Cartrette v. Cartrette*, 73 N.C. App. 169, 325 S.E.2d 671 (1985) (father could be required to pay support after mother began to receive public assistance for the child, even though father not required to pay support in parties' consent judgment); *Brinkley v. Brinkley*, 135 N.C. App. 608, 522 S.E.2d 90 (1999) (father not entitled to a credit for the amount he paid above his court-ordered child support obligation or for the amount due him under the parties' equitable distribution judgment); *cf. Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003) (establishing a rebuttable presumption that a mutually agreed upon amount of child support in an unincorporated separation agreement is just and reasonable), *aff'd per curiam in part, review dismissed in part*, 359 N.C. 65, 602 S.E.2d 360 (2004).]

b. The significant, separate income or estate of a minor child does not relieve a parent of the responsibility to support the child to the extent he is able to do so. [*Gowing v. Gowing*, 111 N.C. App. 613, 617, 432 S.E.2d 911, 913 (1993) ("If a parent can support his minor children, the trial court must refuse to diminish or relieve him of his obligation to provide for his children if the sole ground for that relief is that the children have their own separate estates"); *Browne v. Browne*, 101 N.C. App. 617, 400 S.E.2d 736 (1991) (trial court was correct in refusing to "diminish or relieve" the father of his obligation to provide for his children simply because the children had their own separate estates); *Sloop v. Friberg*, 70 N.C. App. 690, 320 S.E.2d 921 (1984) (no error when court did not consider substantial trust accounts of each child; under G.S. 50-13.4(b), application of the separate property of minors need only be resorted to "if appropriate").]

c. A noncustodial parent's legal obligation to support his child generally is not dependent or contingent on whether the custodial parent allows him to visit the child or to exercise visitation rights pursuant to a court order. [*See Appert v. Appert*, 80 N.C. App. 27, 341 S.E.2d 342 (1986) (the right to receive child support is independent of the noncustodial parent's right to visitation); *see also Sowers v. Toliver*, 150 N.C. App. 114, 562 S.E.2d 593 (2002) (trial court erred when it terminated father's obligation to pay support based on mother's refusal to allow father's visitation with the child).]

d. The fact that a court may consider contributions of a third party to support a deviation from the N.C. Child Support Guidelines does not in any way relieve a parent of her obligation to provide support. [*Guilford Cty. ex rel. Easter v. Easter*, 344 N.C. 166, 473 S.E.2d 6 (1996) (while contributions of a third party, in this case, maternal

grandparents, could be considered upon remand in determining whether to deviate from the child support guidelines, the court noted that mother continued to be responsible for support of her child).] For more on third-party contributions as a factor justifying deviation, see Section IV.D.1.c, below.

B. Grandparents Are Not Responsible for Support of a Grandchild Except in Limited Circumstances

1. A grandparent is not, solely by virtue of his status as a grandparent or the fact that he has legal or physical custody of a grandchild or stands *in loco parentis* with respect to a grandchild, legally responsible for supporting his grandchild. [G.S. 50-13.4(b).] Sections I.C.2 and 3, below, detailing when a stepparent is or may be responsible for support and the secondary nature of that obligation, are applicable to a grandparent.
2. When a grandparent will or may be liable for support.
    a. A grandparent will be responsible for support if the grandparent voluntarily assumes the obligation of support in writing. [G.S. 50-13.4(b).] *See* Section I.C.2, below, on requirements of a writing.
    b. In addition, a grandparent may be liable for the support of her grandchild if either of the grandchild's parents is a minor unemancipated child. [G.S. 50-13.4. *See Whitman v. Kiger*, 139 N.C. App. 44, 533 S.E.2d 807 (2000), *aff'd per curiam*, 353 N.C. 360, 543 S.E.2d 476 (2001).]
        i. The parents of a minor unemancipated parent share the minor unemancipated parent's primary child support responsibility, the court determining the proper share, until the minor unemancipated parent is emancipated or reaches the age of 18. [G.S. 50-13.4(b).]
        ii. If both of the grandchild's parents were unemancipated minors at the time the grandchild was conceived, the maternal and paternal grandparents share primary responsibility for the grandchild's support until both of the grandchild's parents are emancipated or reach the age of 18. [G.S. 50-13.4(b); *Whitman v. Kiger*, 139 N.C. App. 44, 533 S.E.2d 807 (2000) (maternal and paternal grandparents found primarily responsible for infant grandchild born to minor unemancipated parents), *aff'd per curiam*, 353 N.C. 360, 543 S.E.2d 476 (2001).]
        iii. If only one of the grandchild's parents was an unemancipated minor at the time the grandchild was conceived, the maternal and paternal grandparents are liable for any unpaid child support arrearages owed by the grandchild's adult or emancipated parent until the grandchild's other parent is emancipated or reaches the age of 18. [G.S. 50-13.4(b).]

            EXAMPLE: Mother is a minor, father is an adult.

            The parents of the minor mother (the maternal grandparents) share her child support responsibility until she turns 18 or becomes emancipated.

            Both the maternal and paternal grandparents are liable for any unpaid child support arrearages owed by the adult father until the minor mother reaches 18 or is emancipated. After the minor mother turns 18 or is emancipated, the maternal and paternal grandparents are no longer responsible

for any support arrearages of the adult father but continue to be liable for arrearages that accrued before the mother turned 18 or was emancipated. Note that to terminate a parent's obligation for child support (or a grandparent's, in this example) because of the child's emancipation other than by marriage, the child must be judicially emancipated pursuant to G.S. Chapter 7B, Article 35. [*Morris v. Powell*, 269 N.C. App. 496, 840 S.E.2d 223 (2020).]

EXAMPLE: Mother is a minor aged 16, father is a minor aged 15.

Both the maternal and paternal grandparents share primary responsibility for the grandchild's support until both minor parents are 18 or are emancipated. If the mother and father are not emancipated, both maternal and paternal grandparents will be responsible for the grandchild's support until the father turns 18. In other words, the maternal grandparent's responsibility does not end when their child, the mother, turns 18 but, in this case, when the father turns 18.

C. Stepparents Are Not Responsible for Support of a Stepchild Except in Limited Circumstances

1. A stepparent is not, solely by virtue of his status as a stepparent or the fact that he has legal or physical custody of a stepchild or stands *in loco parentis* with respect to a stepchild, legally responsible for supporting his stepchild.
2. When a stepparent will or may be liable. A stepparent may be ordered to pay child support for her stepchild if the stepparent has voluntarily assumed, in writing, the obligation to support her stepchild. [G.S. 50-13.4(b). *See Duffey v. Duffey*, 113 N.C. App. 382, 438 S.E.2d 445 (1994).]
    a. Typically, the status of *in loco parentis* ceases after the marriage has been terminated either by death or divorce. [*Moyer v. Moyer*, 122 N.C. App. 723, 471 S.E.2d 676, *review denied*, 344 N.C. 631, 477 S.E.2d 41 (1996).]
    b. Thus, absent a written agreement to do so, a stepparent is generally not obligated to support a stepchild after divorce. [*See Duffey v. Duffey*, 113 N.C. App. 382, 438 S.E.2d 445 (1994) (stepfather who agreed in separation agreement to support stepchildren obligated to do so; stepfather voluntarily extended his status as *in loco parentis*).]
    c. A stepparent's written assumption of a support obligation with respect to a stepchild must be executed and acknowledged in the same manner as a separation agreement pursuant to G.S. 52-10.1. [*See Moyer v. Moyer*, 122 N.C. App. 723, 471 S.E.2d 676 (handwritten unacknowledged agreement in which defendant agreed to pay child support for a stepchild "until more permanent arrangements were decided upon" not executed with requisite formalities; agreement could not be basis for support order), *review denied*, 344 N.C. 631, 477 S.E.2d 41 (1996).]
3. When a stepparent is liable for support under G.S. 50-13.4(b), the obligation is secondary to that of the child's natural or adoptive parents. [*See Duffey v. Duffey*, 113 N.C. App. 382, 438 S.E.2d 445 (1994).]

a. This generally means that a stepparent who has agreed in writing to support her stepchild is required to provide support only to the extent that the child's parents are unable to provide support sufficient to meet the child's reasonable needs. [*See Duffey v. Duffey*, 113 N.C. App. 382, 438 S.E.2d 445 (1994) (remanding for a determination as to the needs of stepchildren and the ability of their respective natural parents to meet these needs; if the court found that their needs exceeded the ability of their natural parents to meet those needs, then and only then would stepfather be secondarily responsible for the deficiency).]

b. A stepparent's child support obligation is not determined through application of the N.C. Child Support Guidelines. [N.C. Child Support Guidelines, 2020 Ann. R. N.C. 49 (effective Mar. 1, 2020, applicable to child support actions heard on or after that date) (hereinafter referred to as 2020 Guidelines); *Duffey v. Duffey*, 113 N.C. App. 382, 438 S.E.2d 445 (1994) (use of guidelines would equate the duties and obligations of a person secondarily liable with those of persons primarily liable).] Where appropriate, N.C. Child Support Guidelines, 2019 Ann. R. N.C. 49 (effective Jan. 1, 2019) (hereinafter referred to as 2019 Guidelines), N.C. Child Support Guidelines, 2015 Ann. R. N.C. 49 (effective Jan. 1, 2015) (hereinafter referred to as 2015 Guidelines), 2011 Ann. R. N.C. 49 (effective Jan. 1, 2011) (hereinafter referred to as 2011 Guidelines), and 2006 Ann. R. N.C. 49 (effective Oct. 1, 2006) (hereinafter referred to as 2006 Guidelines) will be cited. For more on the 2020 Guidelines, see Cheryl Howell, *Amendments to Chapter 50B and to the Child Support Guidelines*, UNC Sch. of Gov't: On the Civil Side Blog (Feb. 12, 2020), https://civil.sog.unc.edu/amendments-to-chapter-50b-and-to-the-child-support-guidelines. For more on the 2019 Guidelines, see Cheryl Howell, *New Child Support Guidelines for 2019*, UNC Sch. of Gov't: On the Civil Side Blog (Jan. 8, 2019), https://civil.sog.unc.edu/new-child-support-guidelines-for-2019. For more on the 2015 Guidelines, see Cheryl Howell, *We Have New Child Support Guidelines*, UNC Sch. of Gov't: On the Civil Side Blog (Jan. 28, 2015), http://civil.sog.unc.edu/we-have-new-child-support-guidelines.

D. Persons and Agencies *In Loco Parentis*

1. A person (a grandparent where the parents are not unemancipated minors, a relative, a guardian, or a caretaker), other than a child's parent, or an organization, institution, or agency, other than a state or county agency that is responsible for a child's support under a law other than G.S. 50-13.4, that has legal or physical custody of a child or that stands *in loco parentis* with respect to a child is not, solely by virtue of that fact, legally responsible for the child's support.

2. When a person who is not the child's parent, or an agency, organization, or institution standing *in loco parentis* is or may be liable for support. A court may order a person, agency, organization, or institution that stands *in loco parentis* with respect to a child to support the child if the person, agency, organization, or institution standing *in loco parentis* has voluntarily agreed in writing to support the child. [G.S. 50-13.4(b).]

3. Like the support obligation of a stepparent under G.S. 50-13.4(b), the support obligation of a person, agency, organization, or institution standing *in loco parentis* is secondary to that of the child's natural or adoptive parents. [G.S. 50-13.4(b).]

4. The child support obligation of persons or agencies who are secondarily liable for child support is not determined through application of the child support guidelines. [2020 Guidelines.]

II. Amount, Scope, Duration, and Termination of Parents' Support Obligation

A. Amount and Scope of Child Support Obligation

1. The amount and scope of a parent's legal obligation to support his minor child under G.S. Chapter 50 depends primarily on the child's reasonable needs related to health, education, and maintenance (shelter, food, clothing, child care, transportation, etc.) and on the relative ability of the parent to provide support. [G.S. 50-13.4(c).] A minor is any person who has not reached the age of 18 years [G.S. 48A-2.] and has not been legally emancipated pursuant to G.S. Chapter 7B, Article 35. Note that to terminate a parent's obligation for child support because of the child's emancipation other than by marriage, the child must be judicially emancipated pursuant to G.S. Chapter 7B, Article 35. [*Morris v. Powell*, 269 N.C. App. 496, 840 S.E.2d 223 (2020).]
2. In determining the amount of a parent's child support obligation, a court must apply the child support guidelines unless the amount of child support determined under the guidelines would exceed or not meet the reasonable needs of the child considering the relative ability of each parent to provide support, or would be otherwise unjust or inappropriate. [G.S. 50-13.4(c); 2020 Guidelines. See Section III, below, for more on the guidelines.]
3. When the court orders a parent to pay child support in an amount other than that determined under the child support guidelines, the court must consider the child's needs, the estates and earnings of the child and the child's parents, the child care and homemaker contributions of each parent, the conditions and accustomed living standards of the child and the child's parents, and other facts of the particular case. [G.S. 50-13.4(c), (c1). See Section IV, below, for more on deviating from the guidelines.]
4. A parent may assume, through executing a legally binding contract or agreement, a child support obligation that is greater in amount or scope than that imposed by G.S. Chapter 50 or other state laws. [See Section II.B.4, below; *see also Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003) (establishing a rebuttable presumption that a mutually agreed upon amount of child support in an unincorporated separation agreement is just and reasonable), *aff'd per curiam in part, review dismissed in part*, 359 N.C. 65, 602 S.E.2d 360 (2004).] See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

B. Duration of Child Support Obligation

1. The general rule is that absent an enforceable contract or agreement, a parent has no legal obligation to support a child who has reached the age of 18 and is not in primary or secondary school.
2. The general rule is based on G.S. 50-13.4(c), which provides that payments ordered for the support of a child terminate when the child reaches 18. with the following exceptions:

a. If the child is otherwise emancipated, payments terminate at that time. [G.S. 50-13.4(c)(1).]

   i. A 16- or 17-year-old child may be emancipated by court order. [G.S. 7B-3500 *et seq.*]

      (a) While G.S. 50-13.4(c)(1) does not expressly require a decree of emancipation, in a matter of first impression, the court of appeals held that to terminate a parent's obligation to pay child support based on a claim that the child is emancipated, the child must be judicially emancipated, which occurs only as provided in G.S. Chapter 7B, Article 35. [*Morris v. Powell*, 269 N.C. App. 496, 499, 840 S.E.2d 223, 226 (2020) (opinion (1) rejected noncustodial parent's argument that a child, who had moved out of custodial parent's home and was self-supporting, could be emancipated pursuant to the common-law doctrine of de facto or self-emancipation; (2) required a decree of emancipation to automatically terminate the noncustodial parent's child support obligations pursuant to G.S. 50-13.4(c)(1); and (3) interpreted language in G.S. 7B-3509, stating that "[a]ll other common-law provisions for emancipation are superseded" by G.S. Chapter 35, Article 35, to preclude the application of common-law methods of emancipation for purposes of G.S. 50-13.4(c)(1)).]

   ii. A married minor child is emancipated. [G.S. 7B-3509.]

b. If the child is in primary or secondary school when the child reaches age 18, payments continue until the child

   i. Graduates,

   ii. Ceases to attend school on a regular basis,

      (a) For a case finding that this provision does not require full-time attendance, see discussion of *Malone v. Hutchinson-Malone*, 246 N.C. App. 544, 784 S.E.2d 206 (2016), in Section II.B.4.b, below.

   iii. Fails to make satisfactory progress in school, or

   iv. Reaches age 20,

   whichever occurs first, unless the court in its discretion orders that payments cease at age 18 or before high school graduation. [G.S. 50-13.4(c)(2).]

      (a) "[A]s a general rule, [G.S.] 50-13.4(c)(2) establishes the minimum duration of [a] child support obligation under North Carolina law." [*Malone v. Hutchinson- Malone*, 246 N.C. App. 544, 547, 784 S.E.2d 206, 209 (2016).]

      (b) An order terminating support, whether upon the occurrence of one of the events in G.S. 50-13.4(c)(2) or pursuant to an enforceable contract or separation agreement, should include an effective date or otherwise set out clearly the date the obligation terminates. [*Malone v. Hutchinson-Malone*, 246 N.C. App. 544, 784 S.E.2d 206 (2016) (for effective appellate review, the appellate court must be able to ascertain from the trial court's order the effective date of the termination of child support).]

c. If the child is enrolled in an innovative high school program authorized under Part 9 of Article 16 of G.S. Chapter 115C, payments terminate when the child completes

her fourth year of enrollment or when the child reaches the age of 18, whichever occurs later. [G.S. 50-13.4(c)(3), *added by* S.L. 2012-20, § 2, effective Oct. 1, 2012, and applicable to actions or motions filed on or after that date).]

3. Effect of one child's emancipation, graduation from high school, or reaching the age of majority under an order for support of multiple children.

   a. A parent's obligation to pay the entire amount of child support due under an order that requires a lump sum amount of child support for more than one child is not terminated or reduced by termination of the parent's legal duty to support one of the children (for example, by virtue of a child's emancipation, graduation from high school, or reaching the age of majority). [*Dillingham v. Ramsey*, 267 N.C. App. 378, 837 S.E.2d 129 (2019) (in high-income case, father had no right to unilaterally reduce amount of monthly child support by 25 percent when first one, and then another, of the parties' four children started college; support order did not address termination of father's child support obligation upon a child turning 18 or in any other manner); *Craig v. Craig*, 103 N.C. App. 615, 406 S.E.2d 656 (1991) (father had no authority to unilaterally modify the amount of child support upon older child turning 18 when support order did not allocate amount for each individual child and was silent as to any reduction in support upon one child reaching age 18).]

   b. The payor may not unilaterally terminate or proportionally reduce his child support payments but must file a motion seeking modification of the order pursuant to G.S. 50-13.7. [*Dillingham v. Ramsey*, 267 N.C. App. 378, 387, 837 S.E.2d 129, 136 (2019) (proper procedure is for supporting parent to apply to the trial court for relief before reducing child support payments; the supporting parent has the burden to seek modification before reducing the payments, the payee parent having "no obligation to move to enforce the [current] order immediately or to seek modification of Father's child support" after the unilateral reduction of support). *See Modification of Child Support Orders*, Part 3 of this Chapter.] The fact that a parent's legal obligation to support one of several children has terminated may constitute a substantial change of circumstances warranting modification of an existing support order. [*See Craig v. Craig*, 103 N.C. App. 615, 406 S.E.2d 656 (1991) (supporting parent must apply to trial court for modification when one of two or more minor children for whom support is ordered reaches age 18 and support is not allocated by child).]

   c. Note that a child may become emancipated in one of two ways: by the child's marriage or a court order entered in an emancipation proceeding. [G.S. 7B-3500 through -3509].

4. Parents can agree to support and other obligations that exceed or differ from statutory requirements.

   a. A parent may, by entering into a legally binding contract or agreement with the child's parent or other parties, obligate herself to support the child after the child has reached the age of 18 (or is otherwise emancipated) and is no longer in primary or secondary school (for example, by agreeing to pay all or part of the cost of the child's college expenses or by providing support for an adult disabled child). See Section II.E, below, discussing liability for college expenses.

b. The court of appeals has stated that parties may contract to pay more than guideline support or to pay support for a longer period than required by G.S. 50-13.4(c)(2), but if the amount of support or its duration is "less generous" than required by the statute, the obligee "may still recover child support up to the amount and duration required under the statute." Thus, when a duration provision in an incorporated separation agreement is "less generous" than the provision in G.S. 50-13.4(c)(2), the statute controls. [*Malone v. Hutchinson-Malone*, 246 N.C. App. 544, 548, 784 S.E.2d 206, 209 (2016) (footnote omitted) (quoting *Smith v. Smith*, 121 N.C. App. 334, 465 S.E.2d 52 (1996)) (trial court found that child, after reaching age 18, was not attending school full-time and terminated father's child support obligation based on an incorporated separation agreement providing for support to continue if child, who had special needs, was a "full-time" student or until child reached age 20; G.S. 50-13.4(c)(2) only requires that child attend school on a "regular" basis for child support to continue until age 20; since statute was more generous than the contract provision, trial court erred when it granted father's motion to terminate support because child was not attending school full-time). *But cf. Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003) (parties are free to contract to any amount of support they deem appropriate, subject to the right of either party to seek a court order for support; before ordering child support in accordance with the guidelines, the court must find that the party seeking a support order has rebutted the presumption that any amount of support agreed to by the parties in a separation agreement is an appropriate and reasonable amount of support; if the presumption is not rebutted, court must order support as provided in the agreement between the parties), *aff'd per curiam in part, review dismissed in part*, 359 N.C. 65, 602 S.E.2d 360 (2004).]

c. For procedure when parties have executed an agreement regarding support, see *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Sections I.G.6 and III.

5. A court may not order the use of a trust, financial account, or other vehicle that will provide funds to a child (1) after the age of majority or (2) who is otherwise emancipated. [*See Simms v. Bolger*, 264 N.C. App. 442, 826 S.E.2d 522 (2019) (trial court erred when it directed obligor to transfer a lump sum child support award to a custodial account in the names of the plaintiff mother, as custodian, and the child; terms of the custodial account would result in surplus funds being distributed to the child upon emancipation in contravention of the purpose of child support, which is to provide support for a child prior to emancipation).]

C. Support of a Special Needs or Disabled Child

1. There is no separate statute addressing support of a disabled child. The provisions of G.S. 50-13.8 that formerly required a parent to support a child who, upon reaching the age of majority, was mentally or physically incapable of self-support, were repealed in 1979. [*See Jackson v. Jackson*, 102 N.C. App. 574, 402 S.E.2d 869 (1991) (the law does not now require parents to support their disabled child after majority).]

2. Support of a disabled child is determined under G.S. 50-13(c) the same as for any other child. [*See Hendricks v. Sanks*, 143 N.C. App. 544, 547, 545 S.E.2d 779, 781 (2001) (stating that "[t]o treat a mentally disabled child any differently than a mainstream child in terms

of support obligations would be patently unfair, against public policy and not in keeping with the legislative directive").]

3. Thus, the general rule in G.S. 50-13.4(c) applies to a disabled child, that is, absent an enforceable contract or agreement, a parent has no legal duty to support a child who is over the age of 18 and not in primary or secondary school.

4. However, the special circumstances of a disabled child can be considered when determining whether support is required after the child reaches 18 but before the child reaches 20. For example, a child with Down Syndrome was found to be making satisfactory progress toward graduation, requiring a parent to continue support after the child reached 18 pursuant to G.S. 50-13.4(c), even though the child would not receive a traditional diploma. [*Hendricks v. Sanks*, 143 N.C. App. 544, 545 S.E.2d 779 (2001).]

5. For an example of an agreement by a parent to support a disabled child past the age of majority, *see Martin v. Martin*, 180 N.C. App. 237, 636 S.E.2d 340 (2006) (**unpublished**) (parent's obligation in a 1994 consent order to support a child with Down Syndrome beyond the age of majority remained enforceable after a 1997 modification of the amount of support; the 1997 order, which included language that except as modified, prior orders remained in full force and effect, modified and controlled only the amount of child support, leaving the durational terms of the 1994 order in full effect), *review denied*, 361 N.C. 220, 642 S.E.2d 444 (2007).]

D. Termination of a Child Support Obligation

1. Termination of a parent's obligation to pay support. A parent's obligation to pay child support generally terminates when the child reaches the age of 18, subject to some exceptions. [*See* Section II.B, above, on duration of a child support obligation.] A parent's obligation to support a minor unemancipated child terminates:

   a. On the child's death; [G.S. 50-13.10(d)(1).] the parent, however, remains liable for child support arrearages that accrued before the child's death;

   b. On the supporting party's death, [G.S. 50-13.10(d)(2).] absent a binding contract or agreement;

      i. The parent's estate, however, remains liable for child support arrearages that accrued before the parent's death. [*See Larsen v. Sedberry*, 54 N.C. App. 166, 282 S.E.2d 551 (1981) (order awarding payment of past due child support from father's estate to the extent not barred by the ten-year statute of limitations affirmed), *review denied*, 304 N.C. 728, 288 S.E.2d 381 (1982).]

      ii. A parent may create in a separation agreement an obligation to furnish child support that survives the parent's death and becomes an obligation of the parent's estate. [*See Bradshaw v. Smith*, 48 N.C. App. 701, 269 S.E.2d 750 (1980) (recognizing that father's common law duty to support his children terminated on his death but finding that father had by separation agreement obligated himself to pay support, which obligation survived his death and for which his estate was liable).]

      iii. For enforcement of a claim against a decedent's estate (1) for child support pursuant to a contract or agreement or (2) for payment of arrears, see *Enforcement of Child Support Orders*, Part 4 of this Chapter, Section X.

c. On entry of a final order terminating a parent's parental rights pursuant to G.S. Chapter 7B; [G.S. 7B-1112.]

i. A termination of parental rights order does not relieve the parent of liability for child support arrearages that accrued before the date the parent's rights were terminated. [*See Moore Cty. ex rel. Evans v. Brown*, 142 N.C. App. 692, 543 S.E.2d 529 (2001) (discussing legal authority of department of social services to pursue payment of past due public assistance under G.S. 110-135 from a father whose rights had been terminated); *see also* G.S. 48-1-106 (parents whose parental relationship was terminated by adoption decree remain liable for past due payments for child support) and G.S. 50-13.10 (vesting of past due child support).]

d. On entry of a final decree of adoption; [G.S. 48-1-106.]

i. Adoption does not relieve the former parent of liability for child support arrearages that accrued before the child's adoption. [G.S. 48-1-106(c); *Michigan ex rel. Pruitt v. Pruitt*, 94 N.C. App. 713, 380 S.E.2d 809 (1989) (absent evidence that mother waived her right to past-due child support payments, children's subsequent adoption by their stepfather did not affect their father's pre-adoption obligation to pay past-due child support not barred by the statute of limitations).]

ii. A parent's relinquishment of the child for adoption or consent to adoption does not terminate the parent's legal duty to support the child. [G.S. 48-3-607(c) and 48-3-705(d); *Stanly Cty. Dep't of Soc. Servs. ex rel. Dennis v. Reeder*, 127 N.C. App. 723, 493 S.E.2d 70 (1997) (where his parental rights had not otherwise been terminated, defendant's obligation to provide child support continued until entry of a final adoption order).]

e. On entry of an order granting relief from an order of child support, based upon a determination that the obligor is not the child's father; [G.S. 50-13.13, *added by* S.L. 2011-328, § 3, effective Jan. 1, 2012, and applicable to motions or claims for relief filed on or after that date).]

i. A motion or claim for relief pursuant to this statute must be filed within one year of the date the movant knew or reasonably should have known that he was not the father of the child. [G.S. 50-13.13(b).] Notwithstanding this provision, any person who would otherwise be eligible to file a motion or claim was allowed to file a motion or claim pursuant to this act prior to Jan. 1, 2013. [S.L. 2011-328, § 4.]

ii. A motion seeking relief from a child support obligation pursuant to G.S. 50-13.13 must be verified and shall state all of the following:

(a) The basis, with particularity, on which the moving party believes that he is not the child's father;

(b) The moving party has not acknowledged paternity of the child or acknowledged paternity without knowing that he was not the child's biological father;

(c) The moving party has not adopted the child, has not legitimated the child pursuant to G.S. 49-10, 49-12, or 49-12.1, or is not the child's legal father pursuant to G.S. 49A-1;

(d) The moving party did not act to prevent the child's biological father from asserting his paternal rights regarding the child. [G.S. 50-13.13(b).]

iii. When a motion for relief is filed pursuant to this statute, notwithstanding G.S. 8-50.1(b1), a court must order the moving party, the child's mother, and the child to submit to genetic paternity testing if the court finds good cause to believe that the moving party is not the child's father and that he may be entitled to relief under G.S. 50-13.13. [G.S. 50-13.13(d).]

iv. The court may grant relief from prospective child support if paternity has been set aside pursuant to G.S. 49-14 or 110-132 or if the moving party proves by clear and convincing evidence, and the court sitting without a jury finds both of the following:

(a) The results of a valid genetic test establish that the moving party is not the child's biological father [G.S. 50-13.13(f)(1).] and

(b) The moving party either (1) has not acknowledged paternity of the child or (2) acknowledged paternity without knowing that he was not the child's biological father. [G.S. 50-13.13(f)(2).] For the definition of "acknowledging paternity" for purposes of G.S. 50-13.13(f), see G.S. 50-13.13(f)(2)a.–d.

v. Defendant failed to establish the good cause required for court-ordered genetic testing pursuant to G.S. 50-13.13(d) when an earlier order, in accordance with defendant's motion, found that when child was conceived, mother told defendant she was sexually active with at least two other men and had used the Internet to seek sexual partners and that mother told defendant he was the father. Other findings supporting denial of testing, which defendant did not challenge, were that mother and defendant signed an affidavit of parentage on the day child was born and defendant had filed motions for custody of the child and participated in mediation. [*Guilford Cty. ex rel. Ijames v. Sutton*, 230 N.C. App. 409, 753 S.E.2d 397 (2013) (**unpublished**).]

vi. Form AOC-CV-673, Order Granting or Denying Relief from Child Support Obligation, may be used.

f. Incarceration of parent or change in custody. A parent's obligation to pay child support pursuant to a court order does not become past due and no arrearage accrues when:

i. The parent is incarcerated, is not on work release, and has no resources from which child support can be paid; [G.S. 50-13.10(d)(4).] there must be evidence in the record on these points; [*Orange Cty. ex rel. Byrd v. Byrd*, 129 N.C. App. 818, 501 S.E.2d 109 (1998) (suspension of support obligation reversed; no evidence in record on which trial court could find dates of incarceration or defendant's ineligibility for work release).] or

ii. The child is living with the parent pursuant to a valid court order or an express or implied written or oral agreement transferring primary custody to the parent. [G.S. 50-13.10(d)(3).]

g. Reconciliation of parents.

i. The reconciliation of a husband and wife does not invalidate the provisions of a **court order** requiring either party to pay support for their minor child (but payments coming due under court order do not vest pursuant to G.S. 50-13.10(d)(3) during the period that the child lives with the parties). [*See Walker v. Walker*, 59 N.C. App. 485, 297 S.E.2d 125 (1982) (court stating that defendant may, upon a proper showing, be entitled to relief from support payments that fell due during the period of reconciliation); *see also Latham v. Latham*, 74 N.C. App. 722, 329 S.E.2d 721 (1985) (once a court has acquired jurisdiction over the custody or support of a minor child, remarriage of the parties to each other does not divest a court of its continuing jurisdiction over a child for purposes of determining custody or child support).]

ii. Reconciliation terminates executory child support obligations under **an unincorporated separation agreement** between a husband and wife. [*See Stegall v. Stegall*, 100 N.C. App. 398, 397 S.E.2d 306 (1990), *review denied*, 328 N.C. 274, 400 S.E.2d 461 (1991).] See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1, for more on the effect of reconciliation on support provisions in a separation agreement.

2. Effect of arrearage existing at time support obligation terminates.

a. If an arrearage for child support or fees exists at the time that a child support obligation terminates, payments shall continue in the same total amount that was due under the terms of the previous court order or income withholding in effect at the time of the support obligation. [G.S. 50-13.4(c).]

b. The total amount of these payments is to be applied to the arrearage until all arrearages and fees are satisfied or until further order of the court. [G.S. 50-13.4(c). *See Cumberland Cty. ex rel. Mitchell v. Manning*, 262 N.C. App. 383, 822 S.E.2d 305 (2018) (defendant's child support obligation terminated upon child's reaching majority but arrears defendant owed to county remained and were enforceable by civil contempt).]

E. Liability for College Expenses

1. The general rule is that, absent an enforceable contract or agreement, a parent has no legal obligation to support a child who has reached the age of 18 and is not in primary or secondary school. [*See* G.S. 50-13.4(c) and Section II.B, above, on duration of a child support obligation; *Shaffner v. Shaffner*, 36 N.C. App. 586, 588, 244 S.E.2d 444, 446 (1978) (emphasis added) (a court's authority to affect the custody of, and to require reasonable support for, minor children continues only as long as the parents' legal obligation to support exists, and "is limited in scope to agreements whose terms provide for the maintenance and support of a child *during his minority*").]

2. A parent may, however, enter into a legally binding contract or agreement with the child's other parent or with other parties to support his child after emancipation and past

majority, by paying all or part of the child's college expenses. An unincorporated agreement for support of a child *past her majority* may not be modified absent the consent of the parties and is enforceable at law as any other contract. [*Shaffner v. Shaffner*, 36 N.C. App. 586, 244 S.E.2d 444 (1978) (citing *Church v. Hancock*, 261 N.C. 764, 136 S.E.2d 81 (1964)) (agreement to pay weekly support until children each reached age 21, college expenses not mentioned).]

3. A parent agreed to pay all or part of a child's college expenses in the following cases:
   a. *Barker v. Barker*, 228 N.C. App. 362, 363, 745 S.E.2d 910, 912 (2013) (defendant in civil contempt of consent order that required him to pay 90 percent of children's college expenses "as long as they diligently applied themselves to the pursuit of education"); *Ross v. Voiers*, 127 N.C. App. 415, 490 S.E.2d 244 (ex-husband in civil contempt for noncompliance with consent order in which he agreed to pay all college expenses of parties' daughter), *review denied*, 347 N.C. 402, 496 S.E.2d 387 (1997); *Sharpe v. Nobles*, 127 N.C. App. 705, 493 S.E.2d 288 (1997) (in divorce decree, father agreed to deposit $50/month for child's college education; father in civil contempt of order that required him to make a catch-up payment of $4,100 and to provide certified copy of deposit to former wife); *Smith v. Smith*, 121 N.C. App. 334, 465 S.E.2d 52 (1996) (defendant in contempt of consent judgment in which he agreed to pay for child's college, technical school, or other educational opportunities past the high school level; agreement to pay college expenses was in the nature of child support, so court was authorized to award attorney fees when father failed to make payments). *Cf. Powers v. Powers*, 103 N.C. App. 697, 407 S.E.2d 269 (1991) (court reversed an award of attorney fees to wife after finding husband in contempt of consent judgment requiring him to pay for child's college expenses, holding that order was not for "child support").
   b. *Wilson v. Wilson*, 214 N.C. App. 541, 714 S.E.2d 793 (2011) (court enforced agreement of father in incorporated separation agreement to continue monthly child support payments while children enrolled and in good standing in college or trade or technical school); *Williams v. Williams*, 97 N.C. App. 118, 387 S.E.2d 217 (1990) (father's obligation in separation agreement incorporated into Canadian divorce decree to support children beyond age of 18 while attending university, college, or accredited educational institution could be enforced through Uniform Reciprocal Enforcement of Support Act); *Blount v. Lemaire*, 232 N.C. App. 521, 757 S.E.2d 527 (2014) (**unpublished**) (not paginated on Westlaw) (when father agreed in incorporated separation agreement to pay college expenses for "room, board and tuition" and "reasonable spending money" for each child, trial court properly entered money judgment for college costs father failed to pay).
   c. *Altman v. Munns*, 82 N.C. App. 102, 345 S.E.2d 419 (1986) (father bound by unincorporated separation agreement to pay for daughter's college expenses); *Martin v. Martin*, 204 N.C. App. 595, 696 S.E.2d 925 (2010) (**unpublished**) (defendant properly ordered to perform his obligation to pay one-half of child's college expenses; when the parties intended for all provisions of the unincorporated separation agreement to be independent of each other, a breach by plaintiff of the provisions allowing defendant visitation would not excuse defendant's performance of the provision requiring him to pay one-half of children's college expenses).]

4. For enforcement by contempt of a parent's agreement to pay college expenses, and for award of attorney fees related to enforcement, see *Enforcement of Child Support Orders*, Part 4 of this Chapter, Section VII.

III. Child Support Guidelines

A. Federal Law

1. Background.
   a. The current federal requirements regarding child support guidelines were enacted by Congress in the Family Support Act of 1988. [Pub. L. No. 100-485, 102 Stat. 2343.]
   b. The federal Child Support Enforcement Amendments of 1984 [Pub. L. No. 98-378, 98 Stat. 1321.] required states to adopt child support guidelines but did not require state courts or administrative agencies to use guidelines when entering child support orders.
2. Federal requirements.
   a. As a condition of receiving federal funding for the state's Temporary Assistance for Needy Families (TANF) and child support enforcement (IV-D) programs, federal law requires each state to:
      i. Establish, by statute or by judicial or administrative action, guidelines governing the amount of child support orders within the state and
      ii. Review its child support guidelines at least once every four years to ensure that their application results in the determination of appropriate orders for child support. [42 U.S.C. § 667(a).]
   b. Federal law requires that each state's child support guidelines:
      i. Take into consideration all earnings and income of a child's noncustodial parent [45 C.F.R. § 302.56(c)(1)(i).];
      ii. Be based on specific descriptive and numeric criteria and result in a computation of the parent's child support obligation [45 C.F.R. § 302.56(c)(4).];
      iii. Provide that incarceration may not be treated as voluntary unemployment in establishing or modifying support orders [45 C.F.R. § 302.56(c)(3).]; and
      iv. Address how the parents will provide for the child's health care needs, through health insurance coverage and/or through cash medical support in accordance with 45 C.F.R. § 303.31. [45 C.F.R. § 302.56(c)(2).]
3. Federal law requires state guidelines to set presumptive amount.
   a. Federal law provides that a state's child support guidelines must create a presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the child support award determined by applying the guidelines is the correct amount of child support to be awarded under state law. [42 U.S.C. § 667(b)(2); 45 C.F.R. § 302.56(f).]

b. This presumption, however, may be rebutted by a finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case (based on criteria established by the state). [45 C.F.R. § 302.56(g).]

c. With respect to the presumption, federal law requires that:

i. The state's criteria for rebutting the presumptive application of the child support guidelines consider the child's best interests and

ii. Findings rebutting the presumptive application of the child support guidelines state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines. [45 C.F.R. § 302.56(g).]

B. State Law

1. State law, enacted in response to the federal requirements outlined above, requires the North Carolina Conference of Chief District Court Judges to:

a. Prescribe uniform statewide presumptive guidelines for computing the child support obligations of parents, including retroactive support obligations;

b. Develop criteria for determining when, in a particular case, application of the guidelines would be unjust or inappropriate; and

c. Review the guidelines at least once every four years and modify them to ensure that their application results in appropriate child support awards. [G.S. 50-13.4(c1), *amended by* S.L. 2014-77, § 8, effective July 22, 2014, to add "retroactive support obligations," discussed in Section III.B.1.a, above.]

C. North Carolina's Child Support Guidelines

1. North Carolina's first uniform statewide child support guidelines were adopted in 1987.

a. The 1987 Guidelines were based on the "percentage of income" model (for example, a parent was required to pay 17 percent of her income for one child, 25 percent for two children, or 29 percent for three children).

b. Application of the 1987 Guidelines was permissive rather than mandatory until 1989.

2. In 1990, the Conference of Chief District Court Judges adopted new mandatory, presumptive child support guidelines based on the "income shares" model. For the meaning of "income shares," see Section III.E, below.

a. The 1990 child support guidelines were revised in 1991, 1994, 1998, 2002, 2006, 2010, 2014, 2019, and 2020.

b. The guidelines revised in 2014 apply to child support actions *heard* on or after Jan. 1, 2015. For more on the 2015 Guidelines, see Cheryl Howell, *We Have New Child Support Guidelines*, UNC Sch. of Gov't: On the Civil Side Blog (Jan. 28, 2015), http://civil.sog.unc.edu/we-have-new-child-support-guidelines.

c. The guidelines revised in 2018 apply to child support actions *heard* on or after Jan. 1, 2019.

d. The most recent revision of the guidelines applies to child support actions *heard* on or after March 1, 2020.

3. North Carolina's guidelines set a presumptive amount of support.
    a. Support set pursuant to the guidelines is conclusively presumed to meet the reasonable needs of a child, considering the relative ability of each parent to provide support. [2020 Guidelines.]
    b. The guidelines are intended to provide adequate awards of child support that are equitable to the child and both of the child's parents, considering the parents' earnings, income, and other evidence of ability to pay. [2020 Guidelines.]
4. North Carolina's child support guidelines are constitutional.
    a. North Carolina's child support guidelines have been upheld as constitutional. [*Row v. Row*, 185 N.C. App. 450, 650 S.E.2d 1 (2007) (guidelines not unconstitutional based on the Supremacy Clause of the U.S. Constitution; guidelines as applied did not violate noncustodial parent's equal protection rights, nor did they violate his substantive or procedural due process rights), *review denied*, 362 N.C. 238, 659 S.E.2d 741, *cert. denied*, 555 U.S. 824, 129 S. Ct. 144 (2008).]

D. Application of the Child Support Guidelines

1. When guidelines must be applied.
    a. State law expressly requires judges to apply North Carolina's child support guidelines as a rebuttable presumption:
        i. When determining a parent's child support obligation in civil actions for child support pursuant to G.S. 50-13.4; [G.S. 50-13.4(c).]
        ii. When the court enters an order for support based on affidavits of parentage executed by the putative father and mother under G.S. 110-132(a); [G.S. 110-132(b).]
        iii. In juvenile proceedings involving abused, neglected, or dependent children; [G.S. 7B-904(d).]
        iv. In a criminal action for nonsupport of a child born out of wedlock; [G.S. 49-7.]
        v. In criminal prosecutions involving a parent's failure to support his child; [G.S. 14-322(e).] and
        vi. When requiring a parent to pay child support as a condition of probation in a criminal case. [G.S. 15A-1343(b)(4).]
    b. The guidelines apply as a rebuttable presumption in all legal proceedings involving the child support obligation of a parent, including orders entered in criminal and juvenile proceedings, orders entered in Uniform Interstate Family Support Act (UIFSA) (G.S. Chapter 52C) proceedings, orders entered in civil domestic violence (G.S. Chapter 50B) proceedings, and voluntary support agreements and consent orders approved by the court. [2020 Guidelines; *Hart v. Hart*, 268 N.C. App. 172, 836 S.E.2d 244 (2019) (quoting language in 2019 Guidelines).]
    c. The 2011 Guidelines clarified that the guidelines must be used when temporary child support is ordered as a form of relief in a domestic violence protective order entered pursuant to G.S. Chapter 50B.

d. The guidelines must be used when the court enters a temporary or permanent child support order in a noncontested case or in a contested hearing. [2020 Guidelines.] A trial court's failure to follow the applicable child support guidelines constitutes reversible error. [*Jonna v. Yaramada*, 273 N.C. App. 93, 848 S.E.2d 33 (2020) (quoting *Rose v. Rose*, 108 N.C. App. 90, 93, 422 S.E.2d 446, 447 (1992)).]

e. Prospective child support is normally determined under the guidelines. [*State ex rel. Gillikin v. McGuire*, 174 N.C. App. 347, 620 S.E.2d 899 (2005) (citing *Taylor v. Taylor*, 118 N.C. App. 356, 455 S.E.2d 442 (1995), *rev'd on other grounds*, 343 N.C. 50, 468 S.E.2d 33 (1996)).]

i. Prospective support means support to be paid from the date of the filing of the complaint or motion seeking support forward in time. [*State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998).]

ii. Retroactive support means support owed for a time period before a complaint or motion seeking support is filed. [*State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998).] For discussion of the application of the guidelines to retroactive support, see Section VII.D, below.

f. The current version of the Guidelines applies to cases *heard* on or after the effective date of those Guidelines. This means that the previous version of the Guidelines will apply to cases heard before the effective date of the current version, even if an order is entered after that date. [*See State ex rel. Goodwin v. Williams*, 163 N.C. App. 353, 593 S.E.2d 123 (2004) (1998 Guidelines applied to case decided and announced in open court before effective date of 2002 Guidelines, even though order was actually entered after the effective date of the 2002 Guidelines).]

2. Certain findings are not required when support is set at the guideline presumptive amount.

a. When the court sets support in accordance with the guidelines, specific findings regarding a child's reasonable needs or the relative ability of each parent to provide support are not required. [2020 Guidelines; *Browne v. Browne*, 101 N.C. App. 617, 400 S.E.2d 736 (1991) (absent a timely and proper request for a variance from the guidelines, support set consistent with the guidelines is conclusively presumed to be in such amount as to meet the reasonable needs of the child for health, education, and maintenance).]

b. However, when a court considers a request for deviation, the court must make findings as to the child's reasonable needs for support and the parents' ability to provide support, even if the court decides against deviation. See Section IV.G.2, below.

3. Findings are not required when adjustments are made to the presumptive amount for extraordinary expenses.

a. "[E]xtraordinary child-related expenses . . . may be . . . ordered paid by the parents in proportion to their respective incomes if the court determines the expenses are reasonable, necessary, and in the child's best interest." [2020 Guidelines.] This language first appeared in the 2002 Guidelines and was a substantial change from the 1998 Guidelines.

b. Cases applying the 1998 and 1994 Guidelines have not required courts to make findings as to the needs of the child, the parents' ability to pay, or the reasonableness of the expenses, when making adjustments for extraordinary expenses.

i. *Doan v. Doan*, 156 N.C. App. 570, 577 S.E.2d 146 (2003) (citing *Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000)) (adjustment for extraordinary expenses was not a deviation from the support guidelines but was, rather, a discretionary adjustment to the presumptive amount, so trial court not required to make specific findings regarding the child's needs or the parents' ability to pay the extraordinary expenses); *Biggs* (absent a party's request for deviation, trial court was under no obligation to render findings of fact as to the child's needs and the noncustodial parent's ability to pay when father was ordered to pay prospective private school expenses; court adjusted the presumptive guideline amount for those expenses but did not deviate).]

c. Cases applying the 2002 and 2006 Guidelines, relying on *Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000), have not required findings in the case of extraordinary expenses.

i. *Ludlam v. Miller*, 225 N.C. App. 350, 364, 739 S.E.2d 555, 563 (2013) (quoting *Biggs v. Greer*, 136 N.C. App. 294, 298, 524 S.E.2d 577, 581–82 (2000)) ("[A]bsent a party's request for deviation, the trial court is not required to set forth findings of fact related to the child's needs and the non-custodial parent's ability to pay extraordinary expenses." (applying 2006 Guidelines)); *Allen v. Allen*, 201 N.C. App. 159, 688 S.E.2d 118 (2009) (**unpublished**) (trial court did not deviate from the presumptive guidelines but, rather, adjusted guideline amounts to account for the extraordinary expense of private schooling; under *Biggs*, trial court not required to make findings as to whether private school was reasonable, necessary, and in the children's best interest; mother's argument that the 2006 Guidelines required these findings rejected); *Herriman v. Gaston Cty. ex rel. Herriman*, 179 N.C. App. 225, 633 S.E.2d 890 (2006) (**unpublished**) (citing *Biggs*) (trial court did not deviate from guidelines when it found that children's private school tuition was an extraordinary expense, and thus court was under no obligation to render findings of fact; 2002 Guidelines applicable).]

ii. *Cf. Parnell v. Parnell*, 189 N.C. App. 531, 659 S.E.2d 490 (2008) (**unpublished**) (when a party requests deviation, the trial court is required to make findings regarding extraordinary expenses; recognizing the general rule in *Doan v. Doan*, 156 N.C. App. 570, 577 S.E.2d 146 (2003), *and Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000), set out in Section III.D.3.b.i, above, but limiting it to cases in which deviation was not requested).]

d. One case applying the 2019 Guidelines noted that ordering parents to pay extraordinary expenses, not being a deviation from the Guidelines, does not require findings as to the child's reasonable needs or the parents' ability to pay support. [*Madar v. Madar*, 275 N.C. App. 600, 615, 853 S.E.2d 916, 926–27 (2020) (quoting *Biggs v. Greer*, 136 N.C. App. 294, 298, 524 S.E.2d 577, 581–82 (2000). *See* Cheryl Howell, *Child Support: Extraordinary Expenses in Guideline Cases*, UNC Sch. of Gov't: On the Civil Side Blog (Apr. 15, 2021).]

e. For more on extraordinary expenses, see Section III.L.5, below.

4. When the guidelines are not applicable. The guidelines do **not** apply with respect to:
   a. Child support orders entered against stepparents or other parties who are secondarily liable for child support. [2020 Guidelines. *See Duffey v. Duffey*, 113 N.C. App. 382, 438 S.E.2d 445 (1994).]
5. Application of the guidelines when there is an unincorporated separation agreement.
   a. For prospective support.
      i. Prospective support means support to be paid from the date of the filing of the complaint or motion seeking support forward in time. [*State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998).]
      ii. When a valid, unincorporated separation agreement determines a parent's child support obligations, in a subsequent action for child support, the court must base the parent's prospective child support obligation on the amount of support provided under the separation agreement, rather than the amount of support payable under the child support guidelines, unless the court determines, by the greater weight of the evidence, taking into account the child's needs and the factors enumerated in the first sentence of G.S. 50-13.4(c), that the amount of support under the separation agreement is unreasonable. [*Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part*, 359 N.C. 65, 602 S.E.2d 360 (2004); 2015 Guidelines.]
      iii. For more about setting prospective support when there is an unincorporated separation agreement, see *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section I.G.6.
   b. For retroactive support.
      i. Retroactive support means support owed for a time period before a complaint or motion seeking support is filed. [*State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998).]
      ii. Where a valid, unincorporated separation agreement sets out the obligations of a parent for support and the parent fully complies with that obligation, a trial court is not permitted to award retroactive child support in an amount different than the amount required by the unincorporated agreement absent an emergency situation. [*Carson v. Carson*, 199 N.C. App. 101, 680 S.E.2d 885 (2009) (citing *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963)*)* (interpreting 2006 Guidelines) (time period in *Carson* for which support was sought was three years prior to the filing of the complaint, during which time parties had an unincorporated separation agreement that was not being breached; trial court erred by using guidelines to determine retroactive support when unincorporated separation agreement was in effect and was not being breached); 2015 Guidelines.] The 2011, 2015, and 2020 Guidelines provide that "if a child's parents have executed a valid, unincorporated separation agreement that determined a parent's child support obligation for the period of time before the child support action was filed, the court shall not enter an order for retroactive child support or prior maintenance in an amount different than the amount required by the unincorporated separation agreement" without mentioning an exception for an emergency. Case law allows retroactive support in an amount different than the

amount in an unincorporated separation agreement in an emergency situation. [See *Fuchs, Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000), and other cases cited in *Carson*.]

iii. The rule cited above, that a trial court cannot alter the terms of a valid, unincorporated separation agreement retroactively absent an emergency situation, applies to provisions in the agreement concerning payment of the child's medical expenses. [*Carson v. Carson*, 199 N.C. App. 101, 680 S.E.2d 885 (2009) (when there was no evidence that father had breached the provisions of the agreement regarding payment of medical expenses, trial court could not order father to retroactively pay expenses different than the ones parties had agreed on).]

iv. The "emergency" may concern the child but could also arise when the custodial parent is prohibited from seeking a court-ordered increase in child support because of an accident or illness. [*Carson v. Carson*, 199 N.C. App. 101, 108 n.5, 680 S.E.2d 885, 890 n.5 (2009).]

v. For more on this point, see this 2010 *Family Law Bulletin* by Cheryl Howell at www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/flb24.pdf.

c. Incorporated agreements are court orders subject to modification only upon a showing of changed circumstances. [*Beamer v. Beamer*, 169 N.C. App. 594, 610 S.E.2d 220 (2005) (considering request to modify child support provisions in an incorporated agreement).] For a discussion of the modifiability of child support provisions in an incorporated separation agreement, see *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

E. Income Shares Model

1. North Carolina's child support guidelines are based on the "income shares" model (used by approximately thirty-three states). [2020 Guidelines; 2015 Guidelines.]

   a. The income shares model is the prevailing model for child support guidelines in the United States. [*See* "Federal Intent for State Child Support Guidelines: Income Shares, Cost Shares, and the Realities of Shared Parenting," 37 Fam. L.Q. 165 (2003–2004); Child Support Guideline Models By State, http://www.ncsl.org/research/human-services/guideline-models-by-state.aspx.]

2. The income shares model is based on the concept that child support is a shared parental responsibility and that a child should receive the same proportion of parental income he would have received if the child's parents lived together. [2020 Guidelines; 2015 Guidelines.]

3. The schedule of basic child support obligations is based primarily on an analysis of economic research regarding family expenditures for children. [2020 Guidelines; 2015 Guidelines. *See* 2010 Howell Bulletin, www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/flb24.pdf.]

4. Using these guidelines, a parent's basic child support obligation generally decreases as a percentage of the parent's income as the parents' combined income increases.

F. Low-Income Parents

1. The N.C. Schedule of Basic Support Obligations incorporates a self-support reserve based on the federal poverty level for an individual. [Form AOC-A-162, North Carolina Child Support Guidelines, at 2.]
   a. The self-support reserve is reflected in the shaded area of the schedule of basic support obligations. [Form AOC-A-162, at 7.]
   b. The self-support reserve is intended to allow low-income noncustodial parents to retain enough of their income to meet their own basic needs before they are required to pay more than a minimal amount of child support.
2. When a noncustodial parent's adjusted gross income falls within the shaded area in the guidelines' schedule of basic support obligations and Worksheet A is used, the parent's presumptive child support obligation is the amount shown in the shaded area of the schedule considering only the obligor's income. [2020 Guidelines.]
3. When the self-support reserve applies, child-related health insurance premiums and child care expenses are not prorated between the parents and added to or subtracted from the obligor's basic child support obligation. In these cases, child care expenses and health insurance premiums should not be used to calculate the child support obligation. [2020 Guidelines.]
4. However, the guidelines provide that the payment of child care expenses, health insurance premiums, and other extraordinary expenses by either parent may be the basis for a deviation in a self-support reserve case. [2020 Guidelines.]
5. While the guidelines do not specifically state that extraordinary expenses are not prorated between the parties in a self-support reserve case, the 2015 and 2020 Guidelines do state in the Self-Support Reserve section that payment of extraordinary expenses may be a basis for deviation, indicating that extraordinary expenses should not be prorated. [*But see Allen v. Allen*, 201 N.C. App. 159, 688 S.E.2d 118 (2009) (**unpublished**) (applying 2006 Guidelines) (that the parent's income qualifies for the self-support reserve does not require a court to exclude extraordinary expenses not specifically mentioned in the guidelines section on low-income parents, such as private school tuition, from the calculation of the obligor's child support obligation; trial court on remand to recalculate the mother's child support obligation; appellate court noting that if mother's gross income is within the shaded area of schedule of basic support obligations, pursuant to the guidelines, she is obligated to pay her portion of private school tuition because tuition, unlike child care and health insurance premiums, is not specifically excluded in the section dealing with parents with low incomes). *Cf. Ludlam v. Miller*, 225 N.C. App. 350, 739 S.E.2d 555 (2013) (applying 2011 Guidelines) (in self-support reserve case, trial court did not abuse its discretion when it did not require father to contribute to private school expenses based in part on his inability to pay; appellate court acknowledged that trial court may have mistakenly thought that ordering father to pay private school expenses would have constituted a deviation).]
6. The self-support reserve is applied only in cases involving primary custody (when Worksheet A, Form AOC-CV-627, Child Support Obligation Primary Custody, is used) and cannot be used in cases involving shared or split custody (when Worksheet B, Form AOC-CV-628, Child Support Obligation Joint or Shared Physical Custody, or

Worksheet C, Form AOC-CV-629, Child Support Obligation Split Custody, is used). [2020 Guidelines.]

7. The basic guideline support obligation includes $250 per child for the child's annual uninsured medical and/or dental expenses. Even when an obligor's income falls within the shaded area in the guidelines' schedule of basic support obligations, the trial court may order that uninsured health care costs in excess of $250 per year incurred by a parent be paid by either parent or both parents in such proportion as the court deems appropriate. [2020 Guidelines.]

G. Parents with High Combined Incomes

1. The N.C. Child Support Guidelines cannot be used to determine the supporting parent's child support obligation if the parents' combined adjusted gross incomes exceed $30,000 per month. [2020 Guidelines.] For child support actions heard before Jan. 1, 2019, the Guidelines cannot be used if the parents' combined adjusted gross income exceeds $25,000 per month. [2015 Guidelines. *See Kleoudis v. Kleoudis*, 271 N.C. App. 35, 843 S.E.2d 277 (2020) (relevant guidelines had limitation of $25,000 per month in combined monthly gross income; child support schedule in the guidelines not applicable); *Hart v. Hart*, 268 N.C. App. 172, 836 S.E.2d 244 (2019) (same).]

2. When the parents' combined adjusted gross incomes exceed $30,000 per month, the court must determine each parent's child support obligation on a case-by-case basis and should set support in an amount as to meet the reasonable needs of the child, having due regard for the relative abilities of the parties to provide support and for other facts of the case as provided in the first sentence of G.S. 50-13.4(c). [2020 Guidelines (for a more complete statement of the factors that a court should consider in high-income cases pursuant to the 2020 Guidelines, see Section III.G.3, immediately below); *Kleoudis v. Kleoudis*, 271 N.C. App. 35, 843 S.E.2d 277 (2020); *Pascoe v. Pascoe*, 183 N.C. App. 648, 645 S.E.2d 156 (2007) (application of a case-by-case standard for high-income cases has been repeatedly upheld); *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 596 S.E.2d 285 (2004) (trial court granted considerable discretion in its consideration of the factors in G.S. 50-13.4(c) when presumptive guidelines did not apply because of high combined income), *review on additional issues denied*, 359 N.C. 643, 617 S.E.2d 662 (2005); *Bookholt v. Bookholt*, 136 N.C. App. 247, 523 S.E.2d 729 (1999) (earlier version of guidelines not applicable when parties' combined annual income exceeded $150,000), *superseded by statute on other grounds as stated in Williamson v. Williamson*, 142 N.C. App. 702, 523 S.E.2d 729 (2001).]

3. The 2020 Guidelines clarify that support in high-income cases is set considering all factors listed in G.S. 50-13.4(c), stating that the court should set support "in such amount as to meet 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." [*See Zurosky v. Shaffer*, 236 N.C. App. 219, 763 S.E.2d 755 (2014) (citing *Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014)) (in high-income cases in which the guidelines are not applicable, when determining prospective or retroactive child support, a trial court must consider the factors in G.S. 50-13.4(c)); *Crews v. Paysour*, 261 N.C. App. 557, 564, 821 S.E.2d 469, 474 (2018) (quoting *Smith v. Smith*, 247 N.C. App. 135, 145–46, 786 S.E.2d 12, 21 (2016)) (in a high-income case, "[t]he determination

of a child's needs is largely measured by the accustomed standard of living of the child."); *Kleoudis v. Kleoudis*, 271 N.C. App. 35, 38, 843 S.E.2d 277, 281 (2020) (quoting *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 610, 596 S.E.2d 285, 291 (2004)) (when the guidelines do not apply, a child support order is to be "based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount.").] *See also* the cases discussed in Section VII.D, below, for other requirements when determining retroactive support.

4. In a high-income case, the trial court is not bound by, and should not consider, the guidelines in determining a parent's child support obligation. The trial court is required to order support based on particular facts and circumstances of the case. [*Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25 (2006) (rejecting parent's argument that trial court was required to "mathematically extrapolate" his support obligation from the amounts provided in the guidelines); *Bishop v. Bishop*, 275 N.C. App. 457, 463, 853 S.E.2d 815, 820 (2020) ("in an above-the-guidelines case, the trial court is not required to use a particular formula"), *aff'd per curiam*, 868 S.E.2d 850 (N.C. 2022); *Crews v. Paysour*, 261 N.C. App. 557, 821 S.E.2d 469 (2018) (holding that trial court was "mistaken in finding . . . that the amount of child support awarded could not be in an amount lower than the maximum basic child support obligations"). *Cf.* 2015 Guidelines (stating that the "schedule of basic child support may be of assistance to the court in determining a minimal level of child support"); *Derian v. Derian*, 223 N.C. App. 210 (2012) (**unpublished**) (citing the guideline language quoted just above and also included in the 2011 Guidelines and *Pascoe v. Pascoe*, 183 N.C. App. 648, 645 S.E.2d 156 (2007)) (trial court order confirming arbitrator's award of guideline amount for support in high-income case affirmed based on arbitrator's findings that mother's claimed child support expenses were unreasonable when she was living beyond her means and child was only with her 50 percent of the time; father also ordered to pay for private school and tutoring, to maintain health insurance, and to pay all uninsured costs).]

5. In determining child support obligations where the presumptive guidelines do not apply, a trial court must take into consideration a parent's court-ordered financial obligation to another child born of a subsequent marriage. [*Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 596 S.E.2d 285 (2004), *review on additional issues denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).]

6. Where the father failed to assign error to the finding setting out the child's monthly needs while in his custody or to other findings as to child's reasonable needs, the trial court did not, in a high-income case, abuse its discretion when it failed to award the father an "offset" for the expenses he paid while the child was in his custody. [*Pascoe v. Pascoe*, 183 N.C. App. 648, 645 S.E.2d 156 (2007) (father was required to pay monthly support and the child's expenses while in his custody).]

7. Findings in high-income cases.

    a. In high-income cases, language in G.S. 50-13.4(c) that a court give "'due regard' to the estates . . . of . . . the parties" does not require the trial court to make findings as to the value of each party's individual assets. The statutory language "requires only that the trial court consider the evidence and make sufficient findings addressing its

determination regarding the estates to allow appellate review." [*Kleoudis v. Kleoudis*, 271 N.C. App. 35, 41, 42, 843 S.E.2d 277, 283 (2020) (two findings sufficiently addressed the parties' estates: (1) bonus received by mother that was divided equally between the parties in equitable distribution would not be considered in determining child support and (2) estates of both parties were approximately equal, neither party was receiving distributions from investments, and neither would have to deplete his or her estate to support the child); *Bishop v. Bishop*, 275 N.C. App. 457, 468, 853 S.E.2d 815, 822 (2020) (quoting "due regard" language in *Kleoudis*), *aff'd per curiam*, 868 S.E.2d 850 (N.C. 2022).]

b. In modifying a parent's child support obligation in a high-income case where father did not challenge on appeal the trial court's determination that the child's needs had increased, the trial court did not err when it ordered father to pay a monthly amount of support that was "almost 110% of the child's total reasonable needs" when the amount ordered was supported by unchallenged findings as to the significant disparity in the parties' estates, lifestyles, and accustomed standards of living. [*Bishop v. Bishop*, 275 N.C. App. 457, 465, 459, 853 S.E.2d 815, 820, 817 (2020) (father's share of the child's reasonable monthly needs, $5,421, combined with father's monthly court-ordered child support, $3,289, exceeded the child's total monthly reasonable needs of $7,926, which was the basis for father's argument that "the trial court's math is wrong"), *aff'd per curiam*, 868 S.E.2d 850 (N.C. 2022).]

c. In high-income cases, as in other cases, the trial court must make a finding as to a party's actual present income when awarding prospective support. [*Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (when only findings as to father's income were (1) that the amount of average gross monthly income listed in father's financial affidavit was $25,000, which trial court "clearly assumed" was significantly lower than his actual income, based on monthly expenditures of $87,000, and (2) that father's income was substantial, matter was remanded for findings as to the actual monetary value of father's income).]

d. In high-income case, findings as to the reasonable needs of the children were not sufficient when order set out, without any itemization, a lump sum amount for the reasonable needs of the children over a four-year period, gave no indication of the methodology used or the facts the trial court considered, and made no findings as to the individual costs and expenses likely to be incurred for each child in the future. [*Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25 (2006) (fact that court made findings regarding the parties' particular estate, earnings, conditions, and accustomed standard of living did not remedy the absence of findings as to the children's reasonable needs); *Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (findings were not sufficient to support an award of $7,343/month in child support when any findings made established that child's actual present needs, based on mother's actual historical expenditures, were $2,194/month; an award of prospective support may be made by estimating the child's needs based upon the higher standard of living made possible by a high-income parent's means if detailed findings are made to support the award; on remand, trial court to make findings, with a monetary value, as to the child's reasonable needs in light of the ability of the parents to provide support).]

H. Determining a Parent's Child Support Obligation under the Child Support Guidelines

1. The first step in determining a parent's child support obligation under the guidelines is to determine each parent's actual present **gross income**. [See Section III.I, below.]

   a. Although North Carolina's schedule of basic support obligations is based on net income (gross income minus federal and state income and payroll taxes), the net income ranges have been converted to gross income ranges by factoring in federal and state income and payroll taxes.

   b. A parent's child support obligation should be based on the parent's actual income at the time the child support obligation is determined. [*Kaiser v. Kaiser*, 259 N.C. App. 499, 816 S.E.2d 223 (2018) (while support must be based on present income, evidence of past income can be used to support finding of present income); *Simms v. Bolger*, 264 N.C. App. 442, 826 S.E.2d 522 (2019) (quoting *Kaiser*, 259 N.C. App. at 505, 816 S.E.2d at 228) (in modification proceeding, a trial court is to use a party's actual income at the time the existing order is modified but may consider past or historical income to determine the party's current income if the trial court explains in findings its reason for doing so); *Harnett Cty. ex rel. De la Rosa v. De la Rosa*, 240 N.C. App. 15, 23, 770 S.E.2d 106, 112 (2015) (quoting *Respess v. Respess*, 232 N.C. App. 611, 630, 754 S.E.2d 691, 704 (2014) (generally, child support is determined by a party's actual income at the time the award is made); *McKyer v. McKyer*, 179 N.C. App. 132, 146, 632 S.E.2d 828, 836 (2006) ("[g]enerally, a party's ability to pay child support is determined by that party's actual income at the time the award is made"), *review denied*, 361 N.C. 356, 646 S.E.2d 115 (2007); *Hodges v. Hodges*, 147 N.C. App. 478, 556 S.E.2d 7 (2001) (trial court erred when it included income from a part-time job parent no longer held when order entered); *Holland v. Holland*, 169 N.C. App. 564, 610 S.E.2d 231 (2005) (error to use 2001 income for 2002 order; however, court of appeals noted that with appropriate findings, the trial court could have used the 2001 information to determine father's income from his farming business for purposes of computing his child support obligation); *Moore v. McLaughlin*, 240 N.C. App. 88, 772 S.E.2d 14 (2015) (**unpublished**) (trial court erred when it calculated father's income by averaging his income for the years 2010 through 2013 with no findings to support a deviation, instead of using father's income at the time of the hearing); *Bledsoe v. Bledsoe*, 227 N.C. App. 224, 741 S.E.2d 927 (2013) (**unpublished**) (when defendant testified as to her earnings for the first three months of 2012, trial court erred when it based child support order on her 2011 earnings; order did not appear to consider the 2012 earnings and did not include the findings required by *Holland* to support using earnings from a prior year).]

   c. See Sections III.J.2 and III.J.5, both below, discussing when income may be imputed to a parent and when a court may average a parent's income to determine actual present income.

2. The second step in determining a parent's child support obligation is to determine allowable deductions from a parent's gross income to get the parent's **adjusted gross income**. A parent's presumptive child support obligation is based primarily on his adjusted gross income. [See Section III.K, below.]

3. Finally, if applicable, **adjustments** to a parent's basic child support obligation may be made—certain expenditures may be added to the obligation and prorated between the parties, and certain deductions may be subtracted from the obligation. [See Section III.L, below.]
4. When determining a child support award, a trial judge has a high level of discretion, not only in setting the amount of the award, but also in establishing an appropriate remedy. [*Robinson v. Robinson*, 210 N.C. App. 319, 707 S.E.2d 785 (2011) (a trial court has "great discretion" in establishing amount of child support to be awarded); *State ex rel. Williams v. Williams*, 179 N.C. App. 838, 635 S.E.2d 495 (2006); *Felts v. Felts*, 192 N.C. App. 543, 665 S.E.2d 594 (**unpublished**) (citing *Williams*), *review denied*, 362 N.C. 680, 670 S.E.2d 232 (2008).]

I. Gross Income

1. Gross income is income before deductions for federal or state income taxes, Social Security or Medicare taxes, health insurance premiums, retirement contributions, or other amounts withheld from a parent's income. [2020 Guidelines.]
2. The determination of gross income is a conclusion of law rather than a finding of fact. [*State ex rel. Midgett v. Midgett*, 199 N.C. App. 202, 680 S.E.2d 876 (2009) (determination requires the application of fixed rules of law).]
3. Included in gross income.
    a. Gross income includes income from any source, including but not limited to the following:
        i. Income from employment or self-employment (salaries, wages, commissions, bonuses, dividends, severance pay, etc.);
        ii. Ownership or operation of a business, partnership, or corporation;
        iii. Rental of property;
        iv. Retirement or pensions;
        v. Interest, trusts, capital gains, or annuities;
        vi. Social Security benefits of the parent;
        vii. Workers' compensation benefits;
        viii. Unemployment insurance benefits;
        ix. Disability pay and insurance benefits;
        x. Gifts or prizes; and
        xi. Alimony or maintenance received from a person who is not a party to the pending child support action. [2020 Guidelines.]
    b. "Income" has been construed broadly. [*See Spicer v. Spicer*, 168 N.C. App. 283, 607 S.E.2d 678 (2005) (including income from personal injury settlement and rejecting argument that awards compensating "pain and suffering" should be excluded from definition of income for child support purposes).]
    c. A court may consider all available sources of income. [*Moore v. Onafowora*, 208 N.C. App. 674, 703 S.E.2d 744 (2010) (citing *Burnett v. Wheeler*, 128 N.C. App. 174, 493

S.E.2d 804 (1997)); *Kabasan v. Kabasan*, 257 N.C. App. 436, 810 S.E.2d 691 (2018) (citing *Burnett*) (trial court has discretion to consider for purposes of child support all sources of a parent's income, which in this case included income earned on investment accounts, the receipt of which father had deferred); *Hinshaw v. Kuntz*, 234 N.C. App. 502, 760 S.E.2d 296 (2014) (must include bonuses as income where court finds parties likely to continue to receive bonuses in the future, even if the children's reasonable needs can be satisfied without including bonus income).]

d. Veterans Administration benefits and Social Security benefits received for the benefit of a child as a result of the disability or retirement of either parent are income to the parent on whose earnings record the benefits are paid. [2020 Guidelines; 2015 Guidelines (adding Veterans Administration benefits).]

   i. The amount of the benefit is deducted from that parent's child support obligation if the benefits are paid to the other parent. [2020 Guidelines.] After revision, this provision clarifies that the benefit amount is subtracted from the child support obligation of the parent on whose earnings record the benefits are paid only if the benefits are paid to the other parent. *See* Cheryl Howell, *New Child Support Guidelines for 2019*, UNC Sch. of Gov't: On the Civil Side Blog (Jan. 8, 2019), https://civil.sog.unc.edu/new-child-support-guidelines-for-2019.

   ii. Earlier versions of the guidelines provided otherwise. [*See* N.C. Child Support Guidelines, 1999 Ann. R. N.C. 32 (effective Oct. 1, 1998), *and Sain v. Sain*, 134 N.C. App. 460, 517 S.E.2d 921 (1999) (guidelines prohibited trial court from considering disability payments received on behalf of a child as income to the noncustodial parent in determining that parent's presumptive support amount).]

   iii. A North Carolina court does not have authority to order a parent to transfer to the other parent past Social Security disability payments made to that parent on behalf of their children. [*O'Connor v. Zelinske*, 193 N.C. App. 683, 668 S.E.2d 615 (2008) (citing *Brevard v. Brevard*, 74 N.C. App. 484, 328 S.E.2d 789 (1985)) (noting that two later appellate opinions conflict with *Brevard*).]

   iv. The 2015 and 2020 Guidelines provide that if the amount of Veterans Administration benefits and Social Security benefits received by the child is based on the obligor's disability or retirement and exceeds the obligor's child support obligation, no order for prospective support should be entered unless the court decides to deviate. Therefore, a trial court cannot order a custodial parent to pay any portion of the Social Security or Veterans Administration monies to the noncustodial parent. For more on this point, see 2010 Howell Bulletin, www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/flb24.pdf (discussing Social Security benefits), and Cheryl Howell, *We Have New Child Support Guidelines*, UNC Sch. of Gov't: On the Civil Side Blog (Jan. 28, 2015), http://civil.sog.unc.edu/we-have-new-child-support-guidelines (discussing addition by 2015 Guidelines of Veterans Benefits received by a child as income).

   v. Employer contributions toward future Social Security payments for an employee are specifically excluded from income. [2020 Guidelines.] See Section III.I.4, below.

e. Alimony or maintenance received from a person who is not a party to the pending child support action. [2020 Guidelines.]

i. Cost-free housing has been considered a form of maintenance, the value of which is to be included as gross income. [*Spicer v. Spicer*, 168 N.C. App. 283, 607 S.E.2d 678 (2005) (trial court did not err in including as income $300 per month, which was the value of father's free housing from his parents). *See also State ex rel. Williams v. Williams*, 179 N.C. App. 838, 635 S.E.2d 495 (2006) (vehicle and housing payments made by plaintiff's father were maintenance or gift income).]

ii. A friend's consistent and recurring deposits to a parent's bank account, when parent provided no documentation or other evidence supporting his assertion that the deposits were loans, were properly considered income to that parent as either gifts or maintenance. [*Onslow Cty. ex rel. Eggleston v. Willingham*, 199 N.C. App. 755, 687 S.E.2d 541 (2009) (**unpublished**) (deposits occurred continuously over a period of two to three months immediately preceding the hearing).]

iii. Loans from third parties to a parent that are required to be repaid are not income to the parent. [*Kaiser v. Kaiser*, 259 N.C. App. 499, 816 S.E.2d 223 (2018) (general findings concerning parent's income that were supported by competent evidence and did not address loan proceeds were sufficient; a separate, express finding of fact concerning this determination not required).]

iv. Funds received from a third party cohabitant intended to cover living expenses of the third party are not income to the custodial parent if proper findings are made. [*Kaiser v. Kaiser*, 259 N.C. App. 499, 816 S.E.2d 223 (2018) (trial court's determination that a fiancé's payments were income to the custodial parent was vacated and remanded for findings establishing whether the payments were maintenance as defined in the guidelines or represented payment of the fiancé's share of household expenses that the fiancé incurred).]

f. Gifts.

i. Cost-free housing and cost-free use of a car have been considered gift income includable in gross income. [*State ex rel. Williams v. Williams*, 179 N.C. App. 838, 635 S.E.2d 495 (2006) (trial court to recalculate plaintiff's income to take into account payments made by plaintiff's father on her behalf for rent and a car, when plaintiff testified that father would continue to make rent payments through the end of the lease period and until the car was paid for); *Spicer v. Spicer*, 168 N.C. App. 283, 607 S.E.2d 678 (2005) (cost-free housing properly considered a form of gross income valued at $300 per month). *Cf. Guilford Cty. ex rel. Easter v. Easter*, 344 N.C. 166, 473 S.E.2d 6 (1996) (rather than treating gifts from third parties as income, trial court properly considered the payments as a basis to deviate from the Guidelines).]

ii. A friend's consistent and recurring deposits to a parent's bank account, when parent provided no documentation or other evidence supporting his assertion that the deposits were loans, were properly considered income to that parent as either gifts or maintenance. [*Onslow Cty. ex rel. Eggleston v. Willingham*, 199 N.C. App. 755, 687 S.E.2d 541 (2009) (**unpublished**) (deposits occurred continuously over a period of two to three months immediately preceding the hearing).]

iii. Gift income will not be included as income to a parent based on the mere allegation of the other parent, even if the trial court finds the recipient parent not credible. [*Lee Cty. Dep't of Soc. Servs. ex rel. Martin v. Barbee*, 181 N.C. App. 607, 640 S.E.2d 447 (2007) (**unpublished**) (order including $20,000 gift income to father from his parents, based on mother's "belief" that parents continued practice of annual gifts after parties' divorce, reversed for lack of evidence, even though trial court found father's testimony about the matter not credible; father's lack of credibility did not relieve mother of her burden to offer competent evidence to support the allegation of gift income).]

g. Veterans benefits, military pensions and retirement benefits, military pay and allowances, state and federal retirement benefits, and other pensions and annuities. [2020 Guidelines (including as gross income Veterans Administration benefits, retirement or pensions, and annuities).]

i. A servicemember's basic allowance for housing (BAH) should be included as gross income for purposes of calculating child support. [*Cumberland Cty. ex rel. State of Washington v. Cheeks*, 247 N.C. App. 397, 786 S.E.2d 432 (2016) (**unpublished**) (BAH was paid on father's behalf for rent and utilities and substantially reduced his personal living expenses).] For more on *Cheeks*, see Cheryl Howell, *Child Support: Maintenance and Gifts Are Actual Income??,* UNC Sch. of Gov't: On the Civil Side Blog (May 13, 2016), http://civil.sog.unc.edu/child-support-maintenance-and-gifts-are-actual-income.

h. Not yet classified as income or nonincome.

i. No North Carolina court has decided whether educational grants are income under the guidelines. [*McKyer v. McKyer*, 179 N.C. App. 132, 632 S.E.2d 828 (2006) (where trial court classified a school grant to father of $1,800 as income but failed to make sufficient findings, matter was remanded; trial court did not find whether funds qualified as a means-tested public assistance program, whether they significantly reduced father's personal living expenses, or whether there were any limits on use of the funds), *review denied*, 361 N.C. 356, 646 S.E.2d 115 (2007).]

4. Excluded from gross income.

a. Employer contributions toward future Social Security and Medicare payments for an employee. [2020 Guidelines (this language was added in the 2011 Guidelines).] For a case decided under the 2006 Guidelines and holding that payments made by an employer toward an employee's future Social Security and Medicare benefits may not be considered as income for the purpose of determining child support obligations, see *Caskey v. Caskey*, 206 N.C. App. 710, 698 S.E.2d 712 (2010) (Medicare and Social Security taxes that employers are required to pay do not provide a parent with immediate access to additional funds that could be used to pay child support).

b. Amounts that are paid by a parent's employer directly to a third party or entity for health, disability, or life insurance or retirement benefits and are not withheld or deducted from the parent's wages, salary, or pay. [2020 Guidelines.]

c. Benefits received by a parent from means-tested public assistance programs, including Temporary Assistance to Needy Families (TANF), Supplemental Security

Income (SSI), Electronic Food and Nutrition Benefits, and General Assistance. [2020 Guidelines.]

i. Because Supplemental Security Income (SSI) payments are not considered in initial child support calculations, defendant's SSI payments could not be considered in determining his ability to pay in a related contempt proceeding. [*Cty. of Durham ex rel. Wood v. Orr*, 229 N.C. App. 196, 749 S.E.2d 113 (2013) (**unpublished**).]

d. Income of a person who is not a parent of the child for whom support is being determined, regardless of whether that person is married to or lives with the child's parent or has physical custody of the child. [2020 Guidelines. *See Kennedy v. Kennedy*, 107 N.C. App. 695, 421 S.E.2d 795 (1992) (father considered to have received only one-half of rental income from property held as tenants by the entirety with his current wife).]

e. Alimony that is received by a parent from a spouse or ex-spouse who is the other parent involved in the pending child support action. [*See* 2020 Guidelines (including as gross income alimony or maintenance received from persons other than the parties to the instant action).]

f. Adoption assistance benefits are not income of the parents but constitute money received by the children. [2020 Guidelines; 2015 Guidelines (specifically excluding these payments from income for the first time and codifying the holding in *Gaston Cty. ex rel. Miller v. Miller*, 168 N.C. App. 577, 608 S.E.2d 101 (2005) (such payments are a resource of the adopted child, not a subsidy to the parents; North Carolina Administrative Code and the Adoption Assistance Agreement between the county and the parents so provided)).]

g. Child support payments received on behalf of a child other than the child for whom support is being sought in the present action. [2020 Guidelines.]

i. **NOTE:** The 2006 Guidelines did not exclude from a parent's income support received by that parent for other children. Thus, child support received by a parent for another child was included as income to the parent in *New Hanover Child Support Enforcement ex rel. Dillon v. Rains*, 193 N.C. App. 208, 666 S.E.2d 800 (2008) (noting, however, that in the majority of states reviewed, support received for one child is excluded from income when determining the support obligations for another child). [*But cf. Orange Cty. ex rel. Clayton v. Hamilton*, 213 N.C. App. 205, 714 S.E.2d 184 (2011) (stating that *Rains* did not endorse the use of child support as income and holding, in a case decided under the 2006 Guidelines, that the trial court properly refused to include child support received for children from a later marriage in the custodial mother's income).]

ii. The 2011 Guidelines changed the result in *Rains* for child support matters heard on or after Jan. 1, 2011. [*See Orange Cty. ex rel. Clayton v. Hamilton*, 213 N.C. App. 205, 211 n.2, 714 S.E.2d 184, 189 n.2 (2011) (noting that 2011 Guidelines specifically disallow as income child support received for a child other than the child for whom support is being sought).]

h. Bonuses and capital gains are income only if the court can make findings to show that parent is likely to continue receiving the funds in the future. [*Kaiser v. Kaiser*,

259 N.C. App. 499, 506, 816 S.E.2d 223, 229 (2018) (stating that "income from past capital gains generally is a poor predictor of current, regular income from capital gains" and noting that the differences between capital gains and traditional sources of income may require more fact-finding by the trial court).]

i. The sale of a supporting spouse's separate business interests cannot be considered as income to the supporting spouse without a showing that sale of the business assets resulted in actual income or a profit to the supporting spouse. [*Shirey v. Shirey*, 267 N.C. App. 554, 833 S.E.2d 820 (2019) (installment payments from a purchase-money financing sale of business assets previously released and distributed solely to the supporting spouse as separate property were not income to the supporting spouse for purposes of modifying child support agreed to in a consent order), *review denied*, 376 N.C. 675, 853 S.E.2d 159 (2021). *See also McKyer v. McKyer*, 179 N.C. App. 132, 632 S.E.2d 828 (2006) (payment mother received from sale of house was not shown to be income), *review denied*, 361 N.C. 356, 646 S.E.2d 115 (2007).]

5. Income from self-employment or operation of a business.

a. In the case of income derived from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, gross income is gross receipts minus ordinary and necessary expenses required for self -employment or business operation. [2020 Guidelines; *Head v. Mosier*, 197 N.C. App. 328, 677 S.E.2d 191 (2009) (to calculate gross income derived from self-employment, ordinary and necessary business expenses required for self-employment or business operation are subtracted from gross receipts).]

b. Income from self-employment or operation of a business includes or may include the following:

i. A cash reserve account (retained earnings) of a corporation that a parent partially owned, even though the account was encumbered by an agreement between the parent and a creditor bank that restricted a portion of the cash reserves from being paid to the parent as salary. [*Barham v. Barham*, 127 N.C. App. 20, 487 S.E.2d 774 (1997) (that cash reserve account was available to the parent was evidenced by the parent's decision to pledge those funds to the bank in exchange for business financing; court also found that encumbered portion of the cash reserve account did not constitute an ordinary and necessary expense under guidelines definition), *aff'd per curiam*, 347 N.C. 570, 494 S.E.2d 763 (1998).]

ii. Undistributed net income of a closely held (Subchapter C) corporation or partnership may be attributed to a parent who is a shareholder or partner if the parent could require distribution by virtue of the parent's legal interest in the corporation or partnership and if retention of the income by the corporation or partnership is not reasonably necessary for business purposes. [*See Cauble v. Cauble*, 133 N.C. App. 390, 515 S.E.2d 708 (1999) (father owned a controlling interest in a corporation so that he might have directed distribution of corporate profits to his benefit).]

iii. In-kind payments and expense reimbursements (including, for example, free housing, use of a company car, or reimbursed meals) received by a parent in

the course of employment, self-employment, or operation of a business are counted as income if they are significant and reduce the parent's personal living expenses. [2020 Guidelines; *Leary v. Leary*, 152 N.C. App. 438, 567 S.E.2d 834 (2002) (no error when trial court added $250 per month to father's gross income since he had the benefit of a company car).]

c. Ordinary and necessary business expenses.

i. Ordinary and necessary business expenses do not include amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses, investment tax credits, or any other business expenses determined by the court to be inappropriate for determining gross income. [2020 Guidelines; *Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E.2d 176 (1992) (per the guidelines, accelerated depreciation is not to be deducted from a parent's gross income as an ordinary and necessary business expense). *See also Holland v. Holland*, 169 N.C. App. 564, 610 S.E.2d 231 (2005) (trial court erred by treating all depreciation as accelerated depreciation, which, under *Tise*, is not allowed as a deduction from a parent's business income).]

ii. A trial court has discretion to deduct from a parent's monthly gross income the amount of straight line depreciation allowed by the Internal Revenue Code. [*Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E.2d 176 (1992). *See also Holland v. Holland*, 169 N.C. App. 564, 610 S.E.2d 231 (2005) (trial court erred by treating all of father's farm equipment depreciation as nondeductible accelerated depreciation and by failing to exercise its discretion to deduct from father's gross income straight line depreciation allowed by Internal Revenue Code).]

iii. In the context of businesses involving the rental of real property, ordinary and necessary business expenses generally include expenses for repairs, property management and leasing fees, real estate taxes, insurance, and mortgage interest. Payments on the principal amount of a mortgage loan are not considered ordinary and necessary business expenses. [*Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E.2d 176 (1992).]

iv. A court may refuse to allow a parent to deduct business expenses for a home office or personal vehicle, bad debts, depreciation, and repayment of the principal on a business loan if it determines that the expenses are not appropriate for the purpose of determining gross income under the guidelines. [*Cauble v. Cauble*, 133 N.C. App. 390, 515 S.E.2d 708 (1999) (no error when court disallowed bad debt and depreciation expenses claimed by Subchapter C corporation); *Kennedy v. Kennedy*, 107 N.C. App. 695, 421 S.E.2d 795 (1992) (no error when court disallowed expenses for utilities, phone, truck lease, insurance, home and truck maintenance, and personal property taxes claimed by self-employed musician/father; expenses would have been incurred by father whether or not he was in the music business); *Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E.2d 176 (1992) (no deduction for payments on mortgage principal secured by rental property).]

v. Case remanded for further findings when the trial court failed to make findings on evidence presented by a self-employed father as to his business expenses. [*New Hanover Child Support Enforcement ex rel. Dillon v. Rains*, 193 N.C. App.

208, 666 S.E.2d 800 (2008) (order did not reference the $33,000 that father claimed as business expenses and did not include findings on father's evidence that he often used his personal account to cover business expenses). *Cf. Sergeef v. Sergeef*, 250 N.C. App. 404, 792 S.E.2d 192 (2016) (trial court did not err by using mother's tax returns to determine her income from self-employment, rather than using her evidence of actual business expenses, where trial court found her evidence of expenses not credible).]

6. Income received on an irregular, nonrecurring, or one-time basis.
    a. When income is received on an irregular, nonrecurring, or one-time basis, the court may average or prorate the income over a specified period of time or require the parent to pay as child support the same percentage of the parent's nonrecurring income as that paid with respect to the parent's recurring income. [2020 Guidelines.]
    b. There is no guidelines provision that instructs a trial court to treat regular income and irregular or nonrecurring bonus income separately. [*Hinshaw v. Kuntz*, 234 N.C. App. 502, 760 S.E.2d 296 (2014) (pursuant to the guidelines provision mentioned immediately above, a trial court is to average or prorate irregular or nonrecurring bonus income, which is then included in the calculation of child support, or order a parent to pay the same percentage of child support from nonrecurring income as the parent pays from regular or recurring income).]
    c. The guidelines do not require a trial court to include nonrecurring income in its child support calculations. [*Ludlam v. Miller*, 225 N.C. App. 350, 739 S.E.2d 555 (2013) (court has discretion in this matter). *Cf. Hinshaw v. Kuntz*, 234 N.C. App. 502, 760 S.E.2d 296 (2014) (it was error to fail to include recurring bonus income in the trial court's calculation of the parties' base incomes and the overall child support award).]
    d. Mere fact that a nonrecurring payment has occurred, in the absence of evidence that the payment was "income," is not sufficient by itself to be considered as nonrecurring income for calculation of child support. [*McKyer v. McKyer*, 179 N.C. App. 132, 632 S.E.2d 828 (2006) (payment mother received from sale of house was not income), *review denied*, 361 N.C. 356, 646 S.E.2d 115 (2007).] When a nonrecurring payment is classified as income to the obligor, both the nonrecurring payment and income from the investment of the nonrecurring payment may be used for calculation of child support. [*See Simms v. Bolger*, 264 N.C. App. 442, 826 S.E.2d 522 (2019) (settlement payment father received as the result of a work-related injury properly treated as nonrecurring income).]
    e. Inheritance.
        i. No abuse of discretion when trial court did not include father's inheritance of $368,487 in its child support calculations. [*Ludlam v. Miller*, 225 N.C. App. 350, 739 S.E.2d 555 (2013) (citing *Spicer v. Spicer*, 168 N.C. App. 283, 607 S.E.2d 678 (2005)) (trial court has great discretion in this determination, and father had complied with consent order that required him to place 15 percent of inheritance into trust for the children).]
    f. Workers' compensation payment.
        i. The settlement of an obligor's workers' compensation disability claim and a claim against a third party, resulting in two large monetary distributions to the

obligor, was properly classified as nonrecurring income to the obligor. [*Simms v. Bolger*, 264 N.C. App. 442, 826 S.E.2d 522 (2019) (order that child support be paid in part by a one-time lump sum payment from the settlement funds upheld; the monetary distributions received by the obligor in 2011 were properly considered "current income" for purposes of modifying child support in an order entered in 2017).]

ii. A one-time lump sum workers' compensation payment paid to the father was income. [*Felts v. Felts*, 192 N.C. App. 543, 665 S.E.2d 594 (**unpublished**) (not paginated on Westlaw) (workers' compensation lump sum settlement of $125,000 constituted "one-time, nonrecurring" income to the father under the guidelines), *review denied*, 362 N.C. 680, 670 S.E.2d 232 (2008); *Freeze v. Freeze*, 159 N.C. App. 228, 582 S.E.2d 725 (2003) (**unpublished**) (trial court erred by failing to include a lump sum workers' compensation settlement as income attributable to father).]

iii. Trial court did not abuse its discretion when it, after determining that father's workers' compensation lump-sum settlement of $125,000 constituted "one-time, nonrecurring" income to the father, averaged the award over twenty-nine months to determine father's modified child support payment. Under the guidelines, the trial court could either average the settlement over a specified period of time or require father to pay as child support a percentage of the settlement equal to the percentage of his recurring income paid for child support. [*Felts v. Felts*, 192 N.C. App. 543, 665 S.E.2d 594 (**unpublished**) (not paginated on Westlaw) (period of time included the seventeen-month period before father received the settlement, during which time he made no child support payments, and the twelve-month period after receipt of the award until entry of the court's order), *review denied*, 362 N.C. 680, 670 S.E.2d 232 (2008).]

g. Personal injury settlement.

i. Lump sum accident settlement placed in a family trust was "nonrecurring income" within the meaning of the guidelines. [*Spicer v. Spicer*, 168 N.C. App. 283, 607 S.E.2d 678 (2005) (no error in treating entire trust principal as nonrecurring income under the guidelines, rejecting father's argument that only the interest income generated by the trust should be considered).]

h. Other.

i. Sale of the marital house distributed to mother for $249,000 was not nonrecurring income to her without evidence by father that receipt of the sales price was "income." [*McKyer v. McKyer*, 179 N.C. App. 132, 632 S.E.2d 828 (2006) (court reserved for another day the decision about how to treat, for child support purposes, the type of "gain" the mother received from the sale of a distributed marital asset because there was no evidence of gain offered in this case), *review denied*, 361 N.C. 356, 646 S.E.2d 115 (2007).]

7. Income verification.

a. Income statements of the parents should be verified through documentation of both current and past income. Suitable documentation of current earnings (at least one full month's worth) includes pay stubs, employer statements, or business receipts and

expenses. Documentation of current income must be supplemented with a copy of the parent's most recent tax return to provide verification of earnings over a longer period. [2020 Guidelines.]

i. Because financial information is needed to determine the support obligation of each parent, a trial court may order the parties to exchange annually their Wage and Tax Statements, or W-2 forms. [*Jonna v. Yaramada*, 273 N.C. App. 93, 848 S.E.2d 33 (2020).]

b. In a IV-D or non-IV-D child support case, a written statement (or an employment verification form generated by the IV-D Automated Collections and Tracking System) signed by the employer of a parent who is obligated to pay child support is admissible in a proceeding to establish, modify, or enforce a child support order to prove the amount of the obligor's gross income. [G.S. 110-139(c1).]

i. A "IV-D case" is a case in which services have been applied for or are being provided by a child support enforcement agency established pursuant to Title IV-D of the federal Social Security Act, as amended, and Article 9 of G.S. Chapter 110. [G.S. 110-129(7).] "IV-D" references the program's legal authorization under Title IV-D of the Social Security Act.

ii. A "non-IV-D case" is any case, other than a IV-D case, in which child support is legally obligated to be paid. [G.S. 110-129(7).]

c. A court may impose sanctions against a parent who fails to provide suitable documentation of his income upon motion of a party or by the court on its own motion. [2020 Guidelines. *See State ex rel. Midgett v. Midgett*, 199 N.C. App. 202, 680 S.E.2d 876 (2009) (citing the guidelines provision requiring income verification and noting that sanctions may be imposed for noncompliance).]

d. Father's stipulation that he would not raise inability to pay child support as a defense did not relieve him from full disclosure of his financial condition. [*Shaw v. Cameron*, 125 N.C. App. 522, 481 S.E.2d 365 (1997) (error for trial court to limit the scope of discoverable information; to determine father's child support obligation under guidelines, mother was entitled to discover value and nature of father's interest in any partnerships or corporations and terms of any trust of which he might be beneficiary, as well as amount of related income).]

J. Imputed Income—Use of Earning Capacity

1. General rule.

a. The general rule is that a parent's child support obligation is determined by that parent's **actual** income at the time the award is made or modified. [*Hart v. Hart*, 268 N.C. App. 172, 836 S.E.2d 244 (2019) (citing *Frey v. Best*, 189 N.C. App. 622, 659 S.E.2d 60 (2008)); *Moore v. Onafowora*, 208 N.C. App. 674, 703 S.E.2d 744 (2010) (citing *Head v. Mosier*, 197 N.C. App. 328, 677 S.E.2d 191 (2009)); *Frey*, 189 N.C. App. at 631, 659 S.E.2d at 68 (citing *Goodhouse v. DeFravio*, 57 N.C. App. 124, 290 S.E.2d 751 (1982)); *McKyer v. McKyer*, 179 N.C. App. 132, 632 S.E.2d 828 (2006) (citing *Atwell v. Atwell*, 74 N.C. App. 231, 328 S.E.2d 47 (1985)), *review denied*, 361 N.C. 356, 646 S.E.2d 115 (2007); *State ex rel. Godwin v. Williams*, 163 N.C. App. 353, 593 S.E.2d 123 (2004); *Hodges v. Hodges*, 147 N.C. App. 478, 556 S.E.2d 7 (2001).]

b. Under the guidelines, child support calculations are based on the parents' current incomes at the time the order is entered and not as of the time of remand, and they are not based on the parent's average monthly gross income over the years preceding the original trial, unless the average income is used to determine actual present income. [*State ex rel. Midgett v. Midgett*, 199 N.C. App. 202, 680 S.E.2d 876 (2009). *See also Simms v. Bolger*, 264 N.C. App. 442, 826 S.E.2d 522 (2019) (in modification proceeding, the trial court erred when it determined child support arrearages between 2011, when motion to modify was filed, and 2017, when order was entered, based on obligor's income for each of those years, instead of using party's actual income at the time the existing order was modified); *State ex rel. Williams v. Williams*, 179 N.C. App. 838, 635 S.E.2d 495 (2006) (trial court erred in basing defendant's income on a statement in defendant's bankruptcy filing made more than eighteen months before entry of the child support order).] See Section III.J.5, below, for discussion of circumstances allowing for child support to be determined based on a parent's average monthly income for years prior to the hearing.

2. However, case law and the 2020 Guidelines provide that a parent's **capacity to earn** may be used in some circumstances.

   a. If the court finds that a parent's voluntary unemployment or underemployment is the result of the parent's bad faith or deliberate suppression of income to avoid or minimize the parent's child support obligation, the court may calculate child support based on the parent's potential, rather than actual, income. [2020 Guidelines.]

      i. For more on imputing income to a voluntarily unemployed parent, see Cheryl Howell, *Imputing Income: Voluntary Unemployment Is Not Enough*, UNC Sch. of Gov't: On the Civil Side Blog (Sept. 18, 2015), http://civil.sog.unc.edu/imputing-income-voluntary-unemployment-is-not-enough. For more on the bad faith requirement, see other posts by Professor Howell:

         (a) *Imputing Income: So What Is Bad Faith?,* UNC Sch. of Gov't: On the Civil Side Blog (Oct. 7, 2015), http://civil.sog.unc.edu/imputing-income-so-what-is-bad-faith.

         (b) *And They Said It Again: Never Use Earning Capacity without Bad Faith*, UNC Sch. of Gov't: On the Civil Side Blog (Apr. 22, 2016), http://civil.sog.unc.edu/and-they-said-it-again-never-use-earning-capacity-without-bad-faith.

   b. Potential income may not be imputed to a parent who is physically or mentally incapacitated or who is the primary custodian for a child who is under the age of three years and for whom child support is being determined. [2020 Guidelines; 2011 Guidelines precluded imputing income to a parent who was "caring" for a child under the age of 3.]

   c. In compliance with 45 C.F.R. § 302.56(c)(3), incarceration may not be treated as voluntary unemployment in establishing or modifying a child support order. [2020 Guidelines.]

3. When determining whether a parent has disregarded marital and parental obligations, a court is to consider whether the parent

a. Failed to exercise his reasonable capacity to earn,
b. Deliberately avoided her family's financial responsibilities,
c. Acted in deliberate disregard for his support obligations,
d. Refused to seek or to accept gainful employment,
e. Willfully refused to secure or take a job,
f. Deliberately failed to apply herself to business,
g. Intentionally depressed his income to an artificial low, or
h. Intentionally left employment to go into another business. [*Johnston Cty. ex rel. Bugge v. Bugge*, 218 N.C. App. 438, 722 S.E.2d 512 (2012) (citing *Wolf v. Wolf*, 151 N.C. App. 523, 526–27, 566 S.E.2d 516, 518–19 (2002)); *Roberts v. McAllister*, 174 N.C. App. 369, 621 S.E.2d 191 (2005) (citing *Wolf*), *appeal dismissed*, 360 N.C. 364, 629 S.E.2d 608 (2006)).]

4. Requirement of "bad faith."
   a. An intentional reduction in income, without more, is not sufficient to impute income. Some type of "bad faith" is required. The rule that a trial court cannot impute income absent a finding of bad faith "applies throughout the entire child support determination." [*Lasecki v. Lasecki*, 246 N.C. App. 518, 534, 786 S.E.2d 286, 299 (2016).] For more on this case, see Cheryl Howell, *And They Said It Again: Never Use Earning Capacity without Bad Faith*, UNC Sch. of Gov't: On the Civil Side Blog (Apr. 22, 2016), http://civil.sog.unc.edu/and-they-said-it-again-never-use-earning-capacity-without-bad-faith.
   b. "Bad faith" has been recognized as a general term given to situations that trigger the earning capacity rule. The court of appeals has used the terms "bad faith" or "an absence of good faith" interchangeably and has found bad faith or otherwise imputed income based on evidence that a party deliberately suppressed income to avoid family responsibilities or acted in deliberate disregard of her obligation to provide reasonable support.
      i. Bad faith or absence of good faith. [*Metz v. Metz*, 212 N.C. App. 494, 711 S.E.2d 737 (2011) (for court to impose earning capacity rule, evidence must show that actions of party that resulted in reduced income were not taken in good faith); *Moore v. Onafowora*, 208 N.C. App. 674, 703 S.E.2d 744 (2010) (citing *Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25 (2006)) (without a finding of bad faith, law of imputation is not applicable); *Frey v. Best*, 189 N.C. App. 622, 659 S.E.2d 60 (2008) (citing *Goodhouse v. DeFravio*, 57 N.C. App. 124, 290 S.E.2d 751 (1982)) (earning capacity rule must be based on evidence that tends to show the parent's actions resulting in reduction of income were not taken in good faith); *Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003) (citing *Bowers v. Bowers*, 141 N.C. App. 729, 541 S.E.2d 508 (2001)) (before earning capacity may be used as the basis of an award, there must be a showing that actions that reduced the party's income were taken in bad faith, to avoid family responsibilities), *aff'd per curiam in part, review dismissed in part*, 359 N.C. 65, 602 S.E.2d 360 (2004); *Sharpe v. Nobles*, 127 N.C. App. 705, 493 S.E.2d 288 (1997) (before using the earning capacity rule, there must be a showing that the actions which

reduced a party's income were not taken in good faith); *Andrews v. Andrews*, 217 N.C. App. 154, 719 S.E.2d 128 (2011) (when father voluntarily resigned from one position and took another earning substantially less, without considering his ability to meet his child support obligation, it was error for court to conclude that father acted in good faith), *review denied*, 365 N.C. 561, 722 S.E.2d 595 (2012).]

ii. Party deliberately depressed income to avoid family responsibilities or deliberately acted in disregard of an obligation to provide support. [*See Roberts v. McAllister*, 174 N.C. App. 369, 621 S.E.2d 191 (2005) (mother's "naive indifference" to her children's need for financial support was intentional and willful and showed a deliberate disregard of her responsibility to support her children, justifying imputing income to her), *appeal dismissed*, 360 N.C. 364, 629 S.E.2d 608 (2006); *McKyer v. McKyer*, 179 N.C. App. 132, 632 S.E.2d 828 (2006) (findings supported conclusion that father had deliberately suppressed his income and acted in deliberate disregard of his obligation to provide reasonable support to his children), *review denied*, 361 N.C. 356, 646 S.E.2d 115 (2007); *Wolf v. Wolf*, 151 N.C. App. 523, 527, 566 S.E.2d 516, 519 (2002) (father's unemployment was voluntary and in "conscious and reckless disregard" of his duty to provide court-ordered child support); *Cook v. Cook*, 159 N.C. App. 657, 583 S.E.2d 696 (2003) (whether or not "bad faith" is the term used, an intentional reduction in income is not sufficient to support the use of earning capacity rule unless reduction is proven to have been made to avoid a child support obligation); *Kowalick v. Kowalick*, 129 N.C. App. 781, 501 S.E.2d 671 (1998) (before considering a party's earning capacity, trial court must make a finding that the party deliberately depressed his income in bad faith or otherwise disregarded his child support obligation); *Thomas v. Thomas*, 200 N.C. App. 436, 683 S.E.2d 791 (2009) (**unpublished**) (not paginated on Westlaw) (citing *Roberts)* (father's "naive indifference" to his ability to support his children on his meager salary as a part-time trainer and coach, and his willful refusal to take or secure other employment, warranted decision to impute income; father's investment income, which he had lived on during the marriage, had been significantly depleted as a result of losses and withdrawals for his monthly expenses after separation and divorce).]

c. A party's proscribed intent, being a mental attitude, must ordinarily be proven, if proven at all, by circumstantial evidence. [*Roberts v. McAllister*, 174 N.C. App. 369, 621 S.E.2d 191 (2005), *appeal dismissed*, 360 N.C. 364, 629 S.E.2d 608 (2006).]

d. "An unsuccessful or prolonged job search after an involuntary job loss is not necessarily evidence of a bad faith suppression of income." [*Hill v. Hill*, 261 N.C. App. 600, 611, 821 S.E.2d 210, 219 (2018) (noting the lack of cases allowing an award of child support based solely on the depletion of an obligor's estate without a finding of bad faith or suppression of earning capacity; matter remanded for findings to clarify whether the trial court imputed income for the purposes of determining child support and if so, the basis for imputing income for the relevant time periods).]

e. A determination of bad faith in conjunction with suppression of income is best made on a case-by-case basis. [*Roberts v. McAllister*, 174 N.C. App. 369, 621 S.E.2d 191 (2005) (citing *Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per*

curiam in part, review dismissed in part, 359 N.C. 65, 602 S.E.2d 360 (2004)), *appeal dismissed*, 360 N.C. 364, 629 S.E.2d 608 (2006); *Metz v. Metz*, 212 N.C. App. 494, 711 S.E.2d 737 (2011) (citing *Pataky*).]

f. In compliance with 45 C.F.R. § 302.56(c)(3), incarceration may not be treated as voluntary unemployment in establishing or modifying a child support order. [2020 Guidelines.]

g. A party seeking a modification of child support based on a reduction in income has the burden of proving that the reduction in income was not the result of bad faith. [*Andrews v. Andrews*, 217 N.C. App. 154, 719 S.E.2d 128 (2011) (citing *Mittendorff v. Mittendorff*, 133 N.C. App. 343, 515 S.E.2d 464 (1999)), *review denied*, 365 N.C. 561, 722 S.E.2d 595 (2012); *Mason v. Erwin*, 157 N.C. App. 284, 579 S.E.2d 120 (2003) (citing *Mittendorff*).]

5. A trial court may, in some circumstances, average a parent's prior income without "imputing" income to that parent.

a. The trial court's mere use of the phrases "earning capacity" or "past income" does not automatically transform the order into one that "imputes" income to a parent. [*Hartsell v. Hartsell*, 189 N.C. App. 65, 657 S.E.2d 724 (2008) (court did not impute income when it based father's income on his present earnings from all available sources of income).]

b. The trial court did not impute income to a father when it calculated his income based on his present earnings as a teacher and on his average monthly income during the year prior to the hearing from a part-time grading business. [*Hartsell v. Hartsell*, 189 N.C. App. 65, 657 S.E.2d 724 (2008) (income from grading business determined from actual earnings in year before hearing, which trial court reasonably concluded father could continue to earn, based on finding that employment was available in grading business at time of hearing).]

c. Trial court's averaging of father's income from his two prior tax returns to calculate his income at the time of the hearing was not an impermissible imputing of income to father where it was clear that the evidence was used to determine his present actual income. [*Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25 (2006) (where parent's documentation of his income in 2003 was inadequate and highly unreliable, no abuse of discretion when trial court averaged income from 2001 and 2002 tax returns to find gross monthly income at the time of the hearing). *See also Zurosky v. Shaffer*, 236 N.C. App. 219, 763 S.E.2d 755 (2014) (citing *Diehl*) (trial court's use of father's net income from 2003–2008 to determine father's actual income in 2013 upheld when trial court found father's reported income was not credible; findings in support of unreliability of father's evidence included that father overstated his monthly tax payments, contended that he operated at a significant deficit each month, failed to report significant expenditures, and presented conflicting evidence as to his post-separation work habits); *Moore v. Onafowora*, 208 N.C. App. 674, 703 S.E.2d 744 (2010) (when father submitted incomplete financial records for 2008 and 2009 but more complete records for 2007, trial court did not abuse its discretion when it used father's 2007 average monthly income to determine his gross monthly income in 2009; trial court properly considered father's income from all available sources).]

d. If a trial court's findings do not clearly indicate whether the trial court averaged income because of a lack of evidence of current income or whether the court improperly imposed the earning capacity rule without making a finding of bad faith, the matter may be reversed. [*See Reaves v. Reaves*, 174 N.C. App. 839, 622 S.E.2d 523 (2005) (**unpublished**) (when father presented no evidence of his current income, trial court averaged income based on tax returns for the most recent two years for which returns had been filed; matter reversed when findings insufficient for appellate court to determine whether trial court had devised an appropriate method of determining father's current income, given the lack of evidence, or whether it improperly imposed the earning capacity rule without a finding regarding bad faith).]

e. For a case distinguishing *Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25 (2006), and *Hartsell v. Hartsell*, 189 N.C. App. 65, 657 S.E.2d 724 (2008), see *State ex rel. Midgett v. Midgett*, 199 N.C. App. 202, 680 S.E.2d 876 (2009) (reversing decision in which court determined husband's income based on wife's testimony as to husband's earnings, on average, from commercial fishing and towing and crushing cars over the course of their twelve-year marriage; income figures presented encompassed a number of years, not one or two prior years as in *Diehl* and *Hartsell*, there was no finding that husband had failed to provide tax returns as in *Diehl* and *Hartsell*, and court did not find that husband had the current ability to generate the income from those enterprises that he had earned in prior years, as the court had found in *Hartsell*).

6. Determining the amount of imputed income.

a. The amount of potential income imputed to a parent must be based on the parent's assets; residence; employment potential and probable earnings level, based on the parent's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community; and other relevant background factors relating to the parent's actual earning potential. [2020 Guidelines (adding assets and residence to the consideration of the amount of income to impute and adding relevant background factors to the factors that may be considered).]

b. In compliance with 45 C.F.R. § 302.56(c)(3), incarceration may not be treated as voluntary unemployment in establishing or modifying a child support order. [2020 Guidelines.]

c. If the parent has no recent work history or vocational training, potential income should not be less than the minimum hourly wage for a 35-hour work week. [2020 Guidelines; 2015 Guidelines (using 40-hour work week).] To impute income at minimum wage, a trial court must find bad faith. [*State ex rel. Godwin v. Williams*, 163 N.C. App. 353, 593 S.E.2d 123 (2004) (trial court erred when it imputed income to full-time college student at the minimum wage of $5.15 per hour, on a full-time basis, without findings as to deliberate or bad faith conduct to suppress his income or otherwise avoid his child support obligation).] For a related article, see Cheryl Howell, *Imputing Income: Voluntary Unemployment Is Not Enough*, UNC Sch. of Gov't: On the Civil Side Blog (Sept. 18, 2015), http://civil.sog.unc.edu/imputing-income-voluntary-unemployment-is-not-enough.

d. Trial court did not err when it imputed to father a monthly gross income of $18,867, his monthly salary as a nurse anesthetist, even though father could no longer be

employed in that capacity, having lost his licenses as a nurse anesthetist and nurse practitioner. [*Metz v. Metz*, 212 N.C. App. 494, 711 S.E.2d 737 (2011) (evidence showed that father had $355,000 under his control, including some $40,000 in cash, and that father had, by the time the matter was heard, withdrawn $40,000 from retirement accounts that were not included in his financial affidavits).]

e. Trial court did not err when it determined father's potential income based primarily on the amount father spent monthly on expenses, which father paid from amounts earned as a part-time trainer and coach, as well as from investment income and withdrawals from investment accounts. [*Thomas v. Thomas*, 200 N.C. App. 436, 683 S.E.2d 791 (2009) (**unpublished**) (proper to conclude that father's probable earning level would equal the amount on which he was actually living). *Cf. Harnett Cty. ex rel. De la Rosa v. De la Rosa*, 240 N.C. App. 15, 770 S.E.2d 106 (2015) (trial court improperly based its determination of the amount to impute on father's living expenses, which were being paid by his parents).]

f. A trial court is not authorized to determine the amount of imputed income based on its determination of a degree of bad faith. [*Ludlam v. Miller*, 225 N.C. App. 350, 739 S.E.2d 555 (2013) (finding as to bad faith was unclear but suggested that the trial court had concluded that while the bad faith of both unemployed parents was insufficient to impute income at the parents' prior income levels, the degree of bad faith was sufficient to impute income to each parent at minimum wage; this was error, as trial court must base amount of imputed income on the parent's earning potential).]

7. Imputing income to a parent who is voluntarily unemployed.

a. If the court finds that a parent's voluntary unemployment or underemployment is the result of the parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income. [2020 Guidelines.]

b. In compliance with 45 C.F.R. § 302.56(c)(3), incarceration may not be treated as voluntary unemployment in establishing or modifying a child support order. [2020 Guidelines.]

c. The determination of whether to impute income to a parent who is voluntarily unemployed is a determination based in part on the conduct of the parent. [*Roberts v. McAllister*, 174 N.C. App. 369, 621 S.E.2d 191 (2005) (citing *Wolf v. Wolf*, 151 N.C. App. 523, 566 S.E.2d 516 (2002)*)*, *appeal dismissed*, 360 N.C. 364, 629 S.E.2d 608 (2006).] Other factors to be considered are set out in Section III.J.3, above.

d. Mother's "naive indifference" to her children's need for financial support was intentional and willful and showed a deliberate disregard of her responsibility to support her children, justifying imputation of income to her. [*Roberts v. McAllister*, 174 N.C. App. 369, 621 S.E.2d 191 (2005), *appeal dismissed*, 360 N.C. 364, 629 S.E.2d 608 (2006).]

e. Income was properly imputed to unemployed former teacher/mother based on findings that mother had (1) not applied for a teaching position in Mecklenburg County in the past three years despite stating in a verified motion to modify support that she had, (2) resigned from a teaching position in Union County without having found another job, and (3) told father that mothers did not have to pay child support. [*Lueallen v. Lueallen*, 249 N.C. App. 292, 790 S.E.2d 690 (2016).]

f. Without finding that a voluntarily unemployed parent depressed her income in bad faith, it is error to impute income. [*Nicks v. Nicks*, 241 N.C. App. 487, 774 S.E.2d 365 (2015) (citing and quoting *Works v. Works*, 217 N.C. App. 345, 719 S.E.2d 218 (2011)) (voluntarily unemployed physician mother left medical practice to care for child with severe emotional problems and filed a motion to modify child support paid by father; in denying mother's motion to modify, trial court erred when it imputed income to mother without finding that she had depressed her income in bad faith).]

8. Imputing income to a parent who is voluntarily underemployed.

a. See Section III.J.7.a, immediately above, for 2020 Guidelines provision on imputing income to a parent who is voluntarily underemployed.

b. In compliance with 45 C.F.R. § 302.56(c)(3), incarceration may not be treated as voluntary unemployment in establishing or modifying a child support order. [2020 Guidelines.]

c. When father worked only one day a week at a driving range, earning $260 a month, had not sought other work, and showed no intention of contributing significantly to his sons' financial needs, trial court properly imputed income to father. [*McKyer v. McKyer*, 179 N.C. App. 132, 632 S.E.2d 828 (2006) (matter remanded for additional findings regarding the proper amount to be imputed), *review denied*, 361 N.C. 356, 646 S.E.2d 115 (2007).]

d. Even though there was no evidence that father intentionally reduced his income to avoid his child support obligation and sincerity of his religious beliefs was not questioned, when father voluntarily resigned his position as an engineer earning $172,000 per year plus benefits to start a church at an annual salary of $52,800 without benefits and testified that he did so without considering his ability to meet his child support obligation, trial court erred when it concluded that father acted in good faith and reduced his child support obligation. [*Andrews v. Andrews*, 217 N.C. App. 154, 719 S.E.2d 128 (2011), *review denied*, 365 N.C. 561, 722 S.E.2d 595 (2012).]

e. No error in imputing income to father when findings demonstrated father's "naïve indifference" to his ability to support his children on his meager salary as a part-time trainer and athletic coach. Father in bad faith refused to obtain "gainful employment" after his formerly substantial investment assets had been significantly depleted by withdrawals and losses. [*Thomas v. Thomas*, 200 N.C. App. 436, 683 S.E.2d 791 (2009) (**unpublished**) (not paginated on Westlaw) (though father's primary job during the marriage was to manage his investments, situation was such that father would be unable to support himself and his children if his investments continued to decrease; still, father did not increase his work load or seek additional employment).]

9. Imputing income to a parent whose employment was terminated.

a. "An unsuccessful or prolonged job search after an involuntary job loss is not necessarily evidence of a bad faith suppression of income." [*Hill v. Hill*, 261 N.C. App. 600, 611, 821 S.E.2d 210, 219 (2018) (noting the lack of cases allowing an award of child support based solely on the depletion of an obligor's estate without a finding of bad faith or suppression of earning capacity; matter remanded for findings to clarify whether the trial court imputed income for the purposes of determining child support and if so, the basis for imputing income for the relevant time periods).]

b. Income from a position from which father was terminated was imputed to him; court found father was voluntarily unemployed because his actions at work, taken in conscious and reckless disregard of his duty to provide support, irritated and embarrassed his employer, resulting in an "entirely predictable termination." [*Wolf v. Wolf*, 151 N.C. App. 523, 528, 566 S.E.2d 516, 519 (2002) (father's motion to reduce child support denied).]

c. Trial court did not err when it imputed to father a monthly gross income of $18,867, his monthly salary while working as a nurse anesthetist; father's unemployment was the foreseeable result of being criminally convicted for the sexual abuse of his child. [*Metz v. Metz*, 212 N.C. App. 494, 711 S.E.2d 737 (2011) (rejecting (1) father's argument that the loss of his job and related licenses was involuntary and not the result of bad faith on his part and (2) father's attempt to distinguish *Wolf v. Wolf*, 151 N.C. App. 523, 566 S.E.2d 516 (2002), based on the fact that the actions that resulted in his termination did not occur at work).]

10. Imputing income to a parent who voluntarily retired.

a. No error in imputing income to able-bodied 52-year-old father who retired after current wife won a lottery; father voluntarily depressed his income in deliberate disregard of support obligation. [*Mason v. Erwin*, 157 N.C. App. 284, 579 S.E.2d 120 (2003).]

b. Trial court properly imputed income to father who decided to take early retirement at age 51 when his child was three; father chose to remain unemployed by refusing to seek employment, despite his many skills, and remained eligible to work for his former employer, a municipality, without decreasing his retirement benefits. [*Osborne v. Osborne*, 129 N.C. App. 34, 497 S.E.2d 113 (1998).]

11. Imputing income to a parent who quit his job.

a. No error in imputing income to mother when she voluntarily and in bad faith stopped working as a real estate agent. [*King v. King*, 153 N.C. App. 181, 568 S.E.2d 864 (2002) (her explanation for not working, that time involved in trial of child support matter interfered with her ability to work, was rejected by court).]

b. Error for trial court to impute earnings to father merely because he resigned from his employment when resignation was not in bad faith. [*Cook v. Cook*, 159 N.C. App. 657, 583 S.E.2d 696 (2003).]

c. When mother had quit her part-time job as a nurse and was not employed when support order was entered, trial court was required to make findings as to whether she deliberately depressed her income before imputing income. [*Parnell v. Parnell*, 189 N.C. App. 531, 659 S.E.2d 490 (2008) (**unpublished**).]

12. Imputing income to a parent who earns less from new employment.

a. Father's failure to look for work that would pay him what he made before his position was eliminated was not deliberate suppression of income or other bad faith action; his former "earning capacity" could not be used to impute income to him. [*Sharpe v. Nobles*, 127 N.C. App. 705, 493 S.E.2d 288 (1997) (after father's position as district director was abolished, father twice took lower-paying positions with the same company). *Compare Tardani v. Tardani*, 201 N.C. App. 728, 689 S.E.2d 601 (2010)

(**unpublished**) (bad faith found where parent accepted job as a manager trainee even though he had experience as a manager).]

13. Imputing income to a parent attending school.
    a. Defendant who voluntary resigned from his job to attend graduate school full-time did not act in bad faith when he continued to provide adequate support for his children; earnings from former job not imputed to him. [*Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part*, 359 N.C. 65, 602 S.E.2d 360 (2004).]
    b. In case involving teen father who left part-time and summer jobs to attend college full-time in another city, trial court erred in imputing income when it failed to find that father had depressed his income in bad faith. [*State ex rel. Godwin v. Williams*, 163 N.C. App. 353, 593 S.E.2d 123 (2004).]
    c. When entering permanent child support order, trial court properly imputed to unrepresented father amount of income father earned from full-time job he held when temporary child support order was entered. Trial court found that father had in bad faith quit the full-time job two weeks after entry of the temporary order to pursue an associate degree at a community college, so that when permanent order was entered, father's income consisted only of a G.I. bill benefit of approximately $1,000/month. [*Cumberland Cty. ex rel. Rettig v. Rettig*, 231 N.C. App. 170, 753 S.E.2d 740 (2013) (**unpublished**).]
    d. A voluntary decrease in income resulting from a parent's return to school may be considered to support a finding of changed circumstance in a modification proceeding, without a finding of bad faith, if the movant also shows a change in child-oriented expenses. [*See Schroader v. Schroader*, 120 N.C. App. 790, 463 S.E.2d 790 (1995) (custodial mother who left full-time job to attend college full-time could claim resulting reduction in income, even though voluntary, as a changed circumstance in a proceeding to modify the noncustodial father's child support obligation if she showed change in child's expenses); *Fischell v. Rosenberg*, 90 N.C. App. 254, 368 S.E.2d 11 (1988) (court erred in refusing to consider, as a change of circumstance, fact that income of father, the custodial parent, had been reduced by his voluntary termination of employment to return to school; order denying motion to increase mother's support obligation affirmed, however, based on father's failure to present evidence of child-oriented expenses at the time of the prior hearing).]
14. Imputing income to a parent based on rental income.
    a. If a parent fails to make a good faith effort to obtain the best and highest rental income from rental property, a trial court would be required to utilize the potential income, rather than the actual income, from the rental property in determining the parent's monthly gross income. [*Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E.2d 176 (1992); *Stein v. Brasington*, 233 N.C. App. 240, 758 S.E.2d 707 (2014) (**unpublished**) (citing *Lawrence*) (trial court properly imputed income to mother from her interest in a rental property based on the income generated by the property, determined by mother's testimony about weekly rental rate and number of weeks per year property was rented, minus mortgage payments and expenses for upkeep and maintenance; imputation proper based on trial court findings that mother was evasive at trial

about her finances and was unable to account for several large bank deposits; trial court also found, which was unchallenged on appeal, that mother was deliberately suppressing her income and was voluntarily underemployed when she held a nursing degree from Duke University but worked at an Apple store for $10/hour).]

15. Other.
    a. Error for trial court to impute income to father from investment account after father restructured his portfolio from holdings that produced more income to holdings that would favor long-term growth; finding that father deliberately reduced his income not sufficient to justify application of earning capacity rule when court made no finding as to father's motive in changing his investment strategy. [*Cook v. Cook*, 159 N.C. App. 657, 583 S.E.2d 696 (2003).]

16. A trial court must make sufficient findings to justify applying the earning capacity rule.
    a. If the court finds that a parent's voluntary unemployment or underemployment is the result of the parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income. [2015 Guidelines. *See also Hartsell v. Hartsell*, 189 N.C. App. 65, 77, 657 S.E.2d 724, 731 (2008) (quoting *Beall v. Beall*, 290 N.C. 669, 674, 228 S.E.2d 407, 410 (1976)) (a child support award based on capacity to earn must include "a proper finding that the [party] is deliberately depressing his income or indulging himself in excessive spending because of a disregard of his marital obligation to provide reasonable support for his wife and children"); *Frey v. Best*, 189 N.C. App. 622, 659 S.E.2d 60 (2008) (citing *Goodhouse v. DeFravio*, 57 N.C. App. 124, 290 S.E.2d 751 (1982)) (capacity to earn may be the basis of an award of child support if it is based upon a proper finding that a parent is deliberately depressing his income or is otherwise acting in deliberate disregard of his obligation to provide reasonable support for his family); *Bowers v. Bowers*, 141 N.C. App.729, 541 S.E.2d 508 (2001) (earning capacity rule can only be used when there are findings, based on competent evidence, to support a conclusion that the supporting spouse or parent is deliberately suppressing her income to avoid family responsibilities).]
    b. Proper findings made in case not imputing income.
        i. Decision not to impute income to mother upheld when finding that mother did not act in bad faith was supported by evidence showing that shortly after separation, mother worked extra shifts as a part-time restaurant hostess while friends provided child care at no cost; that after mother began receiving postseparation support and temporary child support, mother paid for child care at the same hourly rate that she made as a hostess so she discontinued the extra shifts; mother had sought other work extensively during the recession but a higher salaried job was not available to her, and mother's only option to increase her salary, by working extra weekend shifts at the restaurant, was rejected because, with alternating weekend custody, mother would sacrifice most of her custodial time with daughter and costs of child care would equal her earnings for the extra shifts. [*Balawejder v. Balawejder*, 216 N.C. App. 301, 721 S.E.2d 679 (2011).]

c. Proper findings made in cases imputing income.

i. Findings that husband's unemployment was voluntary and that he had acted in "bad faith" based on a "conscious and reckless disregard" of his duty to provide court-ordered child support sufficient to impute income to father. [*Wolf v. Wolf*, 151 N.C. App. 523, 566 S.E.2d 516 (2002) (father's motion to reduce child support properly denied, noting trial court's "extensive findings of fact" outlining circumstances of father's termination and supporting conclusion that father was voluntarily unemployed).]

ii. Findings sufficient to establish father's naïve indifference to children's need for support when court found that father had failed to exercise his reasonable capacity to earn because he had lived during the marriage on income from his separate investments, which had been significantly depleted as a result of losses and withdrawals for his monthly expenses after separation and divorce, and that father had not sincerely tried to find employment to make up for the decrease in investment income. [*Thomas v. Thomas*, 200 N.C. App. 436, 683 S.E.2d 791 (2009) (**unpublished**).]

d. Findings as to bad faith/deliberate suppression not made.

i. When it was not clear from the order whether the trial court found that plaintiff and defendant had acted in bad faith but left the "general impression" that the trial court found no bad faith, the order was reversed and remanded. [*Ludlam v. Miller*, 225 N.C. App. 350, 358, 739 S.E.2d 555, 560 (2013).]

ii. Trial court erred when it imputed income to husband of $500 per month from commercial fishing and $625 per month from towing and crushing cars without making the requisite findings of bad faith or deliberate suppression of income. [*State ex rel. Midgett v. Midgett*, 199 N.C. App. 202, 680 S.E.2d 876 (2009).]

iii. Trial court made no findings as to defendant's present earnings or as to defendant's reduction of income in bad faith; order that imputed income reversed. [*Ford v. Wright*, 170 N.C. App. 89, 611 S.E.2d 456 (2005).]

iv. When the trial court made no findings that defendant was deliberately depressing his income or indulging in excessive spending to avoid family responsibilities, trial court erred in calculating child support based on defendant's capacity to earn. [*State ex rel. Williams v. Williams*, 179 N.C. App. 838, 635 S.E.2d 495 (2006).]

v. Trial court erred when it imputed income to full-time college student at the minimum wage of $5.15 per hour, on a full-time basis, without findings as to deliberate or bad faith conduct to suppress his income or otherwise avoid his child support obligation. [*State ex rel. Godwin v. Williams*, 163 N.C. App. 353, 593 S.E.2d 123 (2004).]

vi. Error for trial court to calculate child support based on each party's "earning capacity"; order did not include any findings as to whether either party deliberately suppressed her income to avoid support obligation. [*Bowers v. Bowers*, 141 N.C. App. 729, 541 S.E.2d 508 (2001); *Parnell v. Parnell*, 189 N.C. App. 531, 659 S.E.2d 490 (2008) (**unpublished**) (when mother had quit her part-time job as a

nurse and was not employed when support order was entered, trial court was required to make findings regarding her earning capacity, including whether she deliberately depressed her income, before imputing income).]

vii. Trial court erred in imputing any amount of income to self-employed musician/father; no evidence in the record to support a finding that father deliberately depressed his income. [*Kennedy v. Kennedy*, 107 N.C. App. 695, 421 S.E.2d 795 (1992).]

e. Findings as to amount of imputed income not made.

i. Trial court found that year before father's arrest he earned $100,000, and imputed a current income of $50,000, or half of the previous salary, but made no findings to support imputing half his former salary, as opposed to some other fraction or amount. [*Respess v. Respess*, 232 N.C. App. 611, 754 S.E.2d 691 (2014) (affirming decision to impute income to father but remanding for findings setting out how the trial court arrived at the amount to be imputed).]

ii. A finding that "[n]o evidence was presented that [father] could not work more hours" at his employment was not sufficient to support imputing $1,040 per month of additional income to father. The trial court made no findings that full-time work was available at father's current place of employment, as to the availability of other full-time jobs that would pay father the same hourly wage as his part-time job, or as to the effect of father's status as a part-time student. [*McKyer v. McKyer*, 179 N.C. App. 132, 148, 632 S.E.2d 828, 837 (2006) (affirming trial court's conclusion that income could be imputed to father but remanding for additional findings regarding the proper amount to be imputed), *review denied*, 361 N.C. 356, 646 S.E.2d 115 (2007); *Stein v. Brasington*, 233 N.C. App. 240, 758 S.E.2d 707 (2014) (**unpublished**) (citing *McKyer*) (trial court erred in imputing $50,000 of income to mother based on her nursing degree when trial court made no findings as to mother's occupational qualifications, the availability of nursing positions in the community, or the typical starting salary of a nurse; moreover, trial court imputed $50,000 based on mother's testimony that she had applied for a hospital information technology job with that starting salary).]

iii. Trial court erred when it halved the figures provided by wife as to husband's income from commercial fishing and towing and crushing cars without making any findings or conclusions to support the decision to reduce the amounts provided by wife. [*State ex rel. Midgett v. Midgett*, 199 N.C. App. 202, 680 S.E.2d 876 (2009).]

f. Findings sufficient to support decision to impute income but basis used to determine amount of imputed income not proper.

i. When findings about father's deliberate disregard of his responsibility to support his children supported the trial court's decision to impute income to him but trial court improperly based its determination of the amount to impute on father's living expenses, which were being paid by his parents, and there were no findings because no evidence had been presented on the factors normally used to determine the amount of imputed income, the appellate court reversed both the trial court's imputation of income and the award of child support based

upon the imputed amount of income. [*Harnett Cty. ex rel. De la Rosa v. De la Rosa*, 240 N.C. App. 15, 770 S.E.2d 106 (2015) (remand for additional findings was not appropriate when there was no evidence as to (1) father's earning capacity, (2) father's occupational qualifications other than military service, (3) type of work father did while in military service and whether military service had prepared him for some type of work outside the military, (4) father's education or work history prior to military service, or (5) prevailing job opportunities and earning levels in the community).]

17. Effect of prior finding as to deliberate depression of income or deliberately acting in disregard of obligation to provide support.
    a. Finding that in 2001 father was "not voluntarily reducing or minimizing his income to avoid his financial obligations to his family" did not preclude a contrary finding four years later. [*McKyer v. McKyer*, 179 N.C. App. 132, 147, 632 S.E.2d 828, 837 (2006), *review denied*, 361 N.C. 356, 646 S.E.2d 115 (2007).]

K. Adjusted Gross Income

1. A parent's presumptive child support obligation is based primarily on her adjusted gross income.
2. Adjusted gross income is a parent's gross income minus allowable deductions for the support of children other than those for whom support is being determined. [See lines 1a and 1b of Worksheet A, Form AOC-CV-627, Child Support Obligation Primary Custody, and related instructions (subtracting payments made by a parent under a preexisting child support order for other children of that parent and the amount of the parent's financial responsibility for other children living with that parent to arrive at monthly adjusted gross income).] **NOTE**: Form AOC-CV-627 (Rev. 1/15) continues to refer to a "pre-existing" order even though 2015 Guidelines speak of an existing court order.
3. Deductions allowed from gross income to determine monthly adjusted gross income:
    a. Child support payments actually made by a parent under an existing court order, separation agreement, or voluntary support arrangement for a child other than the child for whom support is being determined, regardless of whether the child or children for whom support is being paid was/were born before or after the child or children for whom support is being determined in the pending action. [2020Guidelines and related worksheets; *Hodges v. Hodges*, 147 N.C. App. 478, 556 S.E.2d 7 (2001).] **NOTE**: This paragraph in the 2006 and 2011 Guidelines, set out immediately below, referred to child support payments made by a parent under a "pre-existing" order. Cases based on those guidelines did the same but still should be relevant under the 2015 and 2020 Guidelines.
        i. A preexisting support order is a child support order that is in effect when a child support order in the pending action is entered or modified, regardless of whether the children for whom support is being paid under the preexisting order are older or younger than the children for whom support is being determined in the pending action. [2006 and 2011 Guidelines; *Buncombe Cty. ex rel. Blair v. Jackson*, 138 N.C. App. 284, 531 S.E.2d 240 (2000) (a preexisting child support order is a child support order that is in existence at the time a

child support order is entered or modified in the case presently before the trial court).]

ii. The deduction allowed for amounts paid pursuant to a preexisting child support order applies when support is being determined in a case involving one father and children born to multiple mothers. [*Buncombe Cty. ex rel. Blair v. Jackson*, 138 N.C. App. 284, 531 S.E.2d 240 (2000) (rejecting father's argument that the deduction allowed in the guidelines for support paid pursuant to a preexisting order should not apply in such a situation).]

iii. For an example of a trial court's determination of adjusted gross income when an individual fathered five children by three mothers and the county child support enforcement agency moved to modify support for all five children in a consolidated proceeding, *see Buncombe County ex rel. Blair v. Jackson*, 138 N.C. App. 284, 531 S.E.2d 240 (2000).]

b. Child support payments made pursuant to a voluntary support arrangement for a child other than the child for whom support is being determined if consistent payments have been made for a reasonable and extended period of time. [2020 Guidelines.]

i. Payments for medical insurance premiums made pursuant to a voluntary support agreement for defendant's other children (i.e., children other than child for whom support was being determined) constituted child support under the guidelines and should have been deducted from defendant's gross income to determine his monthly adjusted gross income. [*Hodges v. Hodges*, 147 N.C. App. 478, 556 S.E.2d 7 (2001) (holding applicable to premiums paid pursuant to either an order or a private agreement).]

ii. The guidelines specify that payments made toward child support arrears are **not** deducted from the gross income of the supporting parent. [2020 Guidelines.]

c. A parent's financial responsibility for her natural or adopted children (other than the child for whom support is being determined) who currently reside with the parent. [2020 Guidelines; *Kennedy v. Kennedy*, 107 N.C. App. 695, 421 S.E.2d 795 (1992) (trial court erroneously failed to take into account father's responsibility for his 2-year-old daughter from his present marriage).]

i. For cases heard on or after Jan. 1, 2011, the parent's deduction for the parent's other children living with that parent is equal to the basic child support obligation shown in the child support schedule based on the number of other children and the parent's income. [2020 Guidelines; 2015 Guidelines.] The income of that child's other parent is not considered, regardless of whether that parent resides in the home. [*See* 2010 Howell Bulletin, www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/flb24.pdf.]

ii. For cases heard before Jan. 1, 2011:

(a) If the "other parent" of the parent's "other children" lived with the parent, the parent's deduction for the "other children" was equal to one-half of the basic child support obligation shown in the child support schedule based on the number of "other children" and the combined incomes of the parent

and the "other parent" of the "other children." [2006 Guidelines and related worksheets.]

(b) If the "other parent" of the parent's "other children" did not live with the parent, the parent's deduction for the other children was equal to the basic child support obligation shown in the child support schedule based on the number of other children and the parent's income. [2006 Guidelines and related worksheets.]

(c) Trial court's findings were sufficient as to the deduction from gross income each party received for other children living with the parties. [*New Hanover Child Support Enforcement ex rel. Dillon v. Rains*, 193 N.C. App. 208, 666 S.E.2d 800 (2008) (trial court found that parents had one other biological child residing in their respective homes and worksheet indicated that each parent received a deduction based on his or her financial responsibility for that child).]

4. Deductions not allowed from gross income to determine monthly adjusted gross income.

a. Alimony payments made by a parent to any person may be considered as a factor to vary from the final presumptive child support obligation. [2020 Guidelines.]

b. Amounts deducted from a parent's income for federal or state income taxes, Social Security or Medicare taxes, health insurance premiums, retirement contributions, or other amounts withheld from income. [2020 Guidelines.]

c. For cases heard on or after Jan. 1, 2011, the guidelines specify that payments made towards child support arrears are **not** deducted from the gross income of the supporting parent. [2020 Guidelines; 2015 Guidelines; 2011 Guidelines.]

L. Adjustments for Child Care, Health Insurance, Health Care, and Other Extraordinary Expenses

1. Generally.

a. Incorporation of adjustments for extraordinary expenses in the guideline amounts in a child support order does not constitute a deviation from the guidelines, but rather is deemed a discretionary adjustment to the presumptive amounts set forth in the guidelines. Because there is no deviation, no findings of fact regarding the classification are required, but findings to support the amount so classified are required. [*Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000) (court not required to make findings to support classification of private school as an extraordinary expense under the guidelines); *Doan v. Doan*, 156 N.C. App. 570, 577 S.E.2d 146 (2003) (no abuse of discretion in classifying the child's ice-skating expenses as extraordinary under the guidelines, but matter remanded for findings as to amount of monthly expenses).] See Section III.D.3, above.

b. In cases involving primary custody (Worksheet A, Form AOC-CV-627, Child Support Obligation Primary Custody), work-related child care costs, health insurance premiums for a child, and other extraordinary child-related expenses paid by a noncustodial parent are subtracted from that parent's total child support obligation. [See lines 8–9 of Worksheet A and instructions.]

c. In cases involving joint or shared physical custody (Worksheet B, Form AOC-CV-628, Child Support Obligation Joint or Shared Physical Custody), a parent's child support obligation is adjusted if she pays more than her fair share of work-related child care costs, health insurance premiums, or other extraordinary child-related expenses. [See lines 10–13 of Worksheet B and instructions.]

2. Child care costs. Reasonable child care costs are not considered unless they are, or will be, paid by a child's parent due to employment or a job search or, [2020 Guidelines.] in other words, in order for that parent to obtain or retain employment. Reasonable child care costs that are, or will be, paid by a parent due to employment or job search are added to the basic child support obligation and prorated between the parents based on their respective incomes. [2020 Guidelines.]

   a. Child care expenses are not considered unless they are paid by a child's parent (or by the parent's employer via payroll deductions from the parent's wages). Therefore, child care provided by an employer or paid by a government agency on behalf of a child's parent is not considered.

   b. Based on a finding that mother incurred child care costs due to her employment, it was proper for the trial court to include those costs when it calculated father's retroactive child support obligation. As the guidelines do not require specific findings as to a child's reasonable needs when awarding guideline support and considering other findings, the trial court was not required to specifically find that mother's work-related child care costs were necessary. [*Jonna v. Yaramada*, 273 N.C. App. 93, 848 S.E.2d 33 (2020) (rejecting father's argument that the expense of child care was not necessary because his parents were willing to provide child care at no cost).]

   c. Other reasonable child care costs, such as costs incurred while the custodial parent attends school, may be a basis for deviation. [2020 Guidelines.]

   d. The court may also consider actual child care tax credits received by a parent as a basis for deviation. [2020 Guidelines.]

3. Health insurance costs. The amount that is, or will be, paid by a parent (or a parent's spouse) for health insurance (medical, or medical and dental) for a child for whom support is being determined is added to the parents' basic child support obligation and prorated between the parents based on their respective incomes. [2020 Guidelines.] The guidelines clarify that amounts paid by a spouse of a parent for health insurance are included in the basic child support obligation and prorated between the parties.

   a. This provision does not apply in cases involving primary custody (Worksheet A, Form AOC-CV-627, Child Support Obligation Primary Custody) in which an obligor's income falls within the shaded area of the schedule of basic support obligations. [Worksheet A, Side Two, Instructions for Completing Child Support Worksheet A.]

   b. Payments for health insurance premiums are not considered unless they are paid by the child's parent or stepparent. Payments that are made by a parent's (or stepparent's) employer for health insurance on behalf of the child and are not deducted from the parent's (or stepparent's) wages are not considered. [2020 Guidelines; *Ludlam v. Miller*, 225 N.C. App. 350, 739 S.E.2d 555 (2013) (guidelines clearly anticipate that insurance may be provided by a stepparent).]

c. When a child for whom support is being determined is covered by a family policy, only the portion of the health insurance premium attributable to that child's coverage is considered. If this amount is not available or cannot be verified, the total cost of the premium is divided by the number of persons covered and multiplied by the number of covered children for whom support is being determined. [2020 Guidelines.]

d. For more on health insurance, see Section VII.C.2, below.

4. Uninsured medical or dental expenses or other uninsured health care costs. The basic guideline support obligation includes $250 per child for the child's annual uninsured medical and/or dental expenses. In any case, including those where the parent's income falls within the shaded area of the child support schedule, a court may order that uninsured health care costs in excess of $250 per year incurred by a parent be paid by either parent or both parents in such proportion as the court deems appropriate. [2020 Guidelines.]

a. Uninsured health care costs include reasonable and necessary costs incurred by a parent related to medical care, dental care, orthodontia, asthma treatments, physical therapy, treatment of chronic health problems, and counseling or psychiatric therapy for diagnosed mental disorders. [2020 Guidelines.]

b. A provision in the 2002 Guidelines allowing the court to order parents to pay uninsured health care costs in proportion to their respective incomes was considered not to alter in any way a trial court's discretion to apportion these expenses and not to require a court to "follow a certain formula nor prescribe what [a court] 'should' or 'must' do." [*Holland v. Holland*, 169 N.C. App. 564, 571, 610 S.E.2d 231, 236 (2005); *Madar v. Madar*, 275 N.C. App. 600, 616–17, 853 S.E.2d 916, 927–28 (2020) (quoting *Holland*) (noting lack of "mandatory language" in the 2019 Guidelines addressing the allocation of uninsured expenses between parents; order requiring defendant to pay all uninsured and unreimbursed medical expenses of child affirmed when supported by findings as to "the disparity between the parties' respective incomes"); *Weisberg v. Griffith*, 171 N.C. App. 517, 615 S.E.2d 738 (2005) (**unpublished**) (a trial court is vested with discretion in determining how uninsured health care costs are to be divided; guidelines do not conclusively establish the allocation of uninsured health care expenses) (interpreting provision in 2002 Guidelines in context of unincorporated separation agreement).]

c. A decision by a trial court not to allocate uninsured medical or dental expenses consistent with the parents' respective incomes would not constitute a deviation from the guidelines requirement of findings as to why application of the guidelines would be "unjust or inappropriate." [*Holland v. Holland*, 169 N.C. App. 564, 610 S.E.2d 231 (2005) (considering the 2002 Guidelines).]

d. When a court decides to deviate from the guidelines, it is "perfectly proper" for the court to use a method other than a comparative income analysis when apportioning uninsured medical expenses. [*Roberts v. McAllister*, 174 N.C. App. 369, 621 S.E.2d 191 (2005) (citing *Lawrence v. Nantz*, 115 N.C. App. 478, 445 S.E.2d 87 (1994)) (order upheld that required unemployed mother to whom minimum wage income was imputed to pay one-half of children's uninsured medical expenses), *appeal dismissed*, 360 N.C. 364, 629 S.E.2d 608 (2006).]

e. When trial court did not address how uninsured health care expenses were to be divided and did not determine mother's breach of contract claim that father had failed to reimburse her for children's extracurricular and uninsured medical expenses, matter was remanded for further findings and conclusions. [*Weisberg v. Griffith*, 171 N.C. App. 517, 615 S.E.2d 738 (2005) (**unpublished**).]

f. For more on uninsured medical or dental expenses and other uninsured health care costs, see Section VII.C.1, below.

5. Other extraordinary expenses. Except as noted above, expenses related to a child's attending a special or private elementary or secondary school to meet the child's particular educational needs, expenses for transporting the child between the parents' homes, and other extraordinary child-related expenses may be added to the parents' basic child support obligation and ordered paid by the parents in proportion to their respective incomes if the court determines that the expenses are reasonable, necessary, and in the child's best interest. [2020 Guidelines.]

a. The list of extraordinary expenses in the guidelines is not exhaustive of the expenses that can be included under this section. [*Mackins v. Mackins*, 114 N.C. App. 538, 442 S.E.2d 352, *review denied*, 337 N.C. 694, 448 S.E.2d 527 (1994).]

b. The trial court has the discretion to determine what expenses constitute extraordinary expenses, the amount of these expenses, and with the exception of payments for professional counseling or psychiatric therapy which must be apportioned in the same manner as the basic child support obligation, how the expenses are to be apportioned between the parties. [*Mackins v. Mackins*, 114 N.C. App. 538, 549, 442 S.E.2d 352, 359 (trial court did not abuse its discretion in determining that expenses for a learning center for the children were an extraordinary expense; the applicable version of the guidelines provided that payment for professional counseling or psychiatric therapy for diagnosed mental disorders was to "be apportioned in the same manner as the basic child support obligation and ordered paid as the Court deems equitable"), *review denied*, 337 N.C. 694, 448 S.E.2d 527 (1994).]

c. Allocation of extraordinary expenses is not a deviation.

i. The incorporation of adjustments for extraordinary expenses in a child support order does not constitute a deviation from the child support guidelines, but rather is a discretionary adjustment to the presumptive amounts set forth in the guidelines. [*Madar v. Madar*, 275 N.C. App. 60, 853 S.E.2d 916 (2020) (citing *Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000)); *Ludlam v. Miller*, 225 N.C. App. 350, 739 S.E.2d 555 (2013) (citing *Biggs*) (recognizing that trial court erroneously believed that requiring father to pay part of private school costs would be a deviation but upholding result); *Doan v. Doan*, 156 N.C. App. 570, 577 S.E.2d 146 (2003) (citing *Biggs*) (no abuse of discretion in classifying the child's ice-skating expenses as extraordinary under the guidelines); *Biggs* (applying the 1994 Guidelines, trial court adjusted the guideline amount to account for the extraordinary expense of private schooling but did not deviate from the guidelines when it ordered parents to share costs of private school).] See Section III.D.3, above.

d. Findings.

i. Findings as to the amount of the extraordinary expenses have been required. [*Doan v. Doan*, 156 N.C. App. 570, 577 S.E.2d 146 (2003) (citing *Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000)) (no abuse of discretion in classifying ice-skating expenses as extraordinary under the guidelines but remanding for findings as to amount of monthly expenses).]

ii. Findings that the expenses are "reasonable, necessary, and in the child's best interest" have not been required. [*Ludlam v. Miller*, 225 N.C. App. 350, 363, 739 S.E.2d 555, 563 (2013) (appellate court upheld an order not requiring father to contribute to the costs of private school; order stated as a finding that the trial court was not determining that private school expenses were reasonable, necessary and in the child's best interest); *Allen v. Allen*, 201 N.C. App. 159, 688 S.E.2d 118 (2009) (**unpublished**) (citing *Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000)) (trial court not required to make findings as to whether private school was reasonable, necessary, and in the children's best interest; trial court did not deviate from the presumptive guidelines, but rather adjusted guideline amounts to account for the extraordinary expense of private schooling; mother's argument that the 2006 Guidelines required these findings was rejected); *Herriman v. Gaston Cty. ex rel. Herriman*, 179 N.C. App. 225, 633 S.E.2d 890 (2006) (**unpublished**) (citing *Biggs)* (trial court did not deviate from guidelines when it found that children's private school tuition was an extraordinary expense and thus was under no obligation to render findings of fact; 2002 Guidelines applicable).] For more on the findings required when support is set at guideline presumptive amount, see Section III.D.2, above.

iii. Upon determining that expenses related to a child's inpatient treatment for mental health issues, including travel expenses and psychological evaluations, fell within the 2019 Guidelines' definition of extraordinary expenses, the trial court was not required to make specific findings regarding the child's reasonable needs or the parents' ability to provide support. [*Madar v. Madar*, 275 N.C. App. 60, 853 S.E.2d 916 (2020).]

iv. One appellate decision has held that when a party requests deviation, the trial court is required to make findings regarding extraordinary expenses along with all other needs of the child. [*Parnell v. Parnell*, 189 N.C. App. 531, 659 S.E.2d 490 (2008) (**unpublished**) (recognizing the general rule in *Doan v. Doan*, 156 N.C. App. 570, 577 S.E.2d 146 (2003), and *Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000), but limiting it to cases in which deviation was not requested).]

v. *See* Cheryl Howell, *Child Support: Extraordinary Expenses in Guideline Cases*, UNC Sch. of Gov't: On the Civil Side Blog (Apr. 15, 2021), http://civil.sog.unc.edu/child-support-extraordinary-expenses-in-guideline-cases/.

vi. For more findings in cases considering extraordinary expenses, see Section III.D.3, above.

e. Private school and related education expenses.

i. No abuse of discretion when father not required to pay part of children's private school expenses because father, who fell in self-support reserve category, did not have the income to pay those expenses. [*Ludlam v. Miller*, 225 N.C. App. 350, 739 S.E.2d 555 (2013).]

ii. Trial court did not err when it included as extraordinary expenses, and apportioned between the parents, the cost of private school tuition, mother's work-related child care costs, and costs for the child's summer camp. [*Balawejder v. Balawejder*, 216 N.C. App. 301, 721 S.E.2d 679 (2011).]

iii. Private school expenses paid from a trust created and funded by child's parents, who treated the trust as a separate legal entity, were not considered extraordinary expenses incurred by either parent, or by the parents jointly, for purposes of establishing child support. [*Davis v. Davis*, 156 N.C. App. 217, 575 S.E.2d 72 (2003) (**unpublished**).]

iv. Fact that children's grandparents had paid private school tuition in the past did not relieve mother of obligation to pay her share of that expense. [*Allen v. Allen*, 201 N.C. App. 159, 688 S.E.2d 118 (2009) (**unpublished**).]

v. Fact that a parent's income qualifies for the self-support reserve does not relieve the parent of the obligation to pay extraordinary expenses. [*Allen v. Allen*, 201 N.C. App. 159, 688 S.E.2d 118 (2009) (**unpublished**) (applying 2006 Guidelines); 2011 Guidelines (payment of extraordinary expenses by either parent in a self-support reserve case may be a basis to deviate from the guidelines). *Cf. Ludlam v. Miller*, 225 N.C. App. 350, 739 S.E.2d 555 (2013) (applying 2011 Guidelines) (trial court appeared to erroneously believe that it would need to deviate from the guidelines to order father in self-support reserve case to pay extraordinary expenses).] The 2015 Guidelines contain the same language on this point as the 2011 Guidelines.

f. Visitation-related travel expenses.

i. The trial court is vested with discretion to make adjustments to the guideline amounts for extraordinary expenses, and the determination of what constitutes such an expense is likewise within its sound discretion. [*Doan v. Doan*, 156 N.C. App. 570, 577 S.E.2d 146 (2003); *Foss v. Miller*, 235 N.C. App. 655, 764 S.E.2d 699 (2014) (**unpublished**) (citing *Doan*) (the extent to which a parent's expenses, or expected expenses, for visitation-related travel should be recognized as an extraordinary expense, and the manner in which they should be recognized, is a matter committed to the sound discretion of the trial court).]

ii. In *Meehan v. Lawrance*, 166 N.C. App. 369, 602 S.E.2d 21 (2004), the trial court did not abuse its discretion when it allowed father a credit for travel expenses related to visitation with the minor children. *Cf. Foss v. Miller*, 235 N.C. App. 655, 764 S.E.2d 699 (2014) (**unpublished**) (no abuse of discretion when trial court failed to allow as an extraordinary expense the estimated costs of children's travel to California for visitation with their mother; *Foss* distinguished *Meehan* on the ground that evidence in *Meehan* showed expenses that father had actually incurred, while the accuracy of the evidence of the projected travel costs in *Foss* was questionable).]

M. Child Support Worksheets

1. A parent's child support obligation under the guidelines must be determined by using one of the three child support worksheets that are part of the child support guidelines.
2. Regardless of whether the court enters a child support order determined pursuant to the child support guidelines or deviates from the guidelines, a copy of the worksheet used to determine a parent's presumptive child support obligation should be attached to the child support order, be incorporated by reference into the child support order, or be included in the case file. [2020 Guidelines; G.S. 52C-3-305(c).]
    a. An appellant should include the guidelines worksheet in the record on appeal. [*Lueallen v. Lueallen*, 249 N.C. App. 292, 790 S.E.2d 690 (2016) (citing *Hodges v. Hodges*, 147 N.C. App. 478, 556 S.E.2d 7 (2001)) (appellate court unable to review trial court's calculation of mother's child support obligation without a worksheet in the record); *Hodges* (worksheet not included; appellate court unable to determine with certainty the amount placed in defendant's gross income column); *Ludlam v. Miller*, 225 N.C. App. 350, 739 S.E.2d 555 (2013), and *Hess v. Hermann-Hess*, 228 N.C. App. 281, 748 S.E.2d 773 (2013) (**unpublished**) (citing *Ludlam*) (when the records on appeal in both cases included the worksheet, no prejudicial error arising from the trial court's failure to attach the worksheet to the child support order).]
3. The child support worksheets must include the incomes of both parents, regardless of whether one parent is seeking child support from the other parent or a third party is seeking child support from one or both parents. [2020 Guidelines.]
    a. The income of a person who is not the child's parent should not be included on the child support worksheet used to determine the child support obligation of the child's parent. [2020 Guidelines.]
    b. The child support worksheets may not be used to determine the child support obligation of a stepparent or other party who is secondarily liable for a child's support. [2020 Guidelines.]
4. The worksheet used will depend on how much time a child spends with each parent.
    a. According to G.S. 50-13.2, the amount of time allowed in a child custody order for electronic visitation cannot be considered in calculation of child support. [G.S. 50-13.2(e).]
5. Worksheet A, Form AOC-CV-627, Child Support Obligation Primary Custody, must be used when one parent (or a third party) has primary physical custody of all of the children for whom support is being determined. [2020 Guidelines.]
    a. Worksheet A should be used if the child lives with one parent (or a third party) for 243 nights or more during the year. [2020 Guidelines; Form AOC-CV-627 should be used when the obligee has physical custody of the child(ren) involved in the pending action for a period of time that is more than two-thirds of the year (243 nights or more during the year).]
    b. Primary physical custody is determined without regard to whether a parent has primary, joint, or shared legal custody of a child. [2020 Guidelines.]
    c. Worksheet A may not be used if a parent has primary physical custody of one or more of the children for whom support is being determined and the parents share

custody of one or more children, or if primary custody of two or more children is split between the parents. [2020 Guidelines.]

d. When Worksheet A is used, a child support obligation is calculated for both parents, but a child support order is entered only against the noncustodial parent. [2020 Guidelines.]

6. Worksheet B, Form AOC-CV-628, Child Support Obligation Joint or Shared Physical Custody, must be used if the parents share custody of all of the children for whom child support is being determined or if one parent has primary physical custody of one or more of the children and the parents share custody of another child. [2020 Guidelines.]

   a. Worksheet B should be used only:

      i. When the parents share joint physical custody of at least one of the child(ren) for whom support is sought;

      ii. If one parent has sole legal custody but, in fact, the parents exercise joint physical custody of the child(ren);

      iii. If both parents have custody of the child(ren) for at least one-third of the year and the situation involves a true sharing of expenses, rather than extended visitation with one parent that exceeds 122 overnights. [Form AOC-CV-628.]

   b. Worksheet B cannot be used when a parent and a nonparent share custody of a child.

   c. The self-support reserve for low-income parents cannot be applied when Worksheet B is used. [2020 Guidelines.]

   d. Worksheet B is not to be used in cases involving extended visitation. [*Jonna v. Yaramada*, 273 N.C. App. 93, 848 S.E.2d 33 (2020).] In *Jonna*, a custody order allowed each parent custody for up to five consecutive weeks during summer break for international travel to visit family. Father argued that use of Worksheet B was proper as the "annual five-week extended visitation period" gave father custody between 124 and 129 days in 2017, 2018, and 2019. Noting that Worksheet B requires a true sharing of expenses, rather than extended visitation, the child support order based on Worksheet B was vacated and remanded for additional findings (1) determining whether the number of overnights with father exceeded 122, and (2) if so, whether the number of overnights constituted extended visitation or a true sharing of expenses. [*Id.* at 123, 848 S.E.2d at 55.]

   e. Parents share custody of a child if the child lives with each parent for at least 123 nights during the year and each parent has financial responsibility for the child's expenses during the time that the child lives with that parent. [2020 Guidelines; Form AOC-CV-628.]

   f. The mere fact that a parent has visitation rights that allow the child to spend more than 123 nights per year with the parent is not sufficient, standing alone, to constitute shared custody. [*See Maney v. Maney*, 126 N.C. App. 429, 431, 485 S.E.2d 351, 352 (1997) (where trial court found that "the sharing of costs is the primary focus for determining the sharing of custody and the mere fact that the child[ren] [are] physically in one parent's home for the purposes of sleeping as a[n] accommodation should not be conclusive for purposes of setting child support obligations"); *Cabbs v. Cabbs*, 222 N.C. App. 316, 729 S.E.2d 731 (2012) (**unpublished**) (not paginated on

Westlaw) (citing *Maney* and *Mason v. Freeman*, 188 N.C. App. 165, 654 S.E.2d 833 (2008) (**unpublished**)) (trial court not required to use Worksheet B, even if father had children 130–140 nights during the year, when findings demonstrated no "true sharing" of expenses and that mother "clearly assumes responsibility for the bulk of the children's expenses").]

g. A parent does not have shared custody of a child if the parent has visitation rights that allow the child to spend less than 123 nights per year with the parent and the other parent has primary physical custody of the child. [2020 Guidelines; Form AOC-CV-628.]

h. Shared custody is determined without regard to whether a parent has primary, shared, or joint legal custody of a child. [2020 Guidelines.]

i. In cases involving shared custody, the parents' combined basic child support obligation for all of the children for whom support is being determined (regardless of whether a parent has primary, shared, or split custody) is increased by 50 percent (multiplied by 1.5) and is allocated between the parents based on their respective incomes and the amount of time the children live with the other parent. [2020 Guidelines. See line 5 of Worksheet B, Form AOC-CV-628.]

j. The amount of time that the children live with the other parent is calculated by multiplying the number of children (including any children for whom custody is not shared) by 365 and determining the percentage of nights each child (including a child for whom custody is not shared) lives with each parent. [See lines 7–8 of Worksheet B, Form AOC-CV-628.]

k. In cases involving shared custody, an adjusted child support obligation is calculated for both parents, the lower child support obligation is subtracted from the greater, and the parent with the greater child support obligation is ordered to pay the difference whether she is designated as a custodial or noncustodial parent. [2020 Guidelines; lines 9–14 of Worksheet B, Form AOC-CV-628.]

7. Worksheet C, Form AOC-CV-629, Child Support Obligation Split Custody, must be used when primary physical custody of two or more children is split between the parents. [2020 Guidelines.]

a. Split custody occurs when one parent has primary custody of at least one of the children for whom support is being determined and the other parent has primary custody of the other child or children. [2020 Guidelines; Form AOC-CV-629 is used when there is more than one child involved in the pending action and each parent has physical custody of at least one of the children.]

b. A parent (or third party) has primary physical custody of a child if the child lives with that parent (or custodian) for 243 nights or more during the year. [2020 Guidelines.]

c. Worksheet C cannot be used when the parents share custody of one or more of the children and have primary physical custody or split custody of another child. [2020 Guidelines.]

d. The self-support reserve for low-income parents cannot be applied when Worksheet C is used. [2020 Guidelines.]

e. In cases involving split custody, the basic child support obligation is determined with respect to all of the children but is not multiplied by 1.5 and is not adjusted for the amount of time the children live with each parent. [See lines 4–6 of Worksheet C, Form AOC-CV-629.]

f. In cases involving split custody, a child support obligation is calculated for both parents, the lower child support obligation is subtracted from the greater, and the parent with the greater child support obligation is ordered to pay the difference whether he is designated as a custodial or noncustodial parent. [2020 Guidelines; lines 6–11 of Worksheet C, Form AOC-CV-629.]

IV. Deviating from the Child Support Guidelines

A. What Does or Does Not Constitute a Deviation

1. What constitutes a deviation. A court deviates from the guidelines when it

   a. Orders support in an amount different than the guideline amount. [*See, e.g.*, *State ex rel. Gillikin v. McGuire*, 174 N.C. App. 347, 620 S.E.2d 899 (2005) (citing *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998)) (a decision not to order prospective support is a deviation from the guidelines, and the order must make findings to support decision to deviate).]

   b. At least one case has held that an order providing for prospective support to begin on a date other than the date of the filing of the complaint or the first of the month following the filing of the complaint is a deviation from the guidelines. [*State ex rel. Miller v. Hinton*, 147 N.C. App. 700, 556 S.E.2d 634 (2001) (citing *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998)) (there is an implied presumption that prospective child support payments begin at the time of the filing of the complaint; it is error to order prospective support to begin at any other time without making findings required for deviation).]

2. What does not constitute a deviation. A court does not deviate from the guidelines when it

   a. Makes adjustments in the guideline amount for extraordinary expenses. [*Doan v. Doan*, 156 N.C. App. 570, 577 S.E.2d 146 (2003); *Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000).] However, when a parent's income qualifies for the self-support reserve, payment of extraordinary expenses by either parent may be a basis for deviation [2015 Guidelines.], which would require findings of fact. See Section III.F, above, for more on low-income parents.

B. Procedure to Request Deviation

1. Who may initiate, form of request.

   a. A party may request deviation in an original pleading.

   b. A party may request deviation by motion [2020 Guidelines.] if the party gives at least ten days' written notice. [*Browne v. Browne*, 101 N.C. App. 617, 400 S.E.2d 736 (1991).]

c. A court may deviate from the guidelines on its own motion if it makes the required findings. [2020 Guidelines. *See Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000) (pursuant to the guidelines, in the absence of a request from the parties, the court may award child support in an amount different from that dictated by the official child support guidelines); *Buncombe Cty. ex rel. Blair v. Jackson*, 138 N.C. App. 284, 531 S.E.2d 240 (2000) (citing *Browne v. Browne*, 101 N.C. App. 617, 400 S.E.2d 736 (1991)).]

2. Failure to make timely request for deviation may be waived.

   a. A party's failure to give timely notice of a request to deviate may be waived when evidence related to deviation is introduced without objection. [*Scotland Cty. Dep't of Soc. Servs. ex rel. Powell v. Powell*, 155 N.C. App. 531, 573 S.E.2d 694 (2002) (evidence offered by defendant in support of his request at the hearing for deviation, about pre-hearing living arrangements of the plaintiff and the children, was initially excluded but subsequently admitted, without objection, and both parties introduced, without objection, other evidence of the children's needs and the parties' relative ability to provide support; failure to give proper notice of request to deviate waived); *Browne v. Browne*, 101 N.C. App. 617, 400 S.E.2d 736 (1991) (defendant's failure to give timely and proper notice of his request for deviation waived when evidence in support of deviation admitted without objection).]

   b. When failure to timely request deviation is waived, if the parties introduce without objection evidence relating to the reasonable needs of the child for support and the relative ability of each parent to pay support, the trial court must find facts and enter conclusions on this evidence. [*Browne v. Browne*, 101 N.C. App. 617, 400 S.E.2d 736 (1991).]

C. Standard for Deviation

1. A court may deviate from the guidelines if it finds, by the greater weight of the evidence, that application of the guidelines:

   a. Would not meet or would exceed a child's reasonable needs considering the relative ability of each parent to provide support or

   b. Would otherwise be unjust or inappropriate. [G.S. 50-13.4(c); 2020 Guidelines.]

2. The burden is on the moving party to show that the guidelines do not meet or that they exceed the reasonable needs of the children or are otherwise unjust or inappropriate. [*Row v. Row*, 158 N.C. App. 744, 582 S.E.2d 80 (2003) (**unpublished**).]

3. If a party requests deviation but fails to present evidence of the reasonable needs of the children or how the guidelines would not meet or would exceed those needs, the trial court does not err when it denies deviation based on insufficient evidence. [*Row v. Row*, 158 N.C. App. 744, 582 S.E.2d 80 (2003) (**unpublished**).]

4. A trial court is "not *required* to deviate from the guidelines no matter how compelling the reasons to do so." [*Simms v. Bolger*, 264 N.C. App. 442, 450, 826 S.E.2d 522, 528 (2019) (quoting *Pataky v. Pataky*, 160 N.C. App. 289, 303, 585 S.E.2d 404, 413 (2003)); *Pataky* (dicta) (citing *Stephenson v. Bartlett*, 355 N.C. 354, 408, 562 S.E.2d 377, 413 (2002)), *aff'd per curiam in part, review dismissed in part*, 359 N.C. 65, 602 S.E.2d 360 (2004).]

D. Factors That May Justify Deviation

1. The following have been cited in appellate decisions as factors that may justify deviating from the guidelines:
   a. A parent's actual, bona fide financial inability to pay the amount of support determined pursuant to the guidelines; [*Buncombe Cty. ex rel. Blair v. Jackson*, 138 N.C. App. 284, 531 S.E.2d 240 (2000) (remand necessary when support set pursuant to the guidelines amounted to 66 percent of father's gross income).]
   b. A parent's extraordinary medical expenses related to the parent's current spouse; [*State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998) (district court allowed deviation based on cancer of defendant/father's wife; case reversed and remanded for insufficient findings as set out in Section IV.F.7.c, below).]
   c. Contributions (cash or in-kind) received from a third party for a child's support. [*Hartley v. Hartley*, 184 N.C. App. 121, 645 S.E.2d 408 (citing *Guilford Cty. ex rel. Easter v. Easter*, 344 N.C. 166, 473 S.E.2d 6 (1996)) (court must examine the extent and nature of the contributions of a third party in order to determine whether a deviation from the guidelines is appropriate), *appeal dismissed*, 654 S.E.2d 475 (2007); *Easter* (even though grandparents were under no "legal obligation" to provide support, trial court could consider their contributions when determining whether to deviate from the guidelines); *Scotland Cty. Dep't of Soc. Servs. ex rel. Powell v. Powell*, 155 N.C. App. 531, 573 S.E.2d 694 (2002) (quoting *Easter*) (while third-party contributions will not always support deviation, the trial court should have such evidence at its disposal).] While *Easter* holds that contributions from a third party *may* be considered by a trial court when it contemplates a deviation from the guidelines, a deviation is not always necessary, even when a third party provides some support to the minor child. [*Davis v. Davis*, 156 N.C. App. 217, 575 S.E.2d 72 (2003) (**unpublished**) (when calculating father's monthly child support obligation, trial court properly declined to consider that child's private school expenses were paid by a trust created and funded by the child's parents; if dentist/father was not paying the trust for rental of the practice's equipment, he would have had a higher income).]
2. Factors that do not, without more, justify deviation.
   a. Receipt of Social Security benefits by children for the death of a stepparent, in this case their mother's husband, cannot be the sole basis for deviating from the guidelines and lowering father's support obligation. [*Hartley v. Hartley*, 184 N.C. App. 121, 645 S.E.2d 408 (trial court erred when it reduced father's support obligation based upon Social Security payments made directly to the children without finding that father was unable to provide support), *appeal dismissed*, 654 S.E.2d 475 (2007).]
   b. When electronic visitation is authorized in a custody order pursuant to G.S. 50-13.2(e), the amount of time electronic visitation is used shall not be a factor in setting child support.
3. The 2015 and 2020 Guidelines cite the following as examples of situations in which deviation may be warranted:
   a. When one parent pays 100 percent of the child support obligation and 100 percent of the health insurance premium for the child;

b. When the self-support reserve applies (see North Carolina Child Support Guidelines, Form AOC-A-162, at 7 for the Schedule of Basic Support Obligations) and either parent pays child care, health insurance premiums, or other extraordinary expenses;

c. When the custodial parent incurs child care expenses while attending school;

d. When a parent receives actual child care tax credits;

e. When either party pays alimony to an ex-spouse (payment may be considered as a factor for deviation); or

f. **When a parent pays child support for two or more families under two or more child support orders, separation agreements, or voluntary support arrangements.** [Language above is in bold type in the 2015 and 2020 Guidelines to emphasize that deviation should be considered in these cases.]

E. Procedure upon Request for Deviation

1. When a party requests deviation, the court must have a hearing and must make findings as to the child's reasonable needs for support and the parents' ability to provide support.

   a. "[U]pon request of any party" for deviation, the court must hear evidence and make findings with respect to the child's reasonable needs for support and "the relative ability of each parent to provide support." [G.S. 50-13.4(c); *Brooker v. Brooker*, 133 N.C. App. 285, 515 S.E.2d 234 (1999) (G.S. 50-13.4(c) requires findings as to reasonable needs of parties' child and the parties' relative ability to provide support upon a party's request for deviation); *Gowing v. Gowing*, 111 N.C. App. 613, 432 S.E.2d 911 (1993) (the findings required by the language in G.S. 50-13.4(c), see the beginning of this subsection, may be satisfied by consideration of the factors listed in G.S. 50-13.4(c) and repeated in G.S. 50-13.4(c1); the list of factors set out in Section IV.E.3, below, defines the general category of facts relating to the child's reasonable need for support and the relative ability of each party to provide support and should be included in the findings the court makes when requested to deviate from the guidelines); *Beamer v. Beamer*, 169 N.C. App. 594, 610 S.E.2d 220 (2005) (citing *Gowing)* (the factors set out in G.S. 50-13.4(c) and (c1) should be included in the findings if the trial court is requested to deviate); *Parnell v. Parnell*, 189 N.C. App. 531, 659 S.E.2d 490 (2008) (**unpublished**) (because mother requested deviation, trial court was required to make the findings required under G.S. 50-13.4(c) and *Gowing*).]

2. When considering deviation, whether based on a request by a party or on the trial court's own motion, the trial court must:

   a. Determine the presumptive child support award under the guidelines;

   b. Hear evidence, and from the evidence find the facts relating to the reasonable needs of the child and the relative abilities of the parents to meet those needs;

   c. Determine by the greater weight of the evidence whether the presumptive award would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate; and

   d. Make findings to allow effective appellate review. [*Sain v. Sain*, 134 N.C. App. 460, 517 S.E.2d 921 (1999). *See also Row v. Row*, 185 N.C. App. 450, 650 S.E.2d 1 (2007)

(the trial court shall hear evidence, make findings relating to the reasonable needs of the child for support and the relative ability of each parent to provide support; if the court determines by the greater weight of the evidence that application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate, it may deviate; upon deviation, it must make findings as required by statute), *review denied*, 362 N.C. 238, 659 S.E.2d 741, *cert. denied*, 555 U.S. 624, 129 S. Ct. 144 (2008); *Foss v. Miller*, 235 N.C. App. 655, 764 S.E.2d 699 (2014) (**unpublished**) (order that addressed amount needed to provide health insurance for the children but did not address amount needed for their education, maintenance, or other expenses did not contain findings sufficient for appellate review).]

e. See Section IV.F, below, for discussion on the findings required when the court allows a request for deviation; Section IV.G, below, for discussion on the findings required when the court does not deviate or denies a request for deviation and for discussion on when the court must make findings when there has been no request for deviation.

3. [In finding, per G.S. 50-13.4(c), "the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support," the trial court must consider:

a. 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

b. Other facts of the particular case. [G.S. 50-13.4(c), (c1); *Beamer v. Beamer*, 169 N.C. App. 594, 610 S.E.2d 220 (2005) (citing *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998)). *See also Scotland Cty. Dep't of Soc. Servs. ex rel. Powell v. Powell*, 155 N.C. App. 531, 573 S.E.2d 694 (2002) (trial court's conclusion as to whether to deviate from the presumptive amount of child support must be based on factual findings specific enough to indicate to a reviewing court that the judge below took due regard of the particular estates, earnings, conditions, and accustomed standard of living of both the children and the parents).]

F. Findings Required When Court Allows a Request for Deviation

1. Following its determination that deviation is warranted, *in order to allow effective appellate review*, the trial court *must* enter written findings of fact*:*

a. Stating the amount of the supporting parent's presumptive child support amount under the guidelines;

b. Determining the reasonable needs of the child and the relative ability of each parent to provide support;

c. Supporting the conclusion that the presumptive amount of child support determined by application of the guidelines would exceed, or would not meet, the reasonable needs of the child or would be otherwise unjust or inappropriate; and

d. Stating the criteria that justify varying from the guidelines and the basis for the amount of child support ordered as a result of the deviation. [G.S. 50-13.4(c); 2020 Guidelines; *Roberts v. McAllister*, 174 N.C. App. 369, 621 S.E.2d 191 (2005) (citing *Spicer v. Spicer*, 168 N.C. App. 283, 607 S.E.2d 678 (2005)), *appeal dismissed*, 360

N.C. 364, 629 S.E.2d 608 (2006); *Beamer v. Beamer*, 169 N.C. App. 594, 610 S.E.2d 220 (2005); *Rowan Cty. Dep't of Soc. Servs. ex rel. Brooks v. Brooks*, 135 N.C. App. 776, 522 S.E.2d 590 (1999); *Sain v. Sain*, 134 N.C. App. 460, 517 S.E.2d 921 (1999); *Widenhouse v. Crumpler*, 177 N.C. App. 150, 627 S.E.2d 686 (**unpublished**), *review denied*, 360 N.C. 545, 635 S.E.2d 63 (2006).]

2. Deviating without making required findings is reversible error.
   a. Deviating from the guidelines without making the required findings or without making findings based on sufficient evidence in the record constitutes reversible error. [*See Beamer v. Beamer*, 169 N.C. App. 594, 610 S.E.2d 220 (2005) (it was not enough that trial court heard testimony and received documentation detailing the reasonable needs of the children; when trial court failed to make the necessary findings regarding the children's reasonable needs, case was reversed and remanded).]
3. Findings insufficient: no findings as to reasonable needs of the child for support and the relative ability of each parent to pay support.
   a. *Beamer v. Beamer*, 169 N.C. App. 594, 610 S.E.2d 220 (2005) (in modification proceeding, findings addressed health insurance costs and the lack of any need for private school but contained no specific findings regarding the children's maintenance or additional health and educational expenses; though order stated that the children's needs had not changed, there was no finding, and no record evidence, of what those expenses had been previously; without knowing what the children's reasonable expenses were, court of appeals could not review the trial court's decision to deviate or the amount ultimately awarded).
   b. *Spicer v. Spicer*, 168 N.C. App. 283, 607 S.E.2d 678 (2005) (court deviated from the guidelines as to father's nonrecurring income, consisting of personal injury settlement proceeds placed in trust; there were no findings regarding the reasonable needs of the child, no specific consideration of what amount was necessary for the child's health, education, and maintenance, no findings as to actual expenditures, and no indication that trial court considered the accustomed standard of living of the child and the parties—thus there were no findings as to the reasonableness of the expenses in light of that standard of living; without those findings, appellate court unable to determine whether the lump sum awarded from the trust would exceed the child's reasonable needs or fail to meet them). For a case in which the court did not deviate from the guidelines as to an obligor's nonrecurring income arising from settlement of a workers' compensation disability claim and a claim against a third party, see *Simms v. Bolger*, 264 N.C. App. 442, 826 S.E.2d 522 (2019) (decision not to deviate was supported by findings about the needs of the child and the relative ability of each parent to provide support).
   c. *Guilford Cty. ex rel. Easter v. Easter*, 344 N.C. 166, 473 S.E.2d 6 (1996) (trial court's downward deviation based on third-party contributions remanded to trial court because trial court had failed to make findings as to reasonable needs of the children and the relative ability of each parent to provide support).
   d. *Cumberland Cty. ex rel. State of Washington v. Cheeks*, 247 N.C. App. 397, 786 S.E.2d 432 (2016) (**unpublished**) (trial court erred when it deviated from the guidelines without making findings of fact and considering the child's needs for support).

4. Findings insufficient: no basis for the amount of support ordered.
    a. *Beamer v. Beamer*, 169 N.C. App. 594, 610 S.E.2d 220 (2005) (when the order did not explain why the court ordered support in an amount that exceeded the guideline amount by $500, matter remanded for court to explain how it determined the amount ordered and whether the amount is supported by competent evidence).
    b. *Roberts v. McAllister*, 174 N.C. App. 369, 621 S.E.2d 191 (2005) (findings were not sufficient to indicate the basis for the amount ordered when findings did not explain how the court decided upon $800 in monthly support; case remanded for findings as to the basis for the amount ordered), *appeal dismissed*, 360 N.C. 364, 629 S.E.2d 608 (2006).
5. Findings insufficient: failure to find amount of presumptive support.
    a. *Widenhouse v. Crumpler*, 177 N.C. App. 150, 627 S.E.2d 686 (**unpublished**) (not paginated on Westlaw) (trial court did not calculate the presumptive guideline amount; findings that "the presumptive guideline amounts for child support . . . is [sic] unjust or inappropriate and would not meet the reasonable needs of the minor children" and that "it would be burdensome and inaccurate for the Court to calculate child support according to the presumptive guidelines" because different worksheets might be used for the two children, were inadequate to permit effective appellate review of whether deviation was justified), *review denied*, 360 N.C. 545, 635 S.E.2d 63 (2006).
6. Findings insufficient: failure to justify decision to deviate.
    a. *State ex rel. Horne v. Horne*, 127 N.C. App. 387, 489 S.E.2d 431 (1997) (court ordered downward deviation based on live-in boyfriend's earnings; findings did not determine what, if any, contributions mother's boyfriend made to children or household and on what basis; findings established only that boyfriend earned $16.61 per hour for forty hours a week; without findings regarding extent and nature of boyfriend's contributions, court of appeals could not review appropriateness of decision to deviate).
    b. *State ex rel. Nelson v. Jeffers*, 171 N.C. App. 366, 615 S.E.2d 435 (2005) (**unpublished**) (not paginated on Westlaw) (order contained no finding as to what factor made the guideline amount unjust or excessive; finding that "[t]he Judge deviated from the Guideline amount[,]" was "simply not sufficient" to allow appellate court to determine whether trial court abused its discretion in deviating from the presumptive child support amount).
7. Findings insufficient: failure to make several required findings.
    a. *Sarno* v. *Sarno*, 255 N.C. App. 543, 804 S.E.2d 819 (2017) (between husband and wife, the parties alleged (1) that no findings were made as to the presumptive amount of guidelines support, the reasonable needs of the child, or the relative ability of each party to provide support and (2) that application of the guidelines would exceed or not meet the child's needs or be unjust or inappropriate; order allowing deviation vacated and remanded for findings).
    b. *Sain v. Sain*, 134 N.C. App. 460, 517 S.E.2d 921 (1999) (in modification proceeding, trial court allowed downward deviation apparently due to father's disability; matter remanded for entry of new child support order when order failed to find what

guideline amount would be, what child's reasonable needs were, and that presumptive guideline amount would be "unjust or inappropriate"), *disapproved of on other grounds by O'Connor v. Zelinske*, 193 N.C. App. 683, 668 S.E.2d 615 (2008).

c. *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 646, 507 S.E.2d 591, 594 (1998) (emphasis in original) (internal quotation marks omitted) (order allowing downward deviation lacked specific findings necessary to justify deviation; trial court made findings relating to child care contributions, health insurance costs, and relative ability of each party to pay but failed to include findings regarding child's reasonable needs, including his education, maintenance, or accustomed standard of living; order did not include findings that showed that the court had considered whether the presumptive amount "would not meet or would exceed the *reasonable needs of the child* considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate").

d. *Rowan Cty. Dep't of Soc. Servs. ex rel. Brooks v. Brooks*, 135 N.C. App. 776, 522 S.E.2d 590 (1999) (order allowing deviation remanded for additional fact-finding when order did not identify presumptive amount of support and did not analyze the reasonable needs of the two minor children, other than finding that child care costs for one child were reasonable; moreover, court's finding as to the reason for deviating was limited to a conclusion that deviation was "reasonable and fair").

e. *Gowing v. Gowing*, 111 N.C. App. 613, 432 S.E.2d 911 (1993) (trial court's findings failed to justify deviation from the guidelines or to provide a basis for the denial of an award where court found that the child was the beneficiary of settlement money that exceeded his needs but made no findings regarding the reasonable needs of the child for support, the earning capacities or incomes of the parties, the relative ability of each parent to pay support, and the child care and homemaker contributions of the plaintiff).

8. Findings required to support decision not to order prospective support.

a. Generally, prospective support is payable from the date a support claim is filed, with payments to start the month thereafter. [See *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section I.H.7.]

b. A decision not to order prospective support is a deviation from the guidelines, and the order must include findings of fact to support the decision to deviate. [*State ex rel. Gillikin v. McGuire*, 174 N.C. App. 347, 620 S.E.2d 899 (2005) (citing *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998)) (trial court found that prospective child support back to the date of the filing of the complaint was owed but did not order payment thereof because court unable to determine amount due to receipt by both parents of disability income during relevant period; decision not to order prospective support required findings to support deviation).]

G. Findings Required When Court Does Not Deviate or Denies a Request for Deviation

1. Generally, when the court does not deviate from the guidelines and orders child support in an amount determined pursuant to the guidelines, the amount ordered is conclusively presumed to meet the reasonable needs of a child considering the relative ability of each

parent to provide support, and specific findings regarding a child's reasonable needs or the relative ability of each parent to provide support are not required. [2020 Guidelines.]

a. Unless requested to deviate, the trial court is not required to take evidence, make findings of fact, or enter conclusions of law "relating to the reasonable needs of the child for support and the relative ability of each parent to [pay or] provide support;"

b. The trial court is only required to hear such evidence as may be necessary for proper application of the presumptive guidelines; and

c. Support consistent with the guidelines "is conclusively presumed to be in such amount as to meet the reasonable needs of the child for health, education and maintenance." [*Scotland Cty. Dep't of Soc. Serv. ex rel. Powell v. Powell*, 155 N.C. App. 531, 536, 573 S.E.2d 694, 697 (2002) (quoting *Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740 (1991)). *See also Head v. Mosier*, 197 N.C. App. 328, 677 S.E.2d 191 (2009) (citing *Brooker v. Brooker*, 133 N.C. App. 285, 515 S.E.2d 234 (1999)) (absent a request for deviation, when the court determines child support based on the guidelines, the court generally is not required to make specific findings regarding the child's reasonable needs and the parents' ability to provide support).]

2. However, when the trial court receives a request to deviate, or when evidence is introduced regarding the needs of the children or the ability of the parents to pay, the trial court must make findings of fact to allow effective appellate review. [*Buncombe Cty. ex rel. Blair v. Jackson*, 138 N.C. App. 284, 288 n.7, 531 S.E.2d 240, 243 n.7 (2000) (even though G.S. 50-13.4(c) and the 1998 Guidelines require findings only when the trial court deviates from the guidelines, an order denying a party's request for deviation must include sufficient findings and conclusions to allow appellate review of the court's determination that deviation was not warranted); *Leary v. Leary*, 152 N.C. App. 438, 567 S.E.2d 834 (2002) (citing *Blair*) (acknowledging that effective appellate review requires findings to support denial of a party's request for deviation).]

a. Other cases have upheld a denial to deviate based on findings as to reasonable needs of the children and the relative ability of the parents to provide that amount. [*See Simms v. Bolger*, 264 N.C. App. 442, 826 S.E.2d 522 (2019) (trial court did not err when it refused obligor's request to deviate from the guidelines based on obligor's assertion that a lump sum award would exceed the reasonable needs of the child; decision not to deviate was supported by findings about the needs of the child and the relative ability of each parent to provide support); *Scotland Cty. Dep't of Soc. Servs. ex rel. Powell v. Powell*, 155 N.C. App. 531, 573 S.E.2d 694 (2002) (decision not to deviate upheld based on specific findings as to the reasonable needs of the children and the relative ability of each party to provide that amount, which demonstrated that trial court based its decision not to deviate on the interplay between those two considerations); *Leary v. Leary*, 152 N.C. App. 438, 567 S.E.2d 834 (2002) (findings as to the incomes of both parties and the reasonable needs of the children supported trial court's denial of father's request to deviate).]

b. According to *Blair*, the trial court is to make substantially the same findings when it allows a request for deviation and when it denies a request for deviation. [*See Buncombe Cty. ex rel. Blair v. Jackson*, 138 N.C. App. 284, 531 S.E.2d 240 (2000) (after determining that deviation is either warranted or unwarranted, the trial court must enter written findings showing the amount of guideline support, the reasonable

needs of the child, and the relative ability of each party to provide support and stating that application of the guidelines would exceed or would (or would not) meet the reasonable needs of the child or would (or would not) be unjust or inappropriate; remand necessary when order denying deviation did not find whether guideline support would exceed, meet, or fail to meet the reasonable needs of the children or whether support pursuant to the guidelines would be unjust or inappropriate).]

c. Moreover, findings are required by G.S. 50-13.4(c) upon the **request** of any party for deviation. [*Brooker v. Brooker*, 133 N.C. App. 285, 515 S.E.2d 234 (1999) (in case denying father's request for deviation, trial court's findings were inadequate; although court made findings as to reasonableness of some of father's claimed expenses, it did not make findings as to reasonable needs of parties' child or of parties' relative ability to provide support; G.S. 50-13.4(c) requires these findings upon a party's request for a deviation).]

3. Even if no request for deviation was made, the court must make findings as to the child's reasonable needs for support and the parents' ability to provide support if evidence is introduced on those issues.

a. Findings as to the reasonable needs/parents' relative ability to provide support are required when deviation has not been requested if the court hears evidence as to these issues. [*Scotland Cty. Dep't of Soc. Servs. ex rel. Powell v. Powell*, 155 N.C. App. 531, 573 S.E.2d 694 (2002) (citing *Browne v. Browne*, 101 N.C. App. 617, 400 S.E.2d 736 (1991)) (no deviation requested in initial pleadings but both parties introduced, without objection, evidence of the children's needs and the parties' relative ability to provide support; trial court was required to find facts and enter conclusions on the evidence); *Gowing v. Gowing*, 111 N.C. App. 613, 432 S.E.2d 911 (1993) (when parties failed to object to evidence of child's needs and their relative ability to provide support, parties waived their rights to notice of a request, and the trial court was free to deviate from the guidelines upon proper findings); *Browne* (even though neither party had requested a hearing on reasonable needs/parents' relative ability to provide support, since evidence on those issues was introduced without objection, trial court was required to find facts and enter conclusions on the evidence).]

4. If neither party requests deviation or introduces evidence relating to the reasonable needs of the child, there is no basis for the court to deviate from the guidelines. [*See Cumberland Cty. ex rel. State of Washington v. Cheeks*, 247 N.C. App. 397, 786 S.E.2d 432 (2016) (**unpublished**) (not paginated on Westlaw) (citing *Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 741 (1991)) (in a case where neither party introduced evidence on the reasonable needs of the child for support, the court of appeals held that the trial court erred when it "chose to deviate" from the guidelines without a request to deviate having been made and without making findings as to the reasonable needs of the child for support; in footnote 1, the court of appeals noted in dicta that without a request for deviation, a trial court may only consider deviation if both parties present evidence on the reasonable needs of the child without objection and the trial court hears that evidence).]

H. Standard of Review on Appeal from Deviation

1. Deviation from the child support guidelines upon a party's request will not be disturbed on appeal absent a clear abuse of discretion. [*Row v. Row*, 185 N.C. App. 450, 650 S.E.2d

1 (2007) (citing *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998)), *review denied*, 362 N.C. 238, 659 S.E.2d 741, *cert. denied*, 555 U.S. 824, 129 S. Ct. 144 (2008); *Hartley v. Hartley*, 184 N.C. App. 121, 645 S.E.2d 408 (citing *Lukinoff)*, *appeal dismissed*, 654 S.E.2d 475 (2007); *Sain v. Sain*, 134 N.C. App. 460, 517 S.E.2d 921 (1999).]

2. A clear abuse of discretion means only if "manifestly unsupported by reason." [*State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 644, 507 S.E.2d 591, 593 (1998) (quoting *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985)). *See also Beamer v. Beamer*, 169 N.C. App. 594, 610 S.E.2d 220 (2005) (when reviewing deviation, abuse of discretion standard means the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision).]

V. Child Support Payments

A. Frequency, Due Date, and Vesting of Payments

1. A court may order that child support be paid by lump sum payment, by periodic payments, by transfer of title or possession of personal property, or by a security interest in or possession of real property. [G.S. 50-13.4(e); *Simms v. Bolger*, 264 N.C. App. 442, 826 S.E.2d 522 (2019) (trial court did not abuse its discretion when it ordered that child support be paid by both ongoing monthly payments and a one-time lump sum award).]
   a. **NOTE**: When a child support order grants the custodial parent exclusive possession of the marital residence, it is good practice to provide in the order that possession lasts only until entry of the final equitable distribution order.
   b. The court of appeals has found that a directive for payment of private school tuition is a "periodic payment, whether [plaintiff] chooses to pay it once a year, once a semester or over ten months[.]" [*Smith v. Smith*, 247 N.C. App. 166, 170, 785 S.E.2d 434, 438 (2016) (construing *Brown v. Brown*, 171 N.C. App. 358, 615 S.E.2d 39 (2005)).]
2. All child support orders entered on or after Oct. 1, 1999, must require that child support payments be made on a monthly basis and that monthly child support payments are due and payable on the first day of each month. [G.S. 50-13.4(c); S.L. 1999-293, § 3.] [See *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section I.H.7, citing cases, including *State ex rel. Gillikin v. McGuire*, 174 N.C. App. 347, 620 S.E.2d 899 (2005) (payment of prospective support from date complaint or motion filed).]
3. Notwithstanding this requirement, child support payments may be withheld and paid via income withholding on a weekly, biweekly, semimonthly, or other basis consistent with the pay period established by the obligor's employer.
4. Each child support payment is vested when it becomes due and may not thereafter be vacated, reduced, or modified in any way or for any reason except as otherwise provided by law. [G.S. 50-13.10(a); *Morris v. Powell*, 269 N.C. App. 496, 500, 840 S.E.2d 223, 226 (2020) (holding that a trial court erred when it failed to order father to pay vested arrears for period after 17-year-old left mother's home and before mother sought to enforce father's obligation, and concluding that "as a matter of law, vested child support obligations cannot be retroactively terminated").]

a. A trial court erred when it ordered that amounts paid by father to cover mother's share of the parenting coordinator's fees "shall reduce [father's] child support arrearage by the amount so paid." [*Nguyen v. Heller-Nguyen*, 248 N.C. App. 228, 242, 788 S.E.2d 601, 610 (2016) (under G.S. 50-13.10(a), each past due child support payment vests when it accrues and may not later be vacated, reduced, or modified, precluding the trial court from allowing an offset against father's child support arrears).]

b. See *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, *Modification of Child Support Orders*, Part 3 of this Chapter, and *Enforcement of Child Support Orders*, Part 4 of this Chapter.

5. Pursuant to G.S. 50-13.10(b), an unpaid, vested, past due child support payment has the full force, effect, and attributes of a judgment of this state except as follows:

a. A child support arrearage may not be entered on the judgment docket unless it has been reduced to judgment pursuant to G.S. 50-13.4(f)(8) or unless it is perfected as a lien pursuant to G.S. 44-86.

b. A writ of execution may not be issued to collect a child support arrearage unless it has been reduced to judgment pursuant to G.S. 50-13.4(f)(8) or unless it is perfected as a lien pursuant to G.S. 44-86. See *Enforcement of Child Support Orders*, Part 4 of this Chapter, Section V for more on execution.

c. A child support arrearage does not constitute a lien against real property unless it has been reduced to judgment pursuant to G.S. 50-13.4(f)(8) or unless it is perfected as a lien pursuant to G.S. 44-86. See *Enforcement of Child Support Orders*, Part 4 of this Chapter, Section VI for more on liens.

6. A child support payment does not become due or vested if it would otherwise have accrued:

a. After the child's death;

b. After the obligor's death;

c. During any period when the child is living with the obligor pursuant to a valid court order or an express or implied written or oral agreement transferring primary custody to the obligor; or

d. During any period when the obligor is incarcerated, is not on work release, and has no resources with which to make the payment. [G.S. 50-13.10(d).]

7. The provisions of G.S. 50-13.10 apply to child support orders entered in civil child support proceedings under G.S. 50-13.4 *et seq*., child support orders entered in paternity proceedings under G.S. 49-14 *et seq*., and voluntary support agreements approved under G.S. 110-132 and 110-133. [G.S. 50-13.10(c).]

B. Payment via Immediate Income Withholding

1. All new and modified child support orders, civil or criminal, entered in IV-D cases must include a provision ordering that income withholding take effect immediately (rather than being implemented only if an obligor becomes delinquent in paying child support). [G.S. 110-136.3(a).] For definition of a IV-D case and a non-IV-D case, see Section III.I.7.b, above.

a. G.S. 110-136.3 and 110-136.4 require the trial court to order wage withholding in IV-D cases and eliminate the discretion the trial court generally has to establish an appropriate remedy. [*Guilford Cty. ex rel. Norwood v. Davis*, 177 N.C. App. 459, 629 S.E.2d 178 (2006) (when trial court failed to order wage withholding in a IV-D case, matter reversed and remanded for entry of immediate withholding pursuant to G.S. 110-136.4).]

b. This requirement does not apply if the obligor is unemployed, the amount of the obligor's disposable income is unavailable, or both parties agree to an alternative method of payment. [G.S. 110-136.4(b).]

2. All civil and criminal child support orders initially entered on or after Jan. 1, 1994, in non-IV-D cases must include a provision ordering that income withholding take effect immediately unless:

a. The parties agree in writing to an alternative method of payment;

b. The court finds, considering the obligor's employment history and record of meeting financial obligations in a timely manner, that there is a reasonable and workable plan that ensures consistent and timely payments by an alternative method of payment; or

c. The court finds good cause not to require immediate income withholding. [G.S. 110-136.3(a); 110-136.5(c1).]

3. When an obligor's employer or income payor receives a notice of income withholding, the employer or payor must:

a. Begin withholding child support from the obligor's disposable earnings or income, as required by the notice of the obligation to withhold, from the first payment that is due for the pay period that occurs fourteen days following the date the notice was served on the payor and

b. Send the child support payment to the State Child Support Collection and Disbursement Unit within seven business days of the date the obligor is paid. [G.S. 110-136.8(b).]

4. Income withholding is discussed in more detail in *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, *Modification of Child Support Orders*, Part 3 of this Chapter, and *Enforcement of Child Support Orders*, Part 4 of this Chapter.

C. Centralized Collection and Disbursement of Child Support Payments

1. Before Oct. 1, 1999, almost all court-ordered child support payments were made through the clerk of superior court.

2. The 1996 federal welfare reform law required states, as a condition of receiving federal funding for child support enforcement under Title IV-D of the Social Security Act, to establish a statewide, centralized unit to collect and disburse child support payments in all IV-D cases and in non-IV-D cases in which a child support order was initially entered on or after Jan. 1, 1994, and payments were made via income withholding. [42 U.S.C. § 654B.]

3. All child support payments made on or after Oct. 1, 1999, in (1) a IV-D case, (2) a non-IV-D case via income withholding (regardless of when the order was entered), or (3) other non-IV-D cases other than those in which the court directs that payments be made directly to the obligee, must be made through the State Child Support Collection

and Disbursement Unit established pursuant to G.S. 110-139(f). [G.S. 15A-1344.1(a); 50-13.4(d); 50-13.9(a); 110-136.8(b)(1); 110-139(f).]

4. The fact that child support payments in a non-IV-D case are made through the State Child Support Collection and Disbursement Unit does not convert the case from a non-IV-D to a IV-D case or require a IV-D agency to provide child support enforcement services with respect to the case.
5. When the State Child Support Collection and Disbursement Unit receives a child support payment from an obligor, it must disburse the payment to the child's custodial parent or other party entitled to receive the payment, unless a court order requires otherwise. [G.S. 50-13.9(b).]
6. When child support payments are made via income withholding, the employer or payor may retain a $2.00 processing fee for each withholding, even if the amount withheld is insufficient to satisfy the full amount required by the income withholding notice. [G.S. 110-136.6(a).]
7. Federal law requires that child support payments received by the State Child Support Collection and Disbursement Unit be disbursed to the appropriate payee within two business days of receipt. [42 U.S.C. § 654b(c)(1).] Similarly, G.S. 52C-3-318(a) requires a support enforcement agency or tribunal of this state to "disburse promptly" amounts received pursuant to a support order.

D. Priority of Child Support Payments

1. Federal law requires that income withholding for current and past due child support be given priority over any other process, attachment, garnishment, or withholding against the same income. [42 U.S.C. § 666(b)(7).]
2. Claims for current and past due child support via income withholding or state tax refund offset take priority over claims by the state Department of Health and Human Services for reimbursement of medical assistance under Medicaid provided to a child whose parent has failed to provide court-ordered health insurance. [G.S. 108A-70(a).]
3. In Uniform Interstate Family Support Act (UIFSA) cases, payment of child or spousal support has priority over payment of fees, costs, and expenses. [G.S. 52C-3-312(b), 52C-1-101(21) (definition of "support order"), *both amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

E. Distribution and Disbursement of Child Support Payments in IV-D Cases

1. Federal law governs the distribution of child support payments in IV-D cases. [42 U.S.C. § 657.]
   a. The federal distribution rules do not apply to child support payments in non-IV-D cases.
   b. The federal distribution rules do not address the allocation of child support payments when an obligor owes child support for two or more families, other than to provide that payments collected via two or more income withholding orders must be allocated. [See Section V.F, below.]

c. The federal distribution rules do not address the priority of child support payments vis-à-vis spousal support– or child support–related costs or fees.

d. The federal distribution rules do not address the distribution or disbursement of spousal support payments.

e. Special distribution rules apply with respect to child support collected in IV-D cases by intercepting an obligor's federal income tax refund and to collections in IV-D cases in which a child receives IV-E (referencing the program's legal authorization under Title IV-E of the federal Social Security Act) foster care assistance. For definition of a IV-D case and a non-IV-D case, see Section III.I.7.b, above.

2. The federal distribution rules (1) classify child support payments as either current support, past due support, or future support and (2) classify assigned and unassigned child support arrearages in cases involving children who currently receive public assistance or who formerly received public assistance.

3. Under the federal distribution rules, all child support payments received in IV-D cases are treated first as payment of current support for the month in which the payment is received and then as payment for past due support arrearages, regardless of whether the payment is designated as a payment of current or past due support.

4. Payment of support when child has never received public assistance. If the child for whom support is owed has never received public assistance, all current and past due support is paid to the child's custodial parent or other person entitled to receive the child support payment.

5. Payment of support when child receives or has received public assistance. The federal distribution rules determine whether all or part of a child support payment for a child who is currently receiving public assistance or who formerly received public assistance is to be paid to the child's custodial parent (or other person entitled to receive the payment) or is to be retained to reimburse the government for public assistance paid on behalf of the child.

   a. If the child for whom support is owed **currently** receives public assistance:

      i. Current child support will be retained to reimburse the government for public assistance paid on behalf of the child;

      ii. Payments of past due support will be retained to reimburse the government for public assistance paid on behalf of the child or paid to the child's custodial parent or other person entitled to receive the payment if the government has not been reimbursed for all public assistance paid on behalf of the child.

   b. If the child for whom support is owed **formerly** received public assistance:

      i. Current child support will be paid to the child's custodial parent or other person who is entitled to receive the payment;

      ii. The classification of child support arrearages as "never assigned," "unassigned pre-assistance," "conditionally assigned," etc., determines whether past due support will be disbursed to the child's custodial parent (or other person entitled to receive the support arrearages) or whether it will be retained to reimburse the government for public assistance paid on behalf of the child.

6. If neither the obligor, nor the individual obligee, nor the child resides in North Carolina, upon request from the support enforcement agency of this state or another state, the support enforcement agency of this state or a tribunal of this state must:
   a. Direct that the support payment be made to the support enforcement agency in the state in which the obligee is receiving services and
   b. Issue and send to the obligor's employer a conforming income-withholding order or an administrative notice of change of payee, reflecting the redirected payments. [G.S. 52C-3-318(b), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]
7. A North Carolina support enforcement agency receiving redirected payments from another state pursuant to a law similar to G.S. 52C-3-318(b), set out immediately above, must furnish to a requesting party or tribunal of the other state a certified statement by the custodian of the record of the amount and dates of all payments received. [G.S. 52C-3-318(c), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

F. Allocating Child Support Payments among Two or More Families

1. "Allocation" refers to the process of crediting all or part of a child support payment by an obligor to the obligor's child support obligation for a particular case when the obligor owes child support in two or more cases.
2. Allocation of child support payments made via income withholding.
   a. Federal law. When an obligor is subject to two or more income withholding orders requiring payment of support for children in two or more families, federal law requires states to allocate child support payments collected via income withholding. [45 C.F.R. § 303.100(a)(5).]
   b. State law. When an obligor is subject to two or more income withholding orders requiring payment of support for children in two or more families, state law provides that:
      i. Withholding for current support has priority over withholding for past due support [G.S. 110-136.7; *Guilford Cty. ex rel. Gray v. Shepherd*, 138 N.C. App. 324, 532 S.E.2d 533 (2000) (trial court erred in prorating payments under an order for current support and under an order requiring payments toward past due support only; priority must be given to the order for current support).] and
      ii. When there are two or more orders for current support, child support payments made via income withholding must be allocated among the families in proportion to the total amount of child support owed under the orders. [G.S. 110-136.7.]
3. Allocation of child support payments that are not made via income withholding.
   a. Federal law does not govern the allocation of child support payments that are not made via income withholding.
   b. State law does not expressly provide for the allocation of child support payments that are not made via income withholding.
   c. The N.C. Department of Health and Human Services has adopted policies requiring the State Child Support Collection and Disbursement Unit to:

i. Aggregate all child support payments (other than those collected by intercepting an obligor's income tax refund or those made to purge an obligor's contempt or to satisfy a lien or judgment) made by an obligor who is required to pay child support for two or more families and

ii. Allocate those payments among multiple child support cases based upon the amount the obligor owes for current child, spousal, or medical support, the amount that the obligor is required to pay for support arrearages, and the "type" of arrearage owed.

G. Child Support Payment Records

1. Prior to Oct. 1, 1999, most child support payments in IV-D and non-IV-D cases were made through the clerk of superior court and the clerk's office maintained official child support payment records (generally using the Administrative Office of the Courts' computerized Support Enforcement System (SES)) for both IV-D and non-IV-D cases. For definition of a IV-D case and a non-IV-D case, see Section III.I.7.b, above.
2. Federal law now requires that child support payments in all IV-D cases and in many non-IV-D cases be made through the State Child Support Collection and Disbursement Unit and that the unit maintain records showing the receipt of payments from parents, employers, and other states and disbursements to custodial parents and other obligees, the state IV-D agency, and the IV-D agencies of other states.
   a. Federal law also requires the unit to furnish to any parent, upon request, timely information on the current status of support payments made through the unit under an order requiring payments to be made by or to the parent.
   b. Records of payments made prior to Oct. 1, 1999, have been transferred from clerks' records and the SES system to the computerized Automated Collection and Tracking System (ACTS) used in IV-D cases, which is linked to the unit.
3. In a IV-D case, the IV-D agency must maintain records showing the amount of each child support payment received from or on behalf of the obligor and the date each payment was received. [G.S. 50-13.9(b1)(3).]
4. In a non-IV-D case:
   a. In the past the clerk of superior court was required to maintain records showing the amount of each child support payment received from or on behalf of the obligor and the date each payment was received. [G.S. 50-13.9(b2)(3).]
   b. Effective Jan. 1, 2007, G.S. 50-13.9(b2)(3), set out immediately above, was repealed. [G.S. 50-13.9(b2), *amended by* S.L. 2005-389, § 1 *and* S.L. 2006-264, § 97.] Effective Jan. 1, 2007, the clerk of superior court maintains all official records and all case data concerning child support matters previously enforced by the clerk. [G.S. 50-13.9(b2)(2), *amended by* S.L. 2005-389, § 1 *and* S.L. 2006-264, § 97.]
   c. In non-IV-D cases in which child support payments are made through the State Child Support Collection and Disbursement Unit, the clerk's payment records are based solely on data transferred to the SES via the ACTS from the collection and disbursement unit. Effective Jan. 1, 2007, the provision requiring the State Child Support Collection and Disbursement Unit to notify the clerk of all payments made in

non-IV-D cases was repealed. [G.S. 50-13.9(b2), *amended by* S.L. 2005-389, § 1 and S.L. 2006-264, § 97.]

5. Records admissible as evidence.
   a. Payment records maintained by the designated child support enforcement agency to monitor the obligor's compliance with or to enforce child support orders in the case are, when properly authenticated, admissible as evidence in an action to establish, enforce, or modify a child support order. [G.S. 50-13.9(b1)(3).]
   b. A copy of the record of child support payments certified as a true copy of the original by the custodian of the record may be forwarded to a responding tribunal. The copy is evidence of the facts asserted therein and is admissible to show whether payments were made. [G.S. 52C-3-315(c).]
6. Credit for miscellaneous payments.
   a. A court may order the clerk of superior court or a IV-D agency to enter a child support payment on the clerk's or agency's records if the child support payment was not received by the State Child Support Collection and Disbursement Unit but was actually received by the party to whom it was owed and if the payment is evidenced by a canceled check, money order, or contemporaneously executed and dated written receipt. [G.S. 50-13.10(e).]
   b. If an obligor is required to pay child support for the same child or children under a child support order in North Carolina and under a child support order issued by a tribunal of another state or a foreign country, a North Carolina tribunal must credit amounts North Carolina collects for a particular period under any child support order against amounts owed for the same period under any other child support order issued by a tribunal of this state, another state, or a foreign country. [G.S. 52C-2-209, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

VI. The Child Support Enforcement (IV-D) Program

A. Federal Law (Title IV-D of the Social Security Act)

1. Title IV-D of the federal Social Security Act (42 U.S.C. §§ 651 *et seq.*) establishes the child support enforcement (IV-D) program, authorizes federal grants to states to administer state child support enforcement (IV-D) programs, and imposes legal requirements related to paternity and child support on states as a condition of receiving federal IV-D funding.
2. Congress enacted Title IV-D in 1975. Title IV-D has been amended by the Child Support Enforcement Amendments of 1984, the Family Support Act of 1988, the Omnibus Budget Reconciliation Act of 1993, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, and the Child Support Performance and Incentives Act of 1998.
3. Federal regulations promulgated by the U.S. Department of Health and Human Services' (DHHS) Office of Child Support Enforcement (OCSE) supplement the requirements set forth in Title IV-D of the Social Security Act. [*See* 45 C.F.R. §§ 301–310.]

B. Federal Child Support (IV-D) Requirements

1. Federal law imposes a number of requirements on states as conditions of receiving federal funding for state child support enforcement (IV-D) and Temporary Assistance for Needy Families (TANF) programs. For example, federal law requires states to:
   a. Establish and use child support guidelines as a rebuttable presumption in entering child support orders; [42 U.S.C. §§ 667(a), (b).]
   b. Operate a central child support case registry;
   c. Operate a unit for the collection and disbursement of payments under support orders; [42 U.S.C. § 654b.]
   d. Operate a state new hire directory; [42 U.S.C. § 653a.]
   e. Enact the Uniform Interstate Family Support Act; [42 U.S.C. § 666(f).]
   f. Allow a civil action to establish the paternity of a child to be filed any time before the child's 18th birthday; [42 U.S.C. §§ 666(a)(5)(A), 668.]
   g. Enact laws regarding genetic paternity testing; [42 U.S.C. § 666(a)(5)(B).]
   h. Adopt procedures governing the voluntary acknowledgment of paternity; [42 U.S.C. § 666(a)(5)(C).]
   i. Collect child support via income withholding; [42 U.S.C. § 666(b).]
   j. Impose liens for delinquent child support; [42 U.S.C. § 666(a)(4).]
   k. Adopt procedures authorizing the State to withhold or suspend, or to restrict the use of, drivers' licenses, professional and occupational licenses, and recreational and sporting licenses of individuals who owe past due child support or who fail after notice to comply with subpoenas or warrants relating to paternity or child support proceedings; [42 U.S.C. § 666(a)(16).] and
   l. Prohibit the retroactive modification of vested, past due child support arrearages. [42 U.S.C. § 666(a)(9)(C).]
2. Some of the child support requirements imposed on states by federal law apply only to IV-D agencies or to IV-D cases. Others, however, require states to enact specific paternity and child support laws that apply generally to non-IV-D as well as IV-D cases.
   a. As a result, paternity and child support law—once governed exclusively by state law—has become increasingly "federalized" and uniform.
   b. A number of North Carolina's statutes regarding paternity and child support (including most of the statutory provisions codified in Article 9 of G.S. Chapter 110) were enacted to comply with federal requirements imposed by the federal IV-D law. [*See* G.S. 110-140(a) (providing that G.S. Chapter 110, Article 9, Child Support, is not intended to conflict with any provision of federal law or to result in the loss of federal funds).]
3. Constitutional challenges arising from the federal requirements.
   a. At least two federal appellate courts have held that the imposition by Congress of federal child support requirements on states as a condition of receiving federal IV-D funding is not an unconstitutional exercise of federal authority and does not violate the constitutional rights of states. [*Kansas v. United States*, 214 F.3d 1196 (10th Cir.),

cert. denied, 531 U.S. 1035, 121 S. Ct. 623 (2000); *Hodges v. Thompson*, 311 F.3d 316 (4th Cir. 2002) (per curiam) (conditioning a state's receipt of federal funding under Title IV-D on its establishment and operation of an automated data processing/information retrieval system and a state child support disbursement unit was constitutionally valid under the Spending Clause and the Tenth Amendment), *cert. denied*, 540 U.S. 811, 124 S. Ct. 53 (2003).]

b. Federal child support requirements under Title IV-D, however, do not necessarily create legal rights that can be enforced against the state by IV-D clients in state or federal court. [*See Blessing v. Freestone*, 520 U.S. 329, 117 S. Ct. 1353 (1997) (holding that Title IV-D does not give individuals a federal right to force a state agency to substantially comply with Title IV-D).]

C. IV-D and Non-IV-D Cases

1. All paternity and child support cases pending in North Carolina courts can be classified as either IV-D cases or non-IV-D cases.
   a. A IV-D case is a case in which services have been applied for or are being provided by a child support enforcement (IV-D) agency. [G.S. 110-129(7).]
   b. A non-IV-D case is any case, other than a IV-D case, in which child support is legally obligated to be paid. [G.S. 110-129(8).]
2. Over time, the status of a paternity or child support case may change from non-IV-D to IV-D (for example, if a child for whom support has been ordered begins receiving public assistance) or from IV-D to non-IV-D (for example, if a IV-D client requests that the client's IV-D case be closed, the child is no longer receiving public assistance, and the obligor does not owe any permanently assigned child support arrearages to the state).
3. The IV-D or non-IV-D status of a pending paternity or child support case may affect the judicial procedure that the parties and court must follow in the pending action or the judicial remedies that are available.
4. Filing fees and other court costs are assessed against a child support enforcement agency initiating a IV-D child support proceeding; however, the clerk of superior court may consent to allow a county child support enforcement agency to pay all costs and fees within forty-five days of any action's filing date in lieu of paying costs and fees at the time of filing. [G.S. 7A-317(a).]

D. IV-D Agencies

1. Federal law requires each state, as a condition of receiving federal IV-D funding, to designate a single state agency to administer, or to supervise the local administration of, the state's IV-D program.
   a. North Carolina's Department of Health and Human Services' Division of Social Services (DSS) is responsible for North Carolina's child support program. The Child Support Services (CSS) Section exists within DSS. [CSS webpage: https://www.ncdhhs.gov/divisions/social-services/child-support-services.]
   b. There are currently (October 2016) 101 Child Support Offices in North Carolina: 76 offices operated under the authority of a county department of social services;

7 offices operated under the authority of a revenue department or a county manager; 17 offices operated under contract with private companies; and 1 tribal office. [CSS webpage: https://www.ncdhhs.gov/divisions/social-services/child-support-services.]

E. IV-D Clients

1. IV-D clients (families served by IV-D agencies) can be divided into three broad categories.
   a. **Current assistance cases** involve children in families that currently receive public assistance (Aid to Families with Dependent Children (AFDC), Temporary Assistance for Needy Families (TANF), or IV-E (Social Security Act foster care assistance)). In these cases, the child's right to child support has been partially assigned to the state.
   b. **Former assistance cases** involve children in families that formerly received public assistance (AFDC, TANF, or IV-E). These cases can be further subdivided into two categories:
      i. Cases in which the obligor still owes child support arrearages that remain assigned to the state and
      ii. Cases in which any remaining child support arrearages are no longer assigned to the state and instead are owed to the child, custodial parent, or caretaker.
   c. **Never assistance cases** involve children in families that have never received AFDC, TANF, or IV-E for a dependent child. In these cases, the child's right to support, other than medical support rights in the case of children covered by Medicaid, is not assigned to the state.
2. The IV-D program is required to provide child support services on behalf of all children who receive (or have received) federally funded cash assistance under the state's Work First (TANF) program (or the former AFDC program) or foster care assistance under Title IV-E of the Social Security Act.
   a. Families that receive public assistance (AFDC, TANF, or IV-E) are not required to apply for IV-D services or to pay a IV-D application fee or costs.
      i. IV-D cases involving families that receive public assistance are referred to the IV-D agency by the county social services department when the family begins receiving public assistance.
      ii. Families that receive Work First (TANF) assistance must cooperate with the IV-D agency in locating a child's absent parent, determining paternity, establishing a child support obligation, and collecting child support.
   b. The acceptance of public assistance on behalf of a dependent child constitutes an assignment **to the state or to the county from which assistance was received** of the child's right to any child support that accrued before the child began receiving TANF cash assistance as well as any child support that will accrue during the period of time that the child receives TANF cash assistance (not to exceed the amount of TANF or AFDC cash assistance paid on behalf of the child). [*See* G.S. 110-137 (assignment of support rights up to the amount of public assistance paid); 42 U.S.C. § 608(a)(3); *see also State ex rel. Crews v. Parker*, 319 N.C. 354, 354 S.E.2d 501 (1987) (assignment was only for amount of support provided through AFDC; grandmother who had raised child since birth entitled to intervene to assert right to receive compensation

from father for years grandmother had supported child before receiving AFDC benefits).]

c. When a family ceases receiving public assistance, the IV-D agency must continue providing child support enforcement services, subject to the same conditions and on the same basis as in the case of other individuals to whom services are furnished. [42 U.S.C. § 654(25).]

d. The IV-D program must provide medical support enforcement services as well as child support services on behalf of all children who receive or have received health care under the state's Medicaid program. [45 C.F.R. §§ 302.33(a)(1)(ii), (a)(5).]

3. The IV-D program is required to provide child support services on behalf of any other child (regardless of whether the child has ever received public assistance) if the child's custodial parent or caretaker files a written application requesting child support enforcement services and pays a $25 application fee ($10 if the individual applying for services is indigent as defined in G.S. 110-130.1(a)). [G.S. 110-130.1(a); 45 C.F.R. § 302.33.]

F. IV-D Services

1. The IV-D program must provide the following child support services to all eligible families:

a. Locating absent parents who owe child support;

b. Establishing the paternity of children born out of wedlock;

c. Establishing child support orders;

d. Enforcing child support orders;

e. Reviewing and modifying child support orders;

f. Establishing, enforcing, and modifying medical support orders;

g. Providing legal services related to these child support services; and

h. Collecting, distributing, and disbursing child support payments.

2. "Any county interested in the paternity and/or support of a dependent child . . . may take up and pursue any paternity and/or support action commenced by the mother, custodian or guardian of the child." [G.S. 110-130.]

a. The language "take up and pursue" refers to intervention. [*Hunt v. Hunt*, 246 N.C. App. 475, 784 S.E.2d 219 (2016).]

b. G.S. 110-130 and other statutes cited in the *Hunt* opinion give the State Child Support Enforcement Agency an unconditional right of intervention when a person has accepted public assistance on behalf of a dependent child, has applied for and pays a fee for child support collection services, or has requested assistance for collection of spousal support while also receiving child support services. [*Hunt v. Hunt*, 246 N.C. App. 475, 784 S.E.2d 219 (2016).]

c. A motion by New Hanover Child Support Enforcement Agency to intervene made more than three years after the entry of the initial child support order was timely when filed less than a month after mother had contracted for child support services. [*Hunt v. Hunt*, 246 N.C. App. 475, 784 S.E.2d 219 (2016).]

3. The IV-D program is not allowed to:
   a. Provide assistance to a child's parent or caretaker in establishing or enforcing a child custody order.
   b. Assist in establishing a spousal support obligation. [G.S. 110-130.2.] A IV-D agency must collect spousal support for a spouse or former spouse if it is enforcing a child support order on behalf of a child who lives with the spouse or former spouse and a spousal support order has been entered on behalf of the spouse or former spouse. [G.S. 110-130.2.]
   c. Use federal IV-D funding to obtain a judgment for a public assistance debt pursuant to G.S. 110-135 when the amount of the debt is not based on the parent's obligation under an existing child support order. [U.S. Dep't of Health & Human Servs., Office of Child Support Enforcement, Use of Presumptive Child Support Guidelines to Establish and Collect Support, Action Transmittal 93-04 (Mar. 22, 1993), www.acf.hhs.gov/programs/cse/pol/AT/1993/at-9304.htm.] A IV-D agency may, however, establish and enforce a child support obligation on behalf of a child whose right to child support has been assigned to the state or county providing support pursuant to G.S. 110-137.
4. Relationship betweeen IV-D attorney and IV-D client.
   a. The attorney representing a IV-D agency in a paternity or child support proceeding is an attorney of record only in the paternity or child support proceeding and is not, by virtue of her appearance in the pending paternity or child support proceeding, an attorney of record in any related proceeding involving child custody, visitation, or similar matters. [*See* G.S. 110-130.1(c).]
   b. The provision of legal services related to the establishment of paternity or the establishment, enforcement, or modification of child support orders on behalf of a IV-D client by an attorney employed or retained by a IV-D agency is insufficient, in and of itself, to create an attorney-client relationship between the attorney who represents the IV-D agency and the client served by the IV-D agency. [*See* G.S. 110-130.1(c).]
   c. For extensive discussion of the parties and their legal relationship in a child support enforcement action, see John L. Saxon, *Who Are the Parties in IV-D Child Support Proceedings? And What Difference Does It Make?* Fam. L. Bull. No. 22 (UNC School of Government, Jan. 2007) (hereinafter 2007 Saxon Bulletin), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/flb22.pdf.

VII. Other Issues Related to Child Support

A. Hague Child Support Convention

1. On Aug. 30, 2016, the United States signed the Instrument of Ratification for the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (the Convention). [Vicki Turetsky, Commissioner, Office of Child Support Enforcement (CSE), U.S. Dep't of Health & Human Servs., Admin. for Children and Families, Office of CSE, U.S. Ratification of Hague Child Support Convention, DCL-16-11,

Dear Colleague Letter (Aug. 30, 2016), http://www.acf.hhs.gov/css/resource/us-ratification-of-hague-child-support-convention (hereinafter 2016 Dear Colleague Letter).]

2. As a result of U.S. ratification of the Convention, the United States is to have a treaty relationship with thirty-one countries in which the Convention is already in force, including the European Union. [2016 Dear Colleague Letter.]
3. The 2016 Dear Colleague Letter sets out the following as highlights from the Convention:
   a. The Convention will greatly speed up the enforcement of U.S. orders. It limits the circumstances under which a court can review and object to an order. It requires recognition of a U.S. order unless a respondent timely raises a challenge, and it limits available objections that the respondent may raise to those similar to ones now allowed under U.S. law.
   b. The Convention recognizes U.S. due process requirements. It allows a challenge to recognition of a foreign support order if there was a lack of notice and an opportunity for a hearing. It allows a challenge if the order does not comply with U.S. jurisdictional rules. And it allows a court to refuse recognition of an order if it is manifestly incompatible with public policy.
   c. The Convention requires treaty countries to provide free legal assistance in child support cases. Title IV-D agencies in the U.S. already provide such assistance, but now other Convention countries must provide cost-free services to U.S. residents.
   d. The Convention provides standardized procedures and timeframes. Each Convention country must follow certain procedures to recognize and enforce child support orders. They must meet certain timeframes for allowing a challenge to an order and for providing status updates. Additionally, there are recommended standardized forms that will reduce the need for a country to request additional information.
4. The provisions adapted from the Convention that could not be readily integrated into G.S. Chapter 52C, Articles 1 through 6, are set out in G.S. Chapter 52C, Article 7, G.S. 52C-7-701 through 52C-7-713. [Official Comment (2015), G.S. Chapter 52C, Article 7.]

B. Child Support Hearing Officers (Expedited Process)

1. In 1985, the U.S. Department of Health and Human Services promulgated a federal regulation requiring states to use expedited administrative or quasi-judicial procedures to establish and enforce child support orders. [45 C.F.R. § 303.101 (enacted May 9, 1985, and since amended).]
   a. This regulation allowed states to use administrative law judges, administrative hearing officers, magistrates, masters, or other quasi-judicial officers, but not judges, to hear and determine cases involving the establishment and enforcement of child support orders. [45 C.F.R. § 303.101(a) (enacted May 9, 1985, and since amended).] Federal law, however, also allowed the U.S. Department of Health and Human Services to waive this requirement if a state showed that it could establish and enforce child support orders in a timely manner using its regular judicial procedures.
   b. The prohibition on using judges and regular judicial procedures to establish and enforce child support orders was repealed on December 23, 1994. [59 Fed. Reg. 66,204 (Dec. 23, 1994).]

2. In order to comply with this former federal requirement, the North Carolina General Assembly enacted legislation in 1985 (G.S. 7A-178, 7A-183, and 50-34 through 50-39) authorizing the appointment of magistrates, assistant clerks of superior court, and clerks of superior court as child support hearing officers authorized to hear and decide cases involving the establishment and enforcement of child support orders in districts in which the federal expedited process requirement was not waived. This legislation was never implemented in any judicial district but has not been repealed, despite the 1994 amendment to the federal regulation.

C. Medical Support

1. Medical, hospital, dental, or other health care expenses.
    a. A child support ordered entered in a civil action for child support or a written agreement between the parties may require either or both parties to pay all or part of the child's medical, hospital, dental, or other health care related expenses. [G.S. 50-13.11(a).]
        i. Counseling services must be provided by a licensed therapist before a court can enforce payment provisions in a consent agreement. [*See Blanton v. Fitch*, 150 N.C. App. 200, 562 S.E.2d 565 (2002) (trial court erred when it ordered father to reimburse mother one-half the cost of counseling services provided to children by a fee-based pastoral counselor and social worker, when the person was not licensed or certified in North Carolina in either capacity; under consent order, parents were each responsible for one-half of uninsured medical bills, including dental, orthodontist, doctor, psychological, hospital, and prescribed medications).]
    b. A parent may not be required to obtain or maintain health insurance for a child or to pay premiums for health insurance for a child under this section. [*Buncombe Cty. ex rel. Blair v. Jackson*, 138 N.C. App. 284, 531 S.E.2d 240 (2000) ("medical support" does not include health insurance; court may order parent to obtain "health insurance" only pursuant to G.S. 50-13.11(a1)).] Health insurance is required by G.S. 50-13.11(a1), discussed in Section VII.C.2, below.
    c. Treatment of uninsured health care costs under the guidelines.
        i. The basic guideline support obligation includes $250 per child for the child's annual uninsured medical and/or dental expenses. In any case, including those where a parent's income falls within the shaded area of the child support schedule, the court may order that uninsured health care costs in excess of $250 per year (including reasonable and necessary costs related to medical care, dental care, orthodontia, asthma treatments, physical therapy, treatment of chronic health problems, and counseling or psychiatric therapy for diagnosed mental disorders) incurred by a parent be paid by either parent or both parents in such proportion as the court deems appropriate. [2020 Guidelines.]
2. Health insurance.
    a. If the court enters a child support order in a civil action for child support, the judge **must** order the child's parent or other responsible party to maintain health insurance for the benefit of the child if it is available at a reasonable cost. [G.S. 50-13.11(a1);

2020 Guidelines (court must order either parent to obtain and maintain medical health insurance coverage for a child if it is actually and currently available to the parent at a reasonable cost); 2011 Guidelines (court *may* order either parent to obtain and maintain health insurance coverage).]

b. *Health care coverage* includes private and public pricing-and-payment models under which medical services can be provided to the dependent child, such as HMO, PPO, fee for service, and Medicaid. [2020 Guidelines (amended to include Medicaid).] For more on this amendment to the guidelines, see Cheryl Howell, *Amendments to Chapter 50B and to the Child Support Guidelines*, UNC Sch. of Gov't: On the Civil Side Blog (Feb. 12, 2020), https://civil.sog.unc.edu/amendments-to-chapter-50b-and-to-the-child-support-guidelines.

c. The court may require one or both parties to maintain dental insurance for a child. [G.S. 50-13.11(a1); 2020 Guidelines.]

d. As used in G.S. 50-13.11(a1), "health insurance for the benefit of [a] child is considered reasonable in cost if [it] is available at a cost to the parent that does not exceed five percent (5%) of the parent's gross income. In applying this standard, the cost is the cost of (1) adding the child to the parent's existing coverage, (2) child-only coverage, or (3) if new coverage must be obtained, the difference between the cost of self-only and family coverage." [G.S. 50-13.11(a1), *amended by* S.L. 2015-220, §§ 1, 3, effective Aug. 18, 2015, and applicable to orders issued or agreements entered into on or after that date.]

   i. Note that the first sentence of the relevant paragraph in the 2020 Guidelines deleted the word "considered" and the phrase "in cost" and now reads as follows: "Pursuant to G.S. 50-13.11(a1), health insurance is reasonable if the coverage for the child is available at a cost to the parent that does not exceed five percent (5%) of the parent's gross income." The remainder of the relevant paragraph in the 2020 Guidelines about the cost when applying the standard is the same as the statutory language set out immediately above.

   ii. For more on the changes to G.S. 50-13.11(a1) related to reasonable cost, see Cheryl Howell, *Child Support: When Is Health Insurance Available at a Reasonable Cost?*, UNC Sch. of Gov't: On the Civil Side Blog (Sept. 11, 2015), http://civil.sog.unc.edu/child-support-when-is-health-insurance-available-at-a-reasonable-cost.

e. Under former G.S. 50-13.11(a1), health insurance was considered reasonable in cost if it was available through the parent's or party's employment or through group health insurance, regardless of service delivery mechanism. The following cases considered former G.S. 50-13.11(a1) and were subject to earlier guidelines:

   i. Insurance that can be obtained through employment is presumptively reasonable in cost. [*Buncombe Cty. ex rel. Frady v. Rogers*, 148 N.C. App. 401, 559 S.E.2d 227 (2002); 2006 and 2011 Guidelines (health insurance is considered reasonable in cost if it is employment-related or other group health insurance, regardless of delivery mechanism).]

   ii. G.S. 50-13.11(a1) recognizes that a party may have access to insurance that is reasonable in cost, other than insurance that is available through employment.

[*Buncombe Cty. ex rel. Frady v. Rogers*, 148 N.C. App. 401, 559 S.E.2d 227 (2002).]

iii. A similar provision in the 2011 Guidelines has been interpreted to mean that a parent with access to employment-related or other group health insurance has access to reasonably priced insurance as a matter of law. [*Reams v. Riggan*, 224 N.C. App. 78, 735 S.E.2d 407 (2012) (this interpretation does not preclude a trial court from determining that some other health insurance is also reasonably priced).]

iv. The trial court must make specific findings of fact regarding the availability of reasonably priced health and dental insurance. [*Ludlam v. Miller*, 225 N.C. App. 350, 739 S.E.2d 555 (2013) (remanding order that required mother to continue to provide health and dental insurance without finding that insurance was currently available to mother at a reasonable cost and that did not identify the source of the insurance).]

(a) If insurance was being provided by mother's new husband's employment, as the court of appeals assumed, the guidelines anticipate that insurance may be provided through a stepparent, and such coverage can be considered as reasonably priced insurance if appropriate findings are made. [*Ludlam v. Miller*, 225 N.C. App. 350, 739 S.E.2d 555 (2013).]

(b) There would be no inherent error in ordering mother to pay insurance premiums for coverage provided through her husband's employer. However, the mother, and not her husband, is legally responsible for paying the premiums. [*Ludlam v. Miller*, 225 N.C. App. 350, 739 S.E.2d 555 (2013).]

v. An order requiring a party to obtain health insurance for a child when insurance is not available through the party's employment does not constitute a deviation from the guidelines under G.S. 50-13.4(c). [*Reams v. Riggan*, 224 N.C. App. 78, 735 S.E.2d 407 (2012).]

f. Allocation of premium payments.

i. The amount that is, or will be, paid by a parent (or a parent's spouse) for health insurance (medical, or medical and dental) for the children for whom support is being determined is added to the basic child support obligation and prorated between the parents based on their respective incomes. [2020 Guidelines.] For more on adjustments to the guideline amount of support for providing health insurance, see Section III.L.3, above.

ii. A noncustodial parent who pays more than his share of the cost of providing health insurance for the child is given a credit against his child support obligation for payment of health insurance premiums in excess of his share. [Worksheet A, Form AOC-CV-627, Child Support Obligation Primary Custody; Worksheet B, Form AOC-CV-628, Child Support Obligation Joint or Shared Physical Custody; Worksheet C, Form AOC-CV-629, Child Support Obligation Split Custody.]

g. Failure to provide coverage ordered or agreed upon. If a party who is required to provide health insurance for a minor child fails to do so, the party is liable for any health, hospital, or dental expenses that are incurred after the date of the order or

agreement that would have been covered had the required insurance been in force. [G.S. 50-13.11(e).]

h. Responsibilities of the employer or health insurer providing coverage.

i. If a court order requires a parent to provide health insurance coverage for a child and the parent is eligible for family health insurance coverage through the parent's employer or a health insurer, the employer or insurer must:

(a) Allow the parent to enroll an eligible child covered by the order under family coverage without regard to enrollment season restrictions;

(b) Enroll an eligible child covered by the order upon the application of the child's other parent, a IV-D agency, or a Medicaid agency if the employed or insured parent fails to enroll the child;

(c) Not disenroll or eliminate coverage of the child unless the order is no longer in effect, the child is enrolled in a comparable health plan, or the employer has eliminated family health benefit plan coverage for all its employees. [G.S. 58-51-120(b); 108A-69.]

ii. When a child is covered under the noncustodial parent's health insurance plan, the health insurer must:

(a) Provide the custodial parent with any information necessary to obtain covered benefits for the child;

(b) Permit the custodial parent, or a health care provider with the custodial parent's consent, to submit claims for covered services without the noncustodial parent's approval;

(c) Make payments on claims submitted by or on behalf of the custodial parent directly to the custodial parent, the provider, or the N.C. Department of Health and Human Services. [G.S. 58-51-120(c).]

iii. A health insurer may not refuse to enroll a child under a parent's health benefit plan because the child:

(a) Was born out of wedlock,

(b) Is not claimed by the parent as a dependent on the parent's federal income tax return, or

(c) Does not reside with the parent or within the insurer's service area. [G.S. 58-51-120(a).]

iv. If a custodial or noncustodial parent is required by court order to provide health benefit plan coverage for a child and the parent is eligible for family health benefit plan coverage through an employer, the parent's employer must withhold from the parent's compensation the employee's share, if any, of premiums for health benefit plan coverage, not to exceed the maximum amount permitted under the federal Consumer Credit Protection Act, and must pay that amount to the health insurer. [G.S. 108A-69(b)(4).]

i. Responsibilities of employer or insurer when plan covered by ERISA.

i. A group health plan or employee health benefit plan that is covered by the federal Employee Retirement Income Security Act (ERISA) must comply with

a medical support order issued pursuant to G.S. 50-13.11(a1) if the medical support order is a qualified medical child support order (QMCSO). [29 U.S.C. § 1169(a)(1).]

ii. A QMCSO must:

(a) Include the name and address of the child recipient and the plan participant, [29 U.S.C. § 1169(a)(3)(A).]

(b) Describe the type of health care coverage that must be provided to the child recipient, [29 U.S.C. § 1169(a)(3)(B).] and

(c) State the period of time covered by the order. [29 U.S.C. § 1169(a)(3)(C).]

iii. An employer or insurer must provide benefits under a parent's health care plan to an eligible child in accordance with a QMCSO. [29 U.S.C. § 1169(a)(1).] A QMCSO may not require a health insurer to provide any benefit that is not otherwise provided under the parent's health care plan, except as required by 42 U.S.C. § 1396g-1 and G.S. 58-51-120. [29 U.S.C. § 1169(a)(4).]

3. Dental insurance. A court may require one or both parties in a civil child support proceeding to maintain dental insurance for a child. [G.S. 50-13.11(a1); 2020 Guidelines.]

4. Medical expenses related to a child's birth and the mother's pregnancy.

a. An order entered in a criminal nonsupport proceeding involving a child born out of wedlock, or in a civil action to determine the paternity of a child born out of wedlock, may require the child's father to pay medical expenses related to the child's birth and the mother's pregnancy. [G.S. 49-8(4) (necessary expenses of birth of the child and suitable medical attention for mother) and 49-15 (medical expenses incident to the pregnancy and the birth of the child), *amended by* S.L. 2013-198, § 23, effective June 26, 2013.]

b. G.S. 49-15 limits recovery of prebirth expenses to medical expenses and does not authorize an award for other expenses incurred before birth. [*Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (rejecting mother's claims for nursery expenses and the cost of maternity clothes before child was born).]

c. If evidence is presented as to the medical expenses incident to the mother's pregnancy, the trial court must address the issue in its order. [*See Crews v. Paysour*, 261 N.C. App. 557, 821 S.E.2d 469 (2018).]

D. Retroactive Support (Also Called "Prior Maintenance")

1. Generally.

a. "Prior maintenance" is the term used, in the absence of an existing child support order, for support awarded prior to the date a civil action for child support is filed. [*Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000) (using term "retroactive child support"). *See also State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998) (retroactive support means support owed for a time period before a complaint or motion seeking support is filed).]

b. A claim for prior maintenance may be brought by a child's custodial parent or caretaker seeking reimbursement from the child's noncustodial parent for actual,

reasonable, and necessary expenditures made by the custodial parent or caretaker for the child's care prior to the date a civil action for child support was commenced against the noncustodial parent. [*See Taylor v. Taylor*, 118 N.C. App. 356, 455 S.E.2d 442 (1995), *rev'd on other grounds*, 343 N.C. 50, 468 S.E.2d 33 (1996).]

c. The three-year statute of limitations established under G.S. 1-52(2) has been applied to a claim for prior maintenance. [*See Napowsa v. Langston*, 95 N.C. App. 14, 381 S.E.2d 882 (plaintiff can seek recovery of expenditures that occurred three years or less before date action was filed for support of her child born out of wedlock; rejecting defendant's argument that plaintiff was not entitled to retroactive child support under G.S. 49-15 for expenditures incurred before defendant's paternity was established), *review denied*, 325 N.C. 709, 388 S.E.2d 460 (1989).]

d. The doctrine of laches is not applicable to bar an action for retroactive child support. [*Napowsa v. Langston*, 95 N.C. App. 14, 381 S.E.2d 882 (the public policy concern about stale claims is adequately addressed by the three-year statute of limitations applied to claims for prior maintenance), *review denied*, 325 N.C. 709, 388 S.E.2d 460 (1989).]

e. A claim for prior maintenance is legally distinct from a claim for child support pursuant to G.S. 50-13.4. A claim for prior maintenance, however, may be joined as a separate claim in a civil action with a claim for child support pursuant to G.S. 50-13.4.

f. A claim for prior maintenance, or retroactive support, does not include expenses incurred before the child's birth. The only prebirth expenses allowed are medical expenses pursuant to G.S. 49-15. [*Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (citing *Robinson v. Robinson*, 210 N.C. App. 319, 707 S.E.2d 785 (2011), and *Freeman v. Freeman*, 103 N.C. App. 801, 407 S.E.2d 262 (1991)) (since parent's obligation for support arises when the child is born, order allowing as retroactive support nursery expenses and cost of maternity clothes reversed).]

2. Prior maintenance is often referred to as "retroactive child support."

a. Referring to prior maintenance as "retroactive child support" may be confusing, as "retroactive child support" is also used to refer to a retroactive increase in the amount provided in an existing support order. [*See Zurosky v. Shaffer*, 236 N.C. App. 219, 763 S.E.2d 755 (2014) (citing *Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000)) (discussing the "two varieties" of retroactive child support).] For a discussion about awarding retroactive support when there is an existing order, see *Modification of Child Support Orders*, Part 3 of this Chapter, Section II.G.4.

b. Adding to the confusion is the occasional incorrect use of the term "retroactive child support." [*See Taylor v. Taylor*, 118 N.C. App. 356, 455 S.E.2d 442 (1995) (noting that trial court erred in classifying support due from time claim was filed to date of trial as "retroactive child support"), *rev'd on other grounds*, 343 N.C. 50, 468 S.E.2d 33 (1996).]

3. Calculating amount of the award for prior maintenance for the period before a civil action for child support is filed.

a. In cases involving a parent's obligation to support her child for a period before a child support action was filed (i.e., cases involving claims for "retroactive child support" or "prior maintenance"), a court may determine the amount of the parent's obligation:

i. By determining the amount of support that would have been required had the guidelines been applied at the beginning of the time period for which support is being sought or

ii. Based on the parent's fair share of actual expenditures for the child's care. [2020 Guidelines.]

b. Until 2011, it appeared that the decision on whether to award prior maintenance based on the guidelines or on a parent's fair share of actual expenditures was discretionary under the guidelines. However, in 2011, cases began to require that an award of retroactive child support be determined based on the parent's actual expenditures for the child during the period for which retroactive child support was sought, based in part on concerns that the Conference of Chief District Judges had exceeded its authority in formulating the guideline provision providing for retroactive support to be based on the guidelines. [*Hinshaw v. Kuntz*, 234 N.C. App. 502, 760 S.E.2d 296 (2014) (citing *Robinson v. Robinson*, 210 N.C. App. 319, 707 S.E.2d 785 (2011)); *Respess v. Respess*, 232 N.C. App. 611, 629, 754 S.E.2d 691, 703 (2014) (citing *Robinson* and *Carson v. Carson*, 199 N.C. App. 101, 680 S.E.2d 885 (2009)) (reversing an award of retroactive child support calculated pursuant to the guidelines, stating that the 2011 Guidelines provision allowing retroactive support to be calculated pursuant to the guidelines or actual expenditures "conflicts with the holding of *Robinson*"); *Robinson* (appellate court cited statement from 1989 case that retroactive child support payments are only recoverable for amounts actually expended on the child's behalf without citing or discussing the guideline provision allowing retroactive support to be based on the guidelines; appellate court reversed order for retroactive support that had no findings as to actual expenditures made on behalf of the children during period for which retroactive support was sought).]

c. In direct response to *Respess v. Respess*, 232 N.C. App. 611, 754 S.E.2d 691 (2014), G.S. 50-13.4(c1) was amended to clarify that the authority of the Conference of Chief District Judges to prescribe statewide presumptive guidelines for the computation of child support obligations includes retroactive support obligations. [G.S. 50-13.4(c1), *amended by* S.L. 2014-77, § 8, effective July 22, 2014, to add "retroactive support obligations."]

i. The 2020 and 2015 Guidelines retained the language from the 2011 Guidelines that provides that in cases involving a parent's obligation to support a child for a period before a child support action was filed, a court may determine the amount of the parent's obligation:

(a) By determining the amount of support that would have been required had the guidelines been applied at the beginning of the time period for which support is being sought or

(b) Based on the parent's fair share of actual expenditures for the child's care. [2020 Guidelines; 2015 Guidelines.]

d. In a recent case, the trial court's use of the 2015 Guidelines to calculate father's retroactive child support obligation was upheld, calling father's assertion that application of the guidelines to retroactive support was error "meritless." [*Jonna v. Yaramada*, 273 N.C. App. 93, 101, 848 S.E.2d 33, 42 (2020).]

e. In an earlier case in which the 2015 Guidelines were not applicable, an award of retroactive child support was determined based on the parent's fair share of actual expenditures for the child's care. [*See Moore v. McLaughlin*, 240 N.C. App. 88, 772 S.E.2d 14 (2015) (**unpublished**) (retroactive child support for period between July 23, 2010, and Feb. 14, 2012, the date the action was revived after being discontinued twice, was to be determined based on evidence of father's actual expenditures for the child).]

f. For more on retroactive support, see Cheryl Howell, *Retroactive Child Support: What Is It and How Is the Amount Determined?* UNC Sch. of Gov't: On the Civil Side Blog (Apr. 1, 2016), http://civil.sog.unc.edu/retroactive-child-support-what-is-it-and-how-is-the-amount-determined.

4. Award based on actual expenditures.

a. The amount of prior maintenance awarded by the court based on actual expenditures must be based on the amount of the actual, reasonable, and necessary expenditures by the custodial parent or caretaker for a child's care and the noncustodial parent's financial ability to pay her fair share of those expenses. [*Stanley v. Stanley*, 118 N.C. App. 311, 454 S.E.2d 701 (1995) (trial court must calculate defendant's share of the monies actually expended by plaintiff for the care of the child during the relevant period); *Robinson v. Robinson*, 210 N.C. App. 319, 707 S.E.2d 785 (2011) (a party seeking retroactive child support must present sufficient evidence of past expenditures made on behalf of the child and evidence that such expenditures were reasonably necessary).]

b. Retroactive child support is calculated by considering reasonably necessary expenditures made on behalf of the child by the party seeking support and the defendant's ability to pay during the period in the past for which retroactive support is sought. [*State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998); *Savani v. Savani*, 102 N.C. App. 496, 403 S.E.2d 900 (1991) (award of retroactive child support must take into account defendant's ability to pay during the period in the past for which reimbursement is sought); *Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (citing *Savani*) (order awarding retroactive support in a high-income case reversed when it did not include findings as to father's ability to pay during the time period for which reimbursement was sought, clarifying for the trial court on remand that the time period for which reimbursement is sought is not when the matter is heard but is the period in the past during which the expenses were incurred).]

c. Retroactive support may not be awarded for a period of time when the parties were complying with payment obligations contained in an unincorporated separation agreement absent a showing of an emergency. [*Carson v. Carson*, 199 N.C. App. 101, 680 S.E.2d 885 (2009) (it is error to award retroactive child support in excess of the terms of an unincorporated separation agreement absent an emergency situation); *Hinshaw v. Kuntz*, 234 N.C. App. 502, 760 S.E.2d 296 (2014) (citing *Carson*) (when father was making child support payments, as provided in a valid unincorporated separation agreement, until mother filed a complaint for child support, and even when he voluntarily increased his support payments after wife's alimony expired, trial court was not authorized to award retroactive support; mother's argument, that pursuant to the agreement father's obligation for support expired when his obligation

to pay alimony expired, was rejected).] For a discussion of the application of the guidelines in cases involving retroactive support in the context of an unincorporated separation agreement, see Section III.D.5.b, above.

d. Burden of proof.

   i. The party seeking retroactive child support must present sufficient evidence of actual expenditures made on behalf of the child and that those expenditures were reasonably necessary. [*State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998) (citing *Savani v. Savani*, 102 N.C. App. 496, 403 S.E.2d 900 (1991)).]

   ii. Once proof of reasonably necessary actual expenditures under G.S. 50-13.4(c) is made, the trial court must reimburse plaintiff for her past expenditures "(1) to the extent she paid father's share of such expenditures, and (2) to the extent the expenditures occurred three years or less before . . . the date she filed her claim for child support." [*State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 648, 507 S.E.2d 591, 595 (1998) (quoting *Napowsa v. Langston*, 95 N.C. App. 14, 21, 381 S.E.2d 882, 886, *review denied*, 325 N.C. 709, 388 S.E.2d 460 (1989)).]

e. Proof of expenditures.

   i. "Contrary to defendant's assertion that plaintiff's affidavit did not constitute evidence of actual expenditures, an affidavit is recognized by this court as a basis of evidence for obtaining support." [*Savani v. Savani*, 102 N.C. App. 496, 502, 403 S.E.2d 900, 904 (1991) (plaintiff's affidavit setting out the expenses she incurred while child in her custody, supplemented by testimony at trial for period not covered by affidavit, was sufficient basis for order reimbursing her for past support).] For more on financial affidavits, see *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section I.F.6.

   ii. A party seeking retroactive support based on actual expenditures must provide "actual evidence" as to the date or dates the expenses were incurred. [*Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (citing *Carson v. Carson*, 199 N.C. App. 101, 680 S.E.2d 885 (2009)) (mother's evidence showed the amount paid and the relevant merchant but not the date the expenses were incurred; as evidence failed to show that submitted expenses were incurred prior to filing of the complaint, order for the listed expenses reversed).]

f. Allocation of retroactive child support expenses between the parties.

   i. The measure of the noncustodial parent's liability to the custodial parent is the amount actually expended by the custodial parent that represents the noncustodial parent's share of support. [*Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (citing *Hicks v. Hicks*, 34 N.C. App. 128, 237 S.E.2d 307 (1977)) (order requiring father to reimburse mother 100 percent of her expenditures was remanded for determination of portion that should be allotted to mother); *Napowsa v. Langston*, 95 N.C. App. 14, 381 S.E.2d 882 (mother entitled to be reimbursed for past expenditures to the extent she paid father's share of those expenditures), *review denied*, 325 N.C. 709, 388 S.E.2d 460 (1989).]

g. Findings.

i. What findings and conclusions in support of an award of retroactive support based on actual expenditures must include.

(a) Findings in support of an award of retroactive child support must include the actual expenditures made on behalf of the child between the relevant dates; judge must also determine that the actual expenditures were reasonably necessary. [*McCullough v. Johnson*, 118 N.C. App. 171, 454 S.E.2d 697 (1995) (citing *Savani v. Savani*, 102 N.C. App. 496, 403 S.E.2d 900 (1991)).]

(b) A trial court's award of retroactive child support must be based on findings adequate to show that plaintiff paid defendant's share of child support as determined under G.S. 50-13.4(c). [*Napowsa v. Langston*, 95 N.C. App. 14, 381 S.E.2d 882, *review denied*, 325 N.C. 709, 388 S.E.2d 460 (1989).]

h. Findings sufficient to support an award of retroactive support based on actual expenditures.

i. *Savani v. Savani*, 102 N.C. App. 496, 403 S.E.2d 900 (1991). Evidence in the record supported trial judge's findings of amount of expenditures over eleven-month period and that amount was reasonable under the circumstances taking into account plaintiff's income, the needs of the child, the income of the defendant, and the accustomed standard of living of the child with defendant.

i. Findings not sufficient to support an award of retroactive support based on actual expenditures.

i. *McCullough v. Johnson*, 118 N.C. App. 171, 172, 454 S.E.2d 697, 697–98 (1995). Finding, which was actually a conclusion, that a "reasonable amount of past child support, for the period Sept. 1, 1992, through Dec. 31, 1992, is $500 per month" insufficient to support an order for retroactive child support. **NOTE**: Period covered was after complaint for support was filed, so support was actually prospective support and not retroactive support.

ii. *Napowsa v. Langston*, 95 N.C. App. 14, 381 S.E.2d 882, *review denied*, 325 N.C. 709, 388 S.E.2d 460 (1989). Trial court's findings were insufficient to support award of retroactive child support absent findings as to parties' estates, earnings, conditions, and accustomed standard of living.

j. What findings and conclusions in support of a decision to deny a motion for reimbursement of actual expenditures must include.

i. *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 649, 507 S.E.2d 591, 596 (1998). A trial court may not simply "decline" to award plaintiff retroactive child support "unless its findings support that plaintiff is not so entitled." When a party seeking retroactive child support puts forth ample evidence of her actual expenditures on the minor's behalf, to deny retroactive support the court's findings must support its conclusion that the party is, in essence, entitled to no sum of reimbursement.

k. Findings not sufficient to support denial of a motion for reimbursement of actual expenditures.

i. *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998). When order contained no findings relating to plaintiff's actual expenditures despite a twenty-nine-page affidavit of expenses submitted by plaintiff, and no findings as to the reasonableness thereof or to the defendant's ability to pay during the three-year period at issue (including the extent to which plaintiff paid defendant's share), order's findings were insufficient to support its conclusion that plaintiff should receive no amount of reimbursement from defendant.

ii. *Orange Cty. ex rel. Dashman v. Dubeau*, 175 N.C. App. 592, 624 S.E.2d 433 (2006) (**unpublished**). Findings inadequate to support decision to deny mother's motion for retroactive support when there was only cursory mention of the total amount mother expended without any specific mention of the nature of the expenditures; there was no specific mention of the reasonableness of the expenditures, only of a "generous standard of living enjoyed" by mother during the relevant time period; and there was no mention of father's ability to pay during the three-year period at issue, nor any determination of the extent to which mother had paid father's share.

5. Award based on guidelines.

   a. If retroactive support is to be awarded based on the guidelines, the 2020 Guidelines provide that the guideline amount is set "by determining the amount of support that would have been required had the guidelines been applied at the beginning of the time period for which support is being sought."

   b. This means that the trial court sets the amount of retroactive support based on both the income of the parties at the beginning of the time period for which support is sought and the guidelines in effect at that time. [*See* 2010 Howell Bulletin, http://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/flb24.pdf.]

   c. However, if the child's parents have executed a valid, unincorporated separation agreement that determined a parent's child support obligation for the period before the child support action was filed, the court shall not enter an order for retroactive support or prior maintenance in an amount different from the amount required by the unincorporated separation agreement. [2020 Guidelines; *Carson v. Carson*, 199 N.C. App. 101, 680 S.E.2d 885 (2009) (it is error to award retroactive child support in excess of the terms of an unincorporated separation agreement absent an emergency situation).] See Section III.D.5.b, above, for discussion of the application of the guidelines in cases involving claims for retroactive support when there is an unincorporated separation agreement.

6. Attorney fees.

   a. Trial court has discretion to award attorney fees pursuant to G.S. 50-13.6 in proceedings for retroactive child support. [*Napowsa v. Langston*, 95 N.C. App. 14, 381 S.E.2d 882, *review denied*, 325 N.C. 709, 388 S.E.2d 460 (1989).]

   b. It was error to award attorney fees in connection with a mother's claim for retroactive child support when the trial court did not find that defendant "refused" to pay an adequate amount of support as required by G.S. 50-13.6 in support only cases. [*Carson v. Carson*, 199 N.C. App. 101, 680 S.E.2d 885 (2009) (where appellate court was unable to ascertain the portion of fees based on an improperly granted retroactive

child support award, case was remanded for findings as to fees attributable to the award of prospective child support, which was upheld).]

c. When father maintained that there would have been no award of arrears for retroactive child support, and thus no award of attorney fees for that claim, if the court had properly credited father's postseparation payments as payment of retroactive support rather than as payment of marital debt, award of attorney fees was vacated for findings classifying and valuing the challenged postseparation payments. [*Robinson v. Robinson*, 210 N.C. App. 319, 707 S.E.2d 785 (2011).] See Section VIII.A, below, for more on attorney fees.

7. For a retroactive increase in the amount of child support provided in an existing order, see *Modification of Child Support Orders*, Part 3 of this Chapter.

E. Public Assistance Debt

1. The responsible parent (or responsible parents) of a child is liable to the state for reimbursement of public assistance paid by the state on behalf of the child. [G.S. 110-135.]
2. What "public assistance" includes.
   a. The term "public assistance" clearly includes cash assistance paid on behalf of a dependent child under the state's Aid to Families with Dependent Children (AFDC) program or Temporary Assistance to Needy Families (TANF) program, called Work First and probably includes IV-E (referencing the program's legal authorization under Title IV-E of the federal Social Security Act) foster care assistance.
   b. It is unclear whether public assistance includes state foster care assistance paid pursuant to G.S. 108A-48 or other public assistance or social services provided to a dependent child.
3. Relationship between G.S. 110-135 and 50-13.4.
   a. An action to recover a public assistance debt created under G.S. 110-135 is legally distinct from a claim for child support pursuant to G.S. 50-13.4. An action to collect a public assistance debt pursuant to G.S. 110-135, however, may be joined as a separate claim in a civil action with a claim for child support pursuant to G.S. 50-13.4 brought by a IV-D agency when a child's right to child support has been assigned to the state pursuant to G.S. 110-137. For definition of a IV-D case and a non-IV-D case, see Section III.I.7.b, above.
      i. G.S. 110-135 must be read and applied *in pari materia* with G.S. 110-137. Any child support payments received from a noncustodial parent and retained by the state pursuant to an assignment under G.S. 110-137 offsets dollar-for-dollar the noncustodial parent's public assistance debt under G.S. 110-135. It is not necessary to bring an action under G.S. 110-135 against a noncustodial parent when the noncustodial parent has been required to pay child support under a valid child support order throughout the entire period of time that the child received public assistance and the child's right to child support has been assigned to the state under G.S. 110-137.
4. The State of North Carolina or the county from which assistance is received is the real party in interest in a claim for reimbursement of public assistance under G.S. 110-135.

[G.S. 110-137; 110-135; *State ex rel. Crews v. Parker*, 319 N.C. 354, 354 S.E.2d 501 (1987) (the state or county is the real party in interest in an action to recover public assistance up to the amount provided when the child's right to support has been assigned to the state or county as a condition of receiving public assistance pursuant to G.S. 110-137; grandmother who had raised child since birth was entitled to intervene to assert right to receive compensation from father for years grandmother had supported child before receiving AFDC benefits).] For extensive discussion of the parties and their legal relationship in a child support enforcement action, see 2007 Saxon Bulletin, https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/flb22.pdf.

5. The county attorney or an attorney retained by the state or county is responsible for representing the state in actions brought pursuant to G.S. 110-135. [G.S. 110-135.]

6. A claim under G.S. 110-135 must be filed within five years of receipt of the last payment of public assistance on behalf of the child. [G.S. 110-135. *See State ex rel. Terry v. Marrow*, 71 N.C. App. 170, 321 S.E.2d 575 (1984).]

7. The court may deny the state's claim based on laches, estoppel, or other equitable defenses. [*See Moore Cty. ex rel. Evans v. Brown*, 142 N.C. App. 692, 543 S.E.2d 529 (trial court had discretion to consider the equity of granting Moore County Department of Social Services' motion to pursue father for public assistance debt; trial court's denial of the motion due to equitable considerations affirmed), *review denied*, 353 N.C. 728, 550 S.E.2d 780 (2001); *State ex rel. Gillikin v. McGuire*, 174 N.C. App. 347, 620 S.E.2d 899 (2005) (citing *Moore Cty. ex rel. Evans*) (in determining whether to order reimbursement under G.S. 110-135 for public assistance previously paid on behalf of a child, the trial court is vested with considerable discretion to consider both law and equity).]

8. In its initial consideration of a claim for reimbursement of past public assistance, the trial court did not err when it denied a request for reimbursement of past paid public assistance based on the fact that, during the fifteen-year period assistance was paid on behalf of the child, multiple other persons had been named as potential fathers and defendant had not been named. [*State ex rel. Gillikin v. McGuire*, 174 N.C. App. 347, 620 S.E.2d 899 (2005) (court allowed to consider equitable factors in determining whether to order reimbursement). *But cf. Orange Cty. ex rel. Harris v. Keyes*, 158 N.C. App. 530, 581 S.E.2d 142 (2003) (error for trial court to forgive past public assistance debt owed to the State of North Carolina for period before defendant knew of the minor child's existence when defendant had agreed in a voluntary support agreement to reimburse the state for public assistance provided for that period; trial court had no legal basis to retroactively modify father's vested child support arrears).] For modification of an order providing for reimbursement of past paid public assistance, see *Modification of Child Support Orders*, Part 3 of this Chapter, Section II.H.4.a.

9. A conviction under G.S. 14-322 for failure to support established paternity and collaterally estopped defendant from relitigating the issue of paternity in a later civil action by the state for reimbursement of public assistance. [*State ex rel. Lewis v. Lewis*, 311 N.C. 727, 319 S.E.2d 145 (1984) (defendant's conviction under G.S. 14-322 necessarily required a finding that defendant was the father of the children whose support was at issue; the State of North Carolina was administering the child support enforcement program for

the county that brought the subsequent civil action, so the parties in the civil action were identical or in privity with the parties in the criminal action).] **NOTE**: When *Lewis* was decided, the standard of proof for a civil paternity action was beyond a reasonable doubt, allowing application of collateral estoppel. Collateral estoppel may not be used when the two actions have different standards of proof. [Sara DePasquale, Fathers and Paternity: Applying the Law in North Carolina Child Welfare Cases 60–61 (UNC School of Government, 2016).]

10. The amount of the public assistance debt owed by a responsible parent under G.S. 110-135 is equal to the lesser of (1) the amount of public assistance paid on behalf of the child; (2) the amount of child support that the responsible parent was required to pay on behalf of the child during the period in which the child received public assistance; or (3) the amount of support that the responsible parent was financially able to provide during the period in which the child received public assistance. [See Section VII.E.3, above; *State ex rel. Terry v. Marrow*, 71 N.C. App. 170, 175, 321 S.E.2d 575, 578 (1984) ("The only limitations in G.S. 110-135 on the extent of reimbursement for which judgment may be obtained relate to the defendant's financial ability to furnish support during the relevant period of time").]
    a. It is error to calculate the amount of past paid public assistance from the date of the original demand notice to a defendant. [*Guilford Cty. ex rel. Manning v. Richardson*, 149 N.C. App. 663, 562 S.E.2d 67 (2002) (obligation to support a child born out of wedlock begins on birth of the child, not when defendant's paternity is judicially determined).]
11. Reduction in past due public assistance debt.
    a. Pursuant to an amendment to G.S. 110-135 effective Dec. 13, 2005, past due public assistance debt is subject to a one-time two-thirds reduction if:
        i. The debt is at least $15,000;
        ii. The responsible parent continues to be obligated to pay current child support;
        iii. The state and the responsible parent agree and the court approves the agreement after an inquiry into the responsible parent's financial status; and
        iv. The responsible parent makes each court-ordered child support payment for a twenty-four-month period, including payments due on child support arrears. [G.S. 110-135, *amended by* S.L. 2005-389, § 2.]
    b. If the responsible parent is late or defaults on any single payment during the twenty-four-month period, there is no reduction in the public assistance debt. [G.S. 110-135, *amended by* S.L. 2005-389, § 2.]
    c. The reduction of public assistance debt set out in G.S. 110-135 is in addition to other remedies available to the state for the retirement of the debt. [G.S. 110-135, *amended by* S.L. 2005-389, § 2.]

VIII. Attorney Fees

A. Attorney Fees

1. Authorization.

   a. G.S. 50-13.6 allows a court in its discretion to award reasonable attorney fees in an original action for support or for custody and support, including a motion in the cause to modify or vacate, to an interested party acting in good faith who has insufficient means to defray the expense of the suit. [G.S. 50-13.6; *Belcher v. Averette*, 152 N.C. App. 452, 568 S.E.2d 630 (2002) (trial court has considerable discretion in allowing or disallowing attorney fees in child support cases).]

   b. Fees also are authorized to an interested party, as deemed appropriate under the circumstances, upon a finding that the supporting party has initiated a frivolous action or proceeding. [G.S. 50-13.6.] See Section VIII.A.11, below.

   c. In Uniform Interstate Family Support Act (UIFSA) cases, G.S. 52C-3-312(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015, provides that if an obligee prevails, a responding tribunal in North Carolina may assess against an obligor filing fees, reasonable attorney fees, other costs, and necessary travel and other reasonable expenses incurred by the obligee and the obligee's witnesses. The tribunal may not assess fees, costs, or expenses against the obligee or the support enforcement agency of either the initiating or the responding state or foreign country, except as provided by other law. Attorney fees may be taxed as costs and may be ordered paid directly to the attorney, who may enforce the order in the attorney's own name. Payment of support owed to the obligee has priority over fees, costs, and expenses.

   d. Attorney fees may be awarded under a separation agreement entered into pursuant to G.S. 52-10.1 that provides for attorney fees, unless the provision is otherwise contrary to public policy. [*Hennessey v. Duckworth*, 231 N.C. App. 17, 752 S.E.2d 194 (2013) (citing *Bromhal v. Stott*, 341 N.C. 702, 462 S.E.2d 219 (1995)).]

2. Discretion as to award and amount.

   a. The trial court has the discretion to award attorney fees once the statutory requirements of G.S. 50-13.6 have been met. [*Hennessey v. Duckworth*, 231 N.C. App. 17, 752 S.E.2d 194 (2013) (citing *Atwell v. Atwell*, 74 N.C. App. 231, 328 S.E.2d 47 (1985)).]

   b. The amount of attorney fees to be awarded rests within the sound discretion of the trial judge. [*Burr v. Burr*, 153 N.C. App. 504, 570 S.E.2d 222 (2002); *Robinson v. Robinson*, 210 N.C. App. 319, 707 S.E.2d 785 (2011) (citing *Burr*).]

   c. The trial court has discretion to award less than the total amount claimed by an attorney. [*See Kuttner v. Kuttner*, 193 N.C. App. 158, 666 S.E.2d 883 (2008) (order awarding only a portion of mother's attorney fees upheld).]

   d. Trial court has no discretion in an action for child support to award legal fees pursuant to a contingent fee contract. [*Davis v. Taylor*, 81 N.C. App. 42, 344 S.E.2d 19, *review denied*, 318 N.C. 414, 349 S.E.2d 593 (1986).] Such contracts in child support cases are void as against public policy.

3. Type of proceedings in which fees awarded. An award of attorney fees is proper in:
    a. An action or proceeding for the custody, support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support. [G.S. 50-13.6.]
    b. A civil contempt proceeding for willful failure to pay child support. [*Belcher v. Averette*, 152 N.C. App. 452, 568 S.E.2d 630 (2002). *See also Smith v. Smith*, 121 N.C. App. 334, 465 S.E.2d 52 (1996) (obligor ordered to pay obligee's attorney fees in case enforcing consent judgment providing for payment of college expenses).]
    c. Probably a criminal contempt proceeding. [*See LaFell v. LaFell*, 177 N.C. App. 811, 630 S.E.2d 257 (2006) (**unpublished**) (criminal contempt for violation of custody order).]
    d. A remand proceeding following an appeal. [*See Lasecki v. Lasecki*, 257 N.C. App. 24, 809 S.E.2d 296 (2017) (fact that attorney fee award for original trial proceedings was affirmed on appeal did not preclude trial court from ordering additional attorney fees for remand proceedings).]
    e. Proceedings for retroactive child support. [See Section VII.D.6, above.]
4. When request for an award of fees is properly made.
    a. A request for attorney fees may be properly raised by a motion in the cause subsequent to the determination of the main action. [*In re Scearce*, 81 N.C. App. 662, 345 S.E.2d 411, *review denied*, 318 N.C. 415, 349 S.E.2d 590 (1986) (request for fees in a custody case pursuant to G.S. 50-13.6).]
    b. There is no requirement that a party first pay attorney fees before seeking an award pursuant to the statute. [*Belcher v. Averette*, 152 N.C. App. 452, 568 S.E.2d 630 (2002) (denying as irrelevant father's motion to compel mother to answer a discovery request that sought proof that she had paid her attorney fees).]
    c. The court of appeals has noted that no case has imposed a time limitation for the filing of a motion for attorney fees in a child custody and child support action pursuant to G.S. 50-13.6, except that a proper notice of appeal divests the trial court of jurisdiction to enter an order for fees while the appeal is pending. [*Bramblett v. Bramblett*, 218 N.C. App. 454, 721 S.E.2d 763 (2012) (**unpublished**) (order awarding attorney fees upheld against claim that request was not timely when it was not included in complaint and was asserted more than a year after complaint filed; motion for fees was filed after conclusion of hearing on child custody and support, and trial court heard and ruled on motion before entry of an order in the custody and support action and prior to any appeal); *Balawejder v. Balawejder*, 216 N.C. App. 301, 721 S.E.2d 679 (2011) (when a custody order is appealed, the trial court loses jurisdiction to consider a request for attorney fees arising out of the custody case).] But see *Duncan v. Duncan*, 366 N.C. 544, 742 S.E.2d 799 (2013), discussed in *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section I.I.
        i. Note, however, that for attorney fees to be included in the amount withheld from a supporting party's income, the court of appeals has held that such a claim should be asserted before entry of the withholding order. [*Glatz v. Glatz*, 98 N.C. App. 324, 390 S.E.2d 763 (denial of motion for attorney fees filed three months

after entry of the income withholding order affirmed; G.S. 110-136.6(a), allowing court costs and attorney fees to be included in amount withheld, "clearly contemplates" that such claims be asserted before entry of the income withholding order), *review denied*, 327 N.C. 427, 395 S.E.2d 677 (1990).]

ii. For a discussion of a trial court's jurisdiction to enter an order for attorney fees after appeal of the underlying child support order, see *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section I.I.6.

5. Ability of party to pay award of fees.

a. The plain language of G.S. 50-13.6 contains no requirement that a trial court make a finding of ability to pay on the part of the person being ordered to pay before attorney fees may be awarded in a custody and support action. [*Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (although some cases have "mentioned" an obligor's ability to pay an award of fees under G.S. 50-13.6, the statute requires no such finding); *Respess v. Respess*, 232 N.C. App. 611, 754 S.E.2d 691 (2014) (citing *Van Every v. McGuire*, 348 N.C. 58, 497 S.E.2d 689 (1998)) (before awarding fees to mother in custody and support action, trial court was not required to find that father had resources available to pay the fees); *Webster v. Webster*, 182 N.C. App. 767, 643 S.E.2d 84 (2007) (**unpublished**). *But see Smith v. Barbour*, 195 N.C. App. 244, 671 S.E.2d 578 (2009) (trial court findings were sufficient to establish father's ability to pay a portion of attorney fees awarded to child's grandparents); *Roberts v. McAllister*, 174 N.C. App. 369, 621 S.E.2d 191 (2005) (affirming trial court's order requiring mother to pay half of father's attorney fees based, in part, on conclusion that mother had the means to pay half), *appeal dismissed*, 360 N.C. 364, 629 S.E.2d 608 (2006); *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005) (affirming the trial court's award of attorney fees but remanding the issue of defendant's ability to pay a final, lump sum fee award of $17,000 in light of a new equitable distribution order entered in the case).]

6. Insufficient means to defray litigation expenses.

a. A party has insufficient means to defray the expenses of a suit when he is "unable to employ adequate counsel in order to proceed as [a] litigant to meet the other spouse as [a] litigant in the suit." [*Sherrill v. Sherrill*, 272 N.C. App. 532, 534, 846 S.E.2d 336, 339–40 (2020) (quoting *Lawrence v. Tise*, 107 N.C. App. 140, 153, 419 S.E.2d 176, 184 (1992)); *Belcher v. Averette*, 152 N.C. App. 452, 454, 568 S.E.2d 630, 632 (2002) (quoting *Hudson v. Hudson*, 299 N.C. 465, 474, 263 S.E.2d 719, 725 (1980)).]

b. In determining whether a party has insufficient means to defray the cost of the litigation, the trial court must consider the party's actual present income and reasonable expenses at the time of the hearing on the request for attorney fees. [*Sherrill v. Sherrill*, 272 N.C. App. 532, 846 S.E.2d 336 (2020) (trial court erred when it disregarded income mother was earning at time of hearing after finding that the new custody arrangement ordered by the court would require her to relocate and leave her current employment).]

c. In determining whether a party has insufficient means to defray the expenses of the suit, the trial court should focus on both the disposable income of the spouse seeking fees and on her separate estate. [*Van Every v. McGuire*, 348 N.C. 58, 497

S.E. 2d 689 (1998) (trial court also may compare the estates of the parties, as set out in Section VIII.A.6.c.i, below); *Bookholt v. Bookholt*, 136 N.C. App. 247, 523 S.E.2d 729 (1999) (citing *Van Every*) (findings failed to take into account plaintiff's liquid estate of $88,000 and focused instead on her negative disposable income to justify award of fees), *superseded by statute on other grounds as stated in Williamson v. Williamson*, 142 N.C. App. 702, 523 S.E.2d 729 (2001); *Murn v. Murn*, 723 S.E.2d 583 (N.C. Ct. App. 2012) (**unpublished**) (citing *Belcher v. Averette*, 152 N.C. App. 452, 568 S.E.2d 630 (2002)) (plaintiff was without sufficient means to pay fees when fees were approximately four times her monthly gross income and evidence showed that defendant owed child support arrearages of $12,036, which meant that plaintiff had to assume majority of financial responsibility for shared monthly basic child support obligation of $4,438.50, which took vast majority of her monthly income).]

i. Fact that a party has a substantial separate estate does not automatically negate her right to attorney fees, but to award fees in such a case, the trial court must find that the use of the separate estate to pay litigation expenses would amount to an unreasonable depletion of that estate. [*Bookholt v. Bookholt*, 136 N.C. App. 247, 523 S.E.2d 729 (1999) (citing *Chused v. Chused*, 131 N.C. App. 668, 508 S.E.2d 559 (1998)) (findings insufficient when court failed to find that use of plaintiff's separate estate to pay her attorney fees would result in an unreasonable depletion of her estate and failed to determine whether plaintiff was an interested party acting in good faith), *superseded by statute on other grounds as stated in Williamson v. Williamson*, 142 N.C. App. 702, 523 S.E.2d 729 (2001); *Chused* (where court did not make findings addressing whether mother's estate would be unreasonably depleted if she had to pay her attorney fees, order requiring defendant to pay fees was reversed and remanded).]

ii. Plaintiff did not meet the statutory requirement of insufficient means to defray the expense of the suit when evidence established that she had a net estate of $665,652 and substantial income. [*Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980).]

d. A district court may determine that a party has sufficient means to defray costs of an action without considering the estate of the other party. [*Taylor v. Taylor*, 343 N.C. 50, 468 S.E.2d 33 (1996) (mother had means to defray expenses where her monthly income exceeded her expenses, she received $1.2 million in property settlement, and no unreasonable depletion of her estate would be required to pay attorney fees; rejecting mother's argument that this determination requires consideration of the relative estates of the parties); *Osborne v. Osborne*, 129 N.C. App. 34, 497 S.E.2d 113 (1998) (citing *Taylor*) (a court is not required to compare the parties' relative estates before attorney fees are awarded).]

i. Though not required, a comparison of estates is permitted. [*Van Every v. McGuire*, 348 N.C. 58, 60, 497 S.E. 2d 689, 690 (1998) (emphasis in original) (that G.S. 50-13.6 "does not *require* the trial court to compare the relative estates of the parties does not automatically mean that it does not *allow* or *permit* the trial court to do so in a proper case"); *Bookholt v. Bookholt*, 136 N.C. App. 247, 253, 523 S.E.2d 729, 733 (1999) (citing *Van Every*) (noting that a trial judge is not required to compare the separate estates of both parties in determining the

propriety of attorney fees but may do so under appropriate circumstances; on remand, trial court could "if it so chooses" compare the separate estates of the parties to determine whether requiring plaintiff to pay her attorney fees would result in an unreasonable depletion of her estate), *superseded by statute on other grounds as stated in Williamson v. Williamson*, 142 N.C. App. 702, 523 S.E.2d 729 (2001); *Hennessey v. Duckworth*, 231 N.C. App. 17, 752 S.E.2d 194 (2013) (addressing conclusion in custody and support action that plaintiff had insufficient means to defray expenses of the suit, noting that plaintiff was unemployed, and that her attorney fees alone "far exceeded" the value of her few assets combined, while defendant had monthly income of close to $11,000).]

ii. Attorney fee award was vacated and remanded where trial court was under the mistaken belief that the law does not allow the court to compare estates. [*Schneider v. Schneider*, 256 N.C. App. 228, 807 S.E.2d 165 (2017) (custody case).]

e. Findings regarding insufficient means to defray expenses.

i. Determination that party has insufficient means to defray expenses must be supported by findings. [*Respess v. Respess*, 232 N.C. App. 611, 754 S.E.2d 691 (2014) (findings were sufficient as to plaintiff's income but remand was required when trial court made no findings as to her expenses or her assets and estate); *Church v. Decker*, 231 N.C. App. 514, 753 S.E.2d 742 (2013) (**unpublished**) (citing *Dixon v. Gordon*, 223 N.C. App. 365, 734 S.E.2d 299 (2012)) (matter remanded when defendant testified as to the value of her home, vehicle, and retirement accounts and as to amount of her annual salary but trial court failed to make findings that would support determination of insufficient means).]

ii. Finding that mother not able to defray litigation expenses upheld; mother had been paying all uninsured medical expenses for the past two years, and she had outstanding balances on those expenses at the time of the hearing. [*Leary v. Leary*, 152 N.C. App. 438, 567 S.E.2d 834 (2002); *Mason v. Erwin*, 157 N.C. App. 284, 579 S.E.2d 120 (2003) (in support only suit, trial court made necessary findings, which were buttressed by other findings, specifically, that plaintiff wife had debts totaling more than $3,700 and it took her six months to save the money necessary to pay her attorney's retainer).]

iii. *But see Belcher v. Averette*, 152 N.C. App. 452, 568 S.E.2d 630 (2002) (no finding as to plaintiff's ability to defray expenses but findings sufficient, as trial court found that minor children did not have the ability to pay and plaintiff was acting on their behalf).

7. Reasonableness of fees awarded.

a. A trial court, considering a motion for attorney fees under G.S. 50-13.6, is permitted, but is not required, to take judicial notice of the customary hourly rates for local attorneys performing the same services and having the same experience as the attorney representing the party seeking the fee award. This would satisfy the party's obligation to provide evidence as to the reasonableness of his attorney's hourly rate. [*Simpson v. Simpson*, 209 N.C. App. 320, 328 n.2, 703 S.E.2d 890, 895 n.2 (2011) (matter of first impression) (proceeding to modify child custody) (however, the court of

appeals "stress[ed]" in a footnote that the better practice is for parties to provide evidence of the customary local rates rather than depending upon judicial notice). *But cf. WFC Lynnwood I LLC v. Lee of Raleigh, Inc.*, 259 N.C. App. 925, 934, 817 S.E.2d 437, 444 (2018) (award vacated where trial court's order simply stated "the court is aware of the range of hourly rates charged by law firms [in the local area and in North Carolina]" and there was no additional evidence in the case on that point).] *See* Ann Anderson, *Attorney Fee Motions and Judicial Notice of "Customary Fee for Like Work"*, UNC Sch. of Gov't: On the Civil Side Blog (July 20, 2018), https://civil.sog.unc.edu/attorney-fee-motions-and-judicial-notice-of-customary-fee-for-like-work.

b. The reasonableness of attorney fees is not gauged by the fees charged by the other side. [*Kuttner v. Kuttner*, 193 N.C. App. 158, 666 S.E.2d 883 (2008) (plaintiff who was ordered to pay defendant's fees unsuccessfully argued that defendant's fees must be unreasonable because they were much higher than those charged by his own counsel).]

c. Findings as to reasonableness of fees.

   i. To support the reasonableness of an award of attorney fees, the trial court must make findings regarding the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers. [*Robinson v. Robinson*, 210 N.C. App. 319, 707 S.E.2d 785 (2011) (order awarding attorney fees must include findings as to the basis of the award, including the nature and scope of the legal services, the skill and time required, and the relationship between the fees customary in such a case and those requested); *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005); *Thomas v. Thomas*, 200 N.C. App. 436, 683 S.E.2d 791 (2009) (**unpublished**) (where the trial court failed to make findings as to the reasonableness of mother's attorney fees, as well as other required findings, award of fees was reversed and issue remanded for further findings).]

   ii. The trial court must make a finding of "reasonableness" regarding the nature and scope of the legal services rendered and the skill and time required. [*Reynolds v. Reynolds*, 147 N.C. App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (trial court did not err in awarding attorney fees of $55,000 when it made numerous findings relating to the skill and expertise of plaintiff's counsel and plaintiff's entitlement to have counsel of a certain caliber to meet defendant and his attorney on an equal footing), *rev'd per curiam on other grounds for reasons stated in dissenting opinion*, 356 N.C. 287, 569 S.E.2d 645 (2002).]

   iii. In *Simms v. Bolger*, 264 N.C. App. 442, 826 S.E.2d 522 (2019), two orders awarding attorney fees in the same year were affirmed as being reasonable. The first order awarded $25,000 in fees, and the defendant did not challenge the reasonableness of the fees; using the affidavit of attorney fees, the trial court broke down hourly rates for counsel, associate counsel, and staff, finding them reasonable for counsel's experience, type of legal services provided, and skill level of a board-certified specialist. The second order awarded $16,240 in fees, and the plaintiff's counsel presented evidence of supplemental attorney fees and expenses, which the trial court found reasonable.

iv. Court made proper findings as to the reasonableness of attorney fees in case finding former husband in contempt for failing to pay child support. [*Belcher v. Averette*, 152 N.C. App. 452, 568 S.E.2d 630 (2002) (trial court found that $6,000 in fees and costs was reasonable for the original hearing and appeal and that hourly rate and time expended as reflected in attorney's affidavit were reasonable).]

v. No abuse of discretion when trial court determined number of hours for wife's counsel based on an extensive discussion with her counsel as well as careful consideration of the attorney's affidavit stating the number of hours he worked on wife's custody and support claims. [*Spicer v. Spicer*, 168 N.C. App. 283, 607 S.E.2d 678 (2005). *See also Beasley v. Beasley*, 259 N.C. App. 735, 816 S.E.2d 866 (2018) (trial court had discretion to determine attorney fee award based on the court record and the attorney fee affidavit submitted to the court); *cf. Murn v. Murn*, 723 S.E.2d 583 (2012) (**unpublished**) (when there were no findings as to the number of hours the attorney worked, order for fees was reversed and remanded for findings on the reasonableness of the fees awarded).]

8. Whether party must be successful in the underlying action.

a. There is no requirement in G.S. 50-13.6 that a party seeking fees in an action for child support or custody be the prevailing party. In many cases awarding fees pursuant to G.S. 50-13.6, whether the recipient of fees is the prevailing party is not raised or discussed. *Cf.* G.S. 52C-3-312(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015, which provides that if an obligee prevails, a responding tribunal in North Carolina may assess against an obligor reasonable attorney fees.

b. One case has specifically rejected the argument that because a party did not prevail in an action involving support and custody the party was not entitled to an award of fees pursuant to G.S. 50-13.6. [*See Burr v. Burr*, 153 N.C. App. 504, 570 S.E.2d 222 (2002) (father sought support and mother sought to modify custody; trial court continued primary custody with father and allowed mother visitation and ordered her to pay current and past support; award of fees to mother upheld, rejecting argument that because mother did not prevail at trial award of attorney fees was improper).] Custody cases are in accord. [*See Wiggins v. Bright*, 198 N.C. App. 692, 679 S.E.2d 874 (2009) (father ordered to pay mother's attorney fees when father's motion for contempt for mother's failure to comply with custody order was denied; order for fees affirmed, as fees were authorized by G.S. 50-13.6 and trial court made required statutory findings as to good faith and insufficient means, making it immaterial whether the recipient of fees was either the movant or the prevailing party; G.S. 50-13.6 requires only that recipient be "an interested party;" father's argument that party awarded fees must have prevailed is contrary to *Burr*); *cf. Baumann-Chacon v. Baumann*, 212 N.C. App. 137, 138 n.1, 710 S.E.2d 431, 432 n.1 (2011) (stating in a footnote that "Plaintiff's claim for attorney's fees rests on [G.S.] 50-13.6 and 50-16.4, which authorize such relief in the event that a litigant successfully prosecutes child support, child custody, or spousal support claims and meets any other applicable conditions for such an award" and thus "rises or falls" with those claims).]

c. One case has upheld an award of fees under G.S. 50-13.6 when "[n]either party was a clear winner or loser." [*Hennessey v. Duckworth*, 231 N.C. App. 17, 21, 752 S.E.2d 194,

198 (2013) (2012 consent order resolved custody and child support claims; mother's claim for attorney fees under G.S. 50-13.6 allowed, father's claim for attorney fees denied; in considering whether the award of fees was precluded by a 2009 unincorporated separation agreement providing that the losing party in any enforcement action was solely responsible for all legal fees and costs, court found it difficult to say who was the "losing party" and who was the "prevailing party" when each party had prevailed on some issues; after court determined that the separation agreement was not applicable, award of fees to mother under G.S. 50-13.6. was upheld when trial court's conclusions as to good faith and insufficient means were supported by adequate findings, which were supported by affidavits and record evidence).]

d. Some appellate cases have reversed an award of fees when the underlying order for support is reversed or remanded on appeal. [*Kowalick v. Kowalick*, 129 N.C. App. 781, 501 S.E.2d 671 (1998) (citing *Walker v. Tucker*, 69 N.C. App. 607, 317 S.E.2d 923 (1984)) (when order decreasing amount mother paid in child support and denying her request for modification of alimony was remanded for findings, award of attorney fees to father was also reversed; father would have to show on remand that he was successful on those claims before being awarded fees); *Walker* (citing *Daniels v. Hatcher*, 46 N.C. App. 481, 265 S.E.2d 429 (1980)) (because portion of the order increasing child support payments was vacated, the award of attorney fees to plaintiff also must be vacated); *Mullen v. Mullen*, 79 N.C. App. 627, 339 S.E.2d 838 (1986) (citing *Walker*) (reversing award of attorney fees because portion of order increasing child support was reversed on appeal), *superseded by statute on other grounds as stated in Brooker v. Brooker*, 133 N.C. App. 285, 515 S.E.2d 234 (1999); *Daniels*, 46 N.C. App. at 485, 265 S.E.2d at 432 (when order increasing father's child support payment was reversed for insufficient findings, order for fees in mother's favor was also reversed, with fees to be reconsidered "only when and if the issue of whether plaintiff is entitled to an award of increased child support is determined in her favor").]

e. Several cases have held that a party is not entitled to an award of attorney fees for a civil contempt proceeding unless the party prevails. [*Reynolds v. Reynolds*, 147 N.C. App. 566, 575, 557 S.E.2d 126, 132 (2001) (John, J., dissenting) (citing *Smith v. Smith*, 121 N.C. App. 334, 465 S.E.2d 52 (1996)), *rev'd per curiam on other grounds for reasons stated in dissenting opinion*, 356 N.C. 287, 569 S.E.2d 645 (2002); *Walter v. Walter*, 279 N.C. App. 61, 864 S.E.2d 534 (2021) (as a general rule, attorney fees are allowed only for a party who prevails in a contempt proceeding); *McKinney v. McKinney*, 253 N.C. App. 473, 799 S.E.2d 280 (2017) (same).

   i. Nonetheless, these cases recognize that in the situation where contempt fails because the alleged contemnor complies with the court order after the motion to show cause is served and prior to the contempt hearing, the court can award fees. [*Ruth v. Ruth*, 158 N.C. App. 123, 579 S.E.2d 909 (2003); *Hudson v. Hudson*, 31 N.C. App. 547, 230 S.E.2d 188 (1976).]

f. However, in *Blanchard v. Blanchard*, 865 S.E.2d 686 (N.C. Ct. App. 2021), the court held that the trial court's authority to award attorney fees under G.S. 50-13.6 for a contempt proceeding does not depend upon who "wins" a particular ruling in a contempt proceeding.

g. For further discussion of this issue, see Cheryl Howell, *Attorney Fees for Contempt in Family Law Cases: Only for a Prevailing Party?*, UNC Sch. of Gov't: On the Civil Side Blog (Nov. 1, 2021), https://civil.sog.unc.edu/attorney-fees-for-contempt-in-family-law-cases-only-for-a-prevailing-party/.

9. Other findings.

a. Findings are required when the court awards attorney fees and also when it denies fees.

i. Trial court is required to make findings of fact to support an award of attorney fees made pursuant to G.S. 50-13.6. [*Burr v. Burr*, 153 N.C. App. 504, 570 S.E.2d 222 (2002).]

ii. Where an award of attorney fees is prayed for but denied, the trial court must provide adequate findings of fact for the appellate court to review its decision. [*Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25 (2006) (citing *Gowing v. Gowing*, 111 N.C. App. 613, 432 S.E.2d 911 (1993)) (remanding to trial court for findings to support denial of request for attorney fees); *Crews v. Paysour*, 261 N.C. App. 557, 566–67, 821 S.E.2d 469, 475 (2018) (quoting *Diehl*, 177 N.C. App. at 653, 630 S.E.2d at 32); *Gowing* (trial court committed error when it made no findings of fact to support denial of attorney fees).]

b. Additional finding required in support only actions.

i. Where the action is solely one for support, the court may award attorney fees to an interested party if it finds "that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding." [G.S. 50-13.6; *Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980) (second sentence of G.S. 50-13.6 applies solely in a support only suit); *Crews v. Paysour*, 261 N.C. App. 557, 821 S.E.2d 469 (2018) (support only case remanded for required findings, including a finding as to whether father was providing adequate support under the circumstances at the time the proceeding was instituted); *Spicer v. Spicer*, 168 N.C. App. 283, 607 S.E.2d 678 (2005) (before awarding fees in an action solely for child support, court must make the required finding under the second sentence of the statute); *Burr v. Burr*, 153 N.C. App. 504, 570 S.E.2d 222 (2002) (citing *Hudson*) (stating that a factual finding regarding refusal to provide support is only necessary when child support is not determined in the same proceeding with child custody).]

ii. Determining whether action is for support only or for support and custody.

(a) A case is considered one for both custody and support when both of those issues were contested before the trial court, even if the custody issue is resolved prior to the support issue being decided. [*Spicer v. Spicer*, 168 N.C. App. 283, 607 S.E.2d 678 (2005) (citing *Taylor v. Taylor*, 343 N.C. 50, 468 S.E.2d 33 (1996)) (when support issue was heard, custody was at issue; even though parties had resolved custody by consent by the time child support order was entered, for attorney fees purposes, the case was considered one for both support and custody).]

(b) An action was for both custody and support when mother's custody claim was pending when case was called for hearing and was not addressed until entry of the order from which appeal was taken. [*Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (even though father's pleading admitted that it was in child's best interest for primary custody to be awarded to mother, and appellate court acknowledged that both parties may have believed and acted as if they had resolved the custody claims before entry of the order, order on appeal was the first and only order that granted legal and physical custody of the child to mother; award of fees to mother upheld).]

(c) An action was for both custody and support, even though the custody issue was "resolved in basically 15 minutes" at trial. [*Theokas v. Theokas*, 97 N.C. App. 626, 630, 389 S.E.2d 278, 280, *review denied*, 327 N.C. 437, 395 S.E.2d 697 (1990). *See also Taylor v. Taylor*, 343 N.C. 50, 468 S.E.2d 33 (1996) (citing *Lawrence v. Tise*, 107 N.C. App.140, 419 S.E.2d 176 (1992)) (an action is properly characterized as one for "custody and support" where both custody and support actions were before trial court when case was called for trial, even though custody issue was quickly settled).]

(d) An action was for both custody and support where wife sought increase in support and husband sought modification of custody. [*Fellows v. Fellows*, 27 N.C. App. 407, 219 S.E.2d 285 (1975).]

(e) Where issue of custody had been settled by the judgment of the court some five months prior to entry of child support judgment, action to determine child support was action for support only. [*Gibson v. Gibson*, 68 N.C. App. 566, 316 S.E.2d 99 (1984) (noting that what was important was not how the custody issue was settled or when but that it was settled and was not at issue when the judgment concerning support was entered). *See also Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980) (custody was initially raised but was disposed of in a consent order and was not at issue when support order was entered).]

iii. Whether support is adequate.

(a) Support can be inadequate even when it is paid as required by a consent judgment. [*Mason v. Erwin*, 157 N.C. App. 284, 579 S.E.2d 120 (2003) (finding that defendant had failed to provide adequate support was upheld, even though defendant paid support as required by a consent judgment; consent judgment did not require support pursuant to the guidelines). *See also Carson v. Carson*, 199 N.C. App. 101, 680 S.E.2d 885 (2009) (support that father paid pursuant to an unincorporated separation agreement was not adequate).]

(b) Support was inadequate based on finding that needs of the children exceeded the amount of support voluntarily paid by plaintiff prior to the hearing. [*Leary v. Leary*, 152 N.C. App. 438, 567 S.E.2d 834 (2002).]

iv. Refusal to pay.

(a) In support only case, trial court erred in awarding attorney fees to wife without making finding that former husband had refused to provide adequate support under the circumstances existing at the time the action was initiated. [*Gibson v. Gibson*, 68 N.C. App. 566, 316 S.E.2d 99 (1984); *Thomas v. Thomas*, 134 N.C. App. 591, 518 S.E.2d 513 (1999) (court failed to make specific finding that father refused to provide child support adequate under the circumstances existing at the time of the institution of this action; no findings that mother was acting in good faith or that her means were insufficient to defray the expenses of the suit were made).]

(b) A parent can be considered to be refusing to pay adequate support for a time period after a complaint for support is filed even though the parent paid the amount agreed upon by the parties in an unincorporated separation agreement. [*See Carson v. Carson*, 199 N.C. App. 101, 680 S.E.2d 885 (2009) (while amount paid pursuant to unincorporated agreement is presumed adequate for time period before action is commenced, trial court was ordered on remand to make proper finding as to whether defendant refused to pay what was adequate after action for support was filed).]

c. Findings in combined actions.

i. A $50,000 award of fees on multiple claims, in this case, child support modification, alimony modification, and contempt, must include adequate findings to support the party's entitlement to attorney fees on each claim. [*Hill v. Hill*, 261 N.C. App. 600, 821 S.E.2d 210 (2018) (trial court on remand instructed to make required findings of fact and conclusions of law for an award of attorney fees on each claim).]

ii. Since attorney fees are not recoverable in an action for equitable distribution, in a combined action, the trial court's findings of fact must reflect that the attorney fees awarded are attributable only to the alimony or child custody and/or support claims. [*Robinson v. Robinson*, 210 N.C. App. 319, 707 S.E.2d 785 (2011) (when trial court failed to make findings reflecting the fees attributable to the alimony and child support portions of the case, appellate court was unable to determine whether the trial court erred by awarding fees for the equitable distribution portion of the case).]

iii. Order was upheld that excluded attorney fees for the equitable distribution portion of a case and directed husband to pay a portion of the approximately 75 percent of wife's attorney fees that were attributable to the custody, child support, and alimony portions of the case, even though the fee affidavits did not label every charge as being attributable to a particular issue. [*Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005) (since services were adequately described, the trial court could compare the time spent on each issue at trial and the evidence presented with the line-item services on the fee affidavits to rationally determine proper apportionment of fees). *See also Clark v. Clark*, 231 N.C. App. 514, 753 S.E.2d 743 (2013) (**unpublished**) (when plaintiff was entitled to attorney fees related to her motions to increase alimony and for payment of child support arrears, both of which were authorized by statute, the trial court was not required to set out amount of fees incurred as to each issue).]

10. Cases with sufficient findings to support an award of attorney fees include:
    a. *Roberts v. McAllister*, 174 N.C. App. 369, 621 S.E.2d 191 (2005), *appeal dismissed*, 360 N.C. 364, 629 S.E.2d 608 (2006). Order requiring mother to pay half of father's attorney fees supported by findings as to father's inadequate monthly income, the reasonableness of father's attorney fees, the increase in fees because of mother's failure to provide support after being asked to do so, and by further findings that father did not have sufficient assets to pay his fees and that mother had the means to pay the half ordered.
    b. *Reynolds v. Reynolds*, 147 N.C. App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting), *rev'd per curiam on other grounds for reasons stated in dissenting opinion*, 356 N.C. 287, 569 S.E.2d 645 (2002). Court found plaintiff to be an interested party who acted in good faith in bringing the action and who did not have sufficient funds with which to employ and pay counsel to handle case that spanned six-year period; court also found the fee award "reasonable and appropriate" and made numerous findings as to the skill and expertise of plaintiff's counsel.
11. Cases with insufficient findings to support an award of attorney fees include:
    a. *Hill v. Hill*, 261 N.C. App. 600, 821 S.E.2d 210 (2018).
        i. An award of attorney fees in an order modifying support lacked findings addressing whether father was providing adequate support at the time he sought modification and, at a later time, when mother sought modification of his obligation. Evidence showed that on both of those dates, father was paying child support in full despite being unemployed.
        ii. A $50,000 award of fees on multiple claims, specifically child support modification, alimony modification, and contempt, did not include adequate findings to support the mother's entitlement to attorney fees on each claim. The trial court was instructed on remand to make the required findings of fact and conclusions of law for an award of attorney fees on each claim.
12. Award of attorney fees in frivolous action by supporting party.
    a. If the court finds as a fact that the supporting party has initiated a frivolous action, it may order the payment of reasonable attorney fees to an interested party as deemed appropriate under the circumstances. [G.S. 50-13.6.]
    b. Father's action for custody and support was frivolous when he had not seen child since the date of separation, had not paid support or contributed to child's other expenses, and owed retroactive support and money for retroactive expenses. [*Doan v. Doan*, 156 N.C. App. 570, 577 S.E.2d 146 (2003).]
    c. Father's complaint for support was frivolous where a support order already was issued in another case file and father alleged no change in circumstances, father's complaint contained several factual errors, and father admitted not reading the complaint before he signed it. [*Durham Cty. ex rel. Adams v. Adams*, 258 N.C. App. 395, 812 S.E.2d 884, *appeal dismissed, review denied*, 371 N.C. 340, 814 S.E.2d 106 (2018).]
13. Award of attorney fees pursuant to provisions in a separation agreement.

a. Attorney fees may be barred by an express provision in a premarital agreement so long as the agreement is performed. [G.S. 50-16.6(b).]

b. Provisions within separation agreements requiring the payment of attorney fees upon a breach by one of the parties are not inconsistent with the public policy in this state. [*Bromhal v. Stott*, 341 N.C. 702, 462 S.E.2d 219 (1995).] For a custody and child support case finding that attorney fees provision in an unincorporated separation agreement was not applicable when the action was not one for breach or specific performance and awarding attorney fees pursuant to G.S. 50-13.6, *see Hennessey v. Duckworth*, 231 N.C. App. 17, 752 S.E.2d 194 (2013).

c. Therefore, provisions for attorney fees are enforceable as provided by the agreement. [*Bromhal v. Stott*, 341 N.C. 702, 462 S.E.2d 219 (1995).]

d. Where separation agreement provided for attorney fees for breach of contract, trial court had authority to award fees for court proceedings following remand of the case from the court of appeals. [*Lasecki v. Lasecki*, 257 N.C. App. 24, 809 S.E.2d 296 (2017) (fact that appellate court affirmed attorney fee award for proceedings before appeal did not impact trial court's ability to award fees for remand proceeding).]

e. For more on attorney fees provisions in a separation agreement, see *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

14. Standard of review on appeal of an award of attorney fees.

a. Whether statutory requirements necessary to support an award of attorney fees in a child custody and support suit have been met is a question of law, reviewable de novo on appeal, and only when these requirements have been met does the standard of review change to abuse of discretion for an examination of the amount of attorney fees awarded. [*Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980); *Hill v. Hill*, 261 N.C. App. 600, 821 S.E.2d 210 (2018) (as a question of law, entitlement to attorney fees pursuant to G.S. 50-13.6 is reviewed de novo); *Carson v. Carson*, 199 N.C. App. 101, 680 S.E.2d 885 (2009) (citing *Hudson*); *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005); *Doan v. Doan*, 156 N.C. App. 570, 577 S.E.2d 146 (2003).]

b. The trial court is granted considerable discretion in allowing or disallowing attorney fees in child support cases. Generally, an award will only be stricken if the award constitutes an abuse of discretion. [*Belcher v. Averette*, 152 N.C. App. 452, 568 S.E.2d 630 (2002); *Leary v. Leary*, 152 N.C. App. 438, 567 S.E.2d 834 (2002).]

15. Award of fees for services performed on appeal.

a. An award of attorney fees for services performed on appeal should ordinarily be granted, provided the general statutory requirements for such an award are duly met, especially where the appeal is taken by the supporting spouse. [*Fungaroli v. Fungaroli*, 53 N.C. App. 270, 273, 280 S.E.2d 787, 790 (1981) (husband had taken three appeals concerning alimony and custody award to wife, the last of which challenged the trial court's award of fees to wife incurred, in part, for representation by her attorney in the North Carolina Court of Appeals, the North Carolina Supreme Court, and the U.S. Supreme Court; after citing G.S. 50-13.6, allowing award of attorney fees in child support and custody cases, and G.S. 50-16.4, allowing award of attorney fees

in alimony cases, the court noted that "there is nothing in our statutory or case law that would suggest that a dependent spouse in North Carolina is entitled to meet the supporting spouse on equal footing, in terms of adequate and suitable legal representation, at the trial level only"); *McKinney v. McKinney*, 228 N.C. App. 300, 745 S.E.2d 356 (2013) (citing *Fungaroli*) (award of appellate attorney fees in child custody and support matters pursuant to G.S. 50-13.6 is within trial court's discretion and extends to any appeal of those matters, whether interlocutory or final; award of $26,000 for fees incurred on appeal upheld), *review denied*, 367 N.C. 288, 753 S.E.2d 678, *review dismissed*, 367 N.C. 288, 753 S.E.2d 679 (2014).]

b. Trial court had discretion to award fees related to husband's defense of wife's petition to the court of appeals for a writ of mandamus when the order included the findings required by statute for an award of fees. [*Sarno v. Sarno*, 255 N.C. App. 543, 804 S.E.2d 819 (2017).]

c. The requirements of the statute authorizing an award of fees must be satisfied when awarding fees for services performed on appeal. [*See Fungaroli v. Fungaroli*, 53 N.C. App. 270, 280 S.E.2d 787 (1981) (award authorized by findings that wife was dependent, was entitled to the relief sought, and was without sufficient means to defray expenses of the suit); *see also Adams v. Adams*, 167 N.C. App. 806, 606 S.E.2d 458 (2005) (**unpublished**) (dependent spouse's motion to court of appeals for award of attorney fees for appeal remanded for finding that she was without sufficient means to afford such fees and for determination of the fee).]

d. The appellate court cannot make the award. [*Tilley v. Tilley*, 30 N.C. App. 581, 227 S.E.2d 640 (1976) (mother in child support action, whose request for fees for the trial court proceeding was denied, a decision from which no appeal was taken, requested appellate court to award fees incurred for services performed by her attorney on appeal; G.S. 50-13.6 authorizes trial court to order payment of counsel fees but does not so authorize a reviewing court). *See also Messina v. Bell*, 158 N.C. App. 111, 581 S.E.2d 80 (2003) (plaintiff's request for attorney fees on appeal pursuant to G.S. 6-21.1, allowing award of attorney fees in small verdict cases, remanded for trial court to make appropriate findings and to enter an award).]

16. Award of fees for services performed on remand.

a. When attorney fees are authorized, trial court also can award fees for court proceedings following a remand of the case from the court of appeals. [*Lasecki v. Lasecki*, 257 N.C. App. 24, 809 S.E.2d 296 (2017).]

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Chapter 3: **Child Support**

Part 2. Procedure for Initial Child Support Orders

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Part 2. Procedure for Initial Child Support Orders

I. Civil Action for Child Support [G.S. 50-13.4 *et seq*.]

A. Subject Matter Jurisdiction

1. When a North Carolina court has subject matter jurisdiction to establish support.
    a. The district court has subject matter jurisdiction over civil actions that are brought pursuant to G.S. 50-13.4 *et seq*. seeking support for a child. [G.S. 7A-242, 7A-244; 50-13.5(c).]
        i. Pursuant to G.S. 7A-244, the district court had subject matter jurisdiction over an action relating to child support. The court of appeals rejected the contention that a fund created by the district court as a supplemental source of payment of the father's child support obligation was a trust over which the clerk had exclusive jurisdiction. [*Eakes v. Eakes,* 194 N.C. App. 303, 669 S.E.2d 891 (2008).]
        ii. While the district court and clerk of superior court have concurrent jurisdiction to determine child support from the estate of an incompetent ward, the district court had original jurisdiction to determine the issue when the child support proceeding was initiated before, and was pending when, the clerk adjudicated the defendant incompetent. [*Clements v. Clements ex rel. Craige,* 219 N.C. App. 581, 725 S.E.2d 373 (citing the general rule that when courts have concurrent jurisdiction, the court that first acquires jurisdiction retains it; district court's original jurisdiction outweighed concurrent jurisdiction of the two forums), *review denied*, 366 N.C. 388, 732 S.E.2d 481 (2012).]
        iii. A trial court has subject matter jurisdiction over a parent's claim for child support asserted against his spouse even though the parents have neither physically separated nor asserted a claim for divorce from bed and board, at least when one party expresses an intent to leave the marital residence as soon as custody is settled. [*Baumann-Chacon v. Baumann,* 212 N.C. App. 137, 710 S.E.2d 431 (2011) (trial court erred when it dismissed claim for child support for lack of subject matter jurisdiction based on fact that spouses had not separated as of date complaint was filed or when matter was heard).]
    b. A North Carolina tribunal that has issued a valid child support order has and shall exercise continuing, exclusive jurisdiction to modify the order pursuant to G.S. 50-13.7(a) if the order is the controlling order and:

i. At the time a request for modification is filed, either the individual obligee, the obligor, or the child for whose benefit the support order was issued resides in North Carolina [G.S. 52C-2-205(a)(1), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] or

ii. Even if the individual obligee, the obligor, or the child for whose benefit the support order was issued do not reside in North Carolina, the parties consent in a record or in open court for a North Carolina tribunal to continue to exercise jurisdiction to modify its order. [G.S. 52C-2-205(a)(2), *amended by* S.L. 2015-117, § 1, effective June 24, 2015. See G.S. 52C-1-101(13c), *added by* S.L. 2015-117, § 1, effective June 24, 2015, for definition of "record".]

iii. For more on modification jurisdiction, see *Modification of Child Support Orders*, Part 3 of this Chapter, Section II.B; for more on modification jurisdiction generally, see Cheryl Howell, *Child Custody and Support: Jurisdiction to Modify*, UNC Sch. of Gov't: On the Civil Side Blog (Apr. 15, 2016), http://civil.sog.unc.edu/child-custody-and-support-jurisdiction-to-modify.

2. When a North Carolina court does not have subject matter jurisdiction to establish support.

a. When a controlling child support order already exists. [Regarding jurisdiction to modify an existing order, see *Modification of Child Support Orders*, Part 3 of this Chapter.

i. The federal Full Faith and Credit for Child Support Orders Act (FFCCSOA) (28 U.S.C. § 1738B) (applicable to a child support order issued by a state tribunal but not to a foreign support order) and the Uniform Interstate Family Support Act (UIFSA) (G.S. Chapter 52C) (applicable to a child support order issued by a state tribunal and to a foreign support order) prohibit a North Carolina court from entering a child support order if another court (in North Carolina, in another state, or in a foreign country) having personal jurisdiction over both the obligor and individual obligee has entered a child support order with respect to the same obligor and same child and that order is entitled to recognition as the controlling child support order under FFCCSOA and UIFSA. [*See* G.S. 52C-2-207(d), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (the tribunal that issued the controlling order under G.S. 52C-2-207(a), (b), or (c) has continuing jurisdiction to the extent provided in G.S. 52C-2-205 (modification) or 52C-2-206 (enforcement)).]

ii. While the problem of multiple orders is "fast disappearing," at least on the appellate level, G.S. 52C-2-207 sets out a "relatively simple procedure to identify a single viable order that will be entitled to prospective enforcement in every state." [Official Comment (2015), G.S. 52C-2-207.]

(a) If only one tribunal has issued a child support order, that order controls. [G.S. 52C-2-207(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] This order controls regardless of when and where it was issued and whether any of the individual parties or the child continue to reside in the issuing state. [Official Comment (2015), G.S. 52C-2-207.] For discussion of determining the validity of an order when there has been more than one order

entered under the Uniform Reciprocal Enforcement of Support Act, see *Modification of Child Support Orders*, Part 3 of this Chapter, Section V.C.

(b) If two or more child support orders have been issued by tribunals in North Carolina, another state, or a foreign country for the same obligor and same child, a North Carolina tribunal having personal jurisdiction over both the obligor and the individual obligee shall apply the rules in G.S. 52C-2-205(b) and shall by order determine which order controls by applying the rules in G.S. 52C-2-207(b).

(1) If only one of the tribunals would have continuing, exclusive jurisdiction under UIFSA, the order of that tribunal controls. [G.S. 52C-2-207(b)(1), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

(2) If more than one tribunal would have continuing, exclusive jurisdiction under UIFSA, an order issued by a tribunal in the child's current home state controls. [G.S. 52C-2-207(b)(2)a., *amended by* S.L. 2015-117, § 1, effective June 24, 2015; see definition of "home state" in G.S. 52C-1-101(4), *amended by* S.L. 2015-117, § 1, effective June 24, 2015, to include a foreign country.]

(3) If more than one tribunal would have continuing, exclusive jurisdiction under UIFSA and no order has been issued in the child's current home state, the order most recently issued controls. [G.S. 52C-2-207(b)(2)b., *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

(4) If none of the tribunals would have continuing, exclusive jurisdiction under UIFSA, a North Carolina tribunal must issue a child support order, which controls. [G.S. 52C-2-207(b)(3), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

(5) For the requirements of an order entered after application of the rules in G.S. 52C-2-207(b), see G.S. 52C-2-207(e), *amended by* S.L. 2015-117, § 1, effective June 24, 2015, discussed in Section I.H.12.g, below.

iii. A child support order that is entered in violation of FFCCSOA's and UIFSA's one order provisions probably is void for lack of subject matter jurisdiction. [*See State ex rel. Harnes v. Lawrence,* 140 N.C. App. 707, 538 S.E.2d 223 (2000) (agreeing with plaintiff's argument that North Carolina did not have subject matter jurisdiction to enter orders for child support and contempt; North Carolina required to give full faith and credit to New Jersey child support order).]

b. Simultaneous proceedings: Jurisdiction when a complaint seeking child support is filed in North Carolina **after** a petition has been filed in another state. A North Carolina tribunal may exercise jurisdiction to establish a child support order pursuant to UIFSA or G.S. 50-13.4 *et seq.* if the North Carolina child support action is filed after a petition or comparable pleading seeking child support with respect to the same obligor and same child has been filed in another state or foreign country only if:

i. The petition or comparable pleading seeking child support was filed in North Carolina before expiration of the time allowed in the other state or foreign country for filing a responsive pleading challenging the exercise of jurisdiction by the

other state or foreign country; [G.S. 52C-2-204(a)(1), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

ii. The party filing the child support action in North Carolina timely challenges the exercise of jurisdiction in the other state or foreign country; [G.S. 52C-2-204(a)(2), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] and

iii. If relevant, North Carolina is the child's home state (that is, the child has lived in North Carolina with a parent or a person acting as a parent since the child's birth if the child is less than 6 months old, or for at least six consecutive months immediately preceding the filing of the petition for support). [G.S. 52C-2-204(a)(3); 52C-1-101(4), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (definition of "home state" amended to include a foreign country).]

c. Simultaneous proceedings: Jurisdiction when a complaint seeking child support is filed in North Carolina **before** a petition is filed in another state or foreign country. A North Carolina tribunal may not exercise jurisdiction to establish a child support order pursuant to UIFSA or G.S. 50-13.4 *et seq.* if the North Carolina child support action is filed before a petition or comparable pleading seeking child support with respect to the same obligor and same child is filed in another state or foreign country if:

i. The petition or comparable pleading seeking child support is filed with the other state or foreign country before expiration of the time allowed in North Carolina for filing a responsive pleading challenging the exercise of jurisdiction by North Carolina; [G.S. 52C-2-204(b)(1), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

ii. The party filing the child support action in the other state or foreign country timely challenges North Carolina's exercise of jurisdiction; [G.S. 52C-2-204(b)(2).] and

iii. If relevant, the other state or foreign country is the child's home state (that is, the child has lived in the other state or foreign country with a parent or a person acting as a parent since the child's birth if the child is less than 6 months old, or for at least six consecutive months immediately preceding the filing of the petition for support). [G.S. 52C-2-204(b)(3), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; 52C-1-101(4), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (definition of "home state" amended to include a foreign country).]

d. G.S. 52C-2-204(a) speaks to the jurisdiction of a North Carolina court to establish, rather than modify, a child support order when a comparable pleading has been filed in another state or foreign country. In *Watkins v. Benjamin*, 267 N.C. App. 122, 833 S.E.2d 22 (2019), simultaneous child support proceedings were pending in North Carolina and Maryland. At issue was whether a 2017 North Carolina order that required father to pay child support to mother (1) established a child support order (in which case, G.S. 52C-2-204(a) would apply) or (2) modified a 2015 North Carolina order, entered before mother filed Maryland proceeding, requiring mother to pay child support to father (in which case, G.S. 52C-2-204(a) would not apply). The court of appeals rejected mother's argument that changing the obligor from mother to father in the 2017 North Carolina order established a new child support order

under UIFSA, affirming the jurisdiction of the North Carolina court to modify the 2015 order despite the pending Maryland proceeding.

e. G.S. Chapter 52C (UIFSA) does not grant a North Carolina tribunal jurisdiction to render judgment or issue an order relating to child custody or visitation in a Chapter 52C proceeding. [G.S. 52C-1-103(b)(2), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

f. For procedure in cases involving proceedings in other states, see Section II, below, on UIFSA, G.S. Chapter 52C.

3. Jurisdiction when child and/or parties are reservation Indians.

a. Absent a congressional act governing jurisdiction, if the exercise of state court jurisdiction would unduly infringe on a tribe's self-governance, the district court does not have subject matter jurisdiction. [*See Jackson Cty. ex rel. Jackson v. Swayney*, 319 N.C. 52, 352 S.E.2d 413 (exercise of state court jurisdiction to determine paternity of a child would unduly infringe on tribal self-governance where mother, child, and putative father were all members of the Eastern Band of Cherokee Indians living on reservation; exclusive tribal court jurisdiction over the determination of paternity especially important to tribal self-governance), *cert. denied*, 484 U.S. 826, 108 S. Ct. 93 (1987).]

b. If the matter at issue does not unduly infringe upon the tribe's right of self-governance, the tribal court and district court have concurrent jurisdiction, except in cases where the tribal court has first exercised jurisdiction and retains jurisdiction.

i. District court had concurrent jurisdiction with the tribal court for action to recover Aid to Families with Dependent Children (AFDC) payments. [*Jackson Cty. ex rel. Jackson v. Swayney*, 319 N.C. 52, 352 S.E.2d 413 (tribe's interest in self-government not significantly affected; no prior action for the same claim filed in tribal court), *cert. denied*, 484 U.S. 826, 108 S. Ct. 93 (1987).]

ii. When a claim for child support had been filed in tribal court and that court had retained jurisdiction, the district court did not have jurisdiction of an action to recover AFDC payments. [*Jackson Cty. ex rel. Smoker v. Smoker*, 341 N.C. 182, 459 S.E.2d 789 (1995) (claim for AFDC payments was based on defendant's duty to support his children, jurisdiction over which had been retained by the tribal court). *See also State ex rel. West v. West*, 341 N.C. 188, 459 S.E.2d 791 (1995) (per curiam) (action to establish current and future child support payable by non-Indian mother for child in custody of Indian father properly dismissed; tribal court exercised jurisdiction first and continued to exercise jurisdiction).]

4. Jurisdiction when a separation agreement with support provisions is involved.

a. The fact that the parents of a minor child have entered into a binding separation agreement that includes provisions for child support does not preclude the custodial parent from instituting a civil action seeking support for the child pursuant to G.S. 50-13.4 *et seq.* and does not deprive the district court of jurisdiction to enter an order requiring the noncustodial parent to pay child support. [*Powers v. Parisher*, 104 N.C. App. 400, 409 S.E.2d 725 (1991) (unincorporated agreement), *review denied,* 331 N.C. 286, 417 S.E.2d 254 (1992); *Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003) (citing *Winborne v. Winborne,* 41 N.C. App. 756, 255 S.E.2d 640 (1979))

(no agreement between the parents can fully deprive the courts of their authority to protect the best interests of minor children), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004).]

b. However, a court cannot order prospective support in an amount different than that required by an unincorporated separation agreement without first concluding that the agreed upon amount is not just and reasonable. [See Section III.C.3.c, below, for a discussion of *Pataky v. Pataky,* 160 N.C. App. 289, 585 S.E.2d 404 (2003) (unincorporated separation agreement), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004).]

c. A court has no authority to enter an order for retroactive support (also called prior maintenance) if support was paid during the time period for which support is sought pursuant to terms of an unincorporated separation agreement between the parties. [See *Liability and Amount,* Part 1 of this Chapter, Section III.D.5.b for discussion of the N.C. Child Support Guidelines and *Carson v. Carson,* 199 N.C. App. 101, 680 S.E.2d 885 (2009).]

d. See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

5. Jurisdiction to hold a trial at a motion session. [*See Schumacher v. Schumacher,* 109 N.C. App. 309, 426 S.E.2d 467 (1993) (judge did not have jurisdiction to try a civil action for child support at a session designated only for civil motions).]

B. Personal Jurisdiction

1. Generally.

a. Child support actions are in personam. [*Lynch v. Lynch*, 96 N.C. App. 601, 386 S.E.2d 607 (1989).] A court must have personal jurisdiction over a child's parent before it can order that parent to pay child support.

b. The jurisdiction of a North Carolina court to enter a child support order shall be as in actions for the payment of money or the transfer of property. [G.S. 50-13.5(c)(1).]

c. When a nonresident defendant challenges the court's exercise of jurisdiction, the burden is upon the plaintiff to establish by a preponderance of the evidence that personal jurisdiction exists. [*Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001) (action seeking, among other things, alimony, postseparation support, and equitable distribution).]

d. Unless the defense has been waived, a child support order entered without personal jurisdiction over a defendant parent is void and may be collaterally attacked by the defendant or set aside at any time pursuant to G.S. 1A-1, Rule 60(b)(4). [*See Brondum v. Cox*, 30 N.C. App. 35, 226 S.E.2d 193 (1976) (Hawaii order determining that defendant was the father of plaintiff's child, and thus was responsible for support, not given full faith and credit in North Carolina because Hawaii court lacked personal jurisdiction over North Carolina defendant), *aff'd,* 292 N.C. 192, 232 S.E.2d 687 (1977).]

e. A court can exercise jurisdiction over any defendant who waives objection to personal jurisdiction. A general appearance in a child support case waives objection to jurisdiction. [See discussion in Section I.B.5.c, below.]

2. Duration of personal jurisdiction.
    a. Personal jurisdiction acquired by a tribunal in North Carolina in a proceeding under G.S. Chapter 52C or another North Carolina law relating to a support order continues as long as the North Carolina tribunal has continuing, exclusive jurisdiction to modify its order or continuing jurisdiction to enforce its order as provided by G.S. 52C-2-205 or 52C-2-206. [G.S. 52C-2-202, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] A "support order" includes a judgment, decree, order, decision, or directive, whether temporary, final, or subject to modification, issued in a state or a foreign country for the benefit of a child, a spouse, or a former spouse, providing for monetary support, health care, arrearages, retroactive support, or reimbursement for financial assistance provided to an individual obligee in place of child support. [G.S. 52C-1-101(21), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]
3. Two-part inquiry to determine personal jurisdiction over a nonresident.
    a. When a nonresident defendant challenges the court's exercise of personal jurisdiction, the court must undertake a two-part inquiry:
        i. The court must first determine whether North Carolina law provides a statutory basis for the assertion of personal jurisdiction, i.e., "long-arm jurisdiction;" [*Speedway Motorsports Int'l Ltd. v. Bronwen Energy Trading Ltd.*, 209 N.C. App. 474, 707 S.E.2d 385 (2011), *review denied*, 365 N.C. 542, 720 S.E.2d 669 (2012).]
        ii. If the court concludes that there is a statutory basis for jurisdiction, it next must consider whether the exercise of personal jurisdiction complies with the due process requirements of the Fourteenth Amendment, i.e., "minimum contacts" analysis. [*See Miller v. Kite*, 313 N.C. 474, 329 S.E.2d 663 (1985); *Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001).]
    b. Because North Carolina's long-arm statute extends personal jurisdiction to the limits permitted by due process, in some appellate opinions the two-part inquiry has been merged into one question: whether the exercise of jurisdiction comports with due process. [*See Lang v. Lang,* 157 N.C. App. 703, 579 S.E.2d 919 (2003); *Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001).] Note, however, that in *Speedway Motorsports International Ltd. v. Bronwen Energy Trading Ltd.*, 209 N.C. App. 474, 487, 707 S.E.2d 385, 394 (2011) (citing *Brown v. Ellis*, 363 N.C. 360, 678 S.E.2d 222 (2009)), *review denied*, 365 N.C. 542, 720 S.E.2d 669 (2012), the court of appeals rejected the practice of collapsing the long-arm statute analysis into the minimum contacts analysis in favor of "two separate steps of analysis."
    c. Factors to consider when determining whether defendant has sufficient minimum contacts with North Carolina:
        i. Quantity of contacts with the state;
        ii. The nature and quality of those contacts;
        iii. The source and connection of the cause of action to the contacts;
        iv. The interest of North Carolina in litigating the matter;
        v. The convenience of the parties; and
        vi. The interests of, and fairness to, the parties. [*Hamilton v. Johnson,* 228 N.C. App. 372, 747 S.E.2d 158 (2013) (first five factors); *Shaner v. Shaner,* 216 N.C.

App. 409, 717 S.E.2d 66 (2011), and *Sherlock v. Sherlock,* 143 N.C. App. 300, 545 S.E.2d 757 (2001) (both citing *Filmar Racing, Inc. v. Stewart,* 141 N.C. App. 668, 541 S.E.2d 733 (2001)).]

d. Service on defendant within the state. [G.S. 52C-2-201(a)(1); 1-75.4(1)a.]

i. It is not necessary to apply the minimum contacts test of due process set forth in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945), and later cases when the defendant is personally served in the forum state. [*Lockert v. Breedlove*, 321 N.C. 66, 361 S.E.2d 581 (1987); *Jenkins v. Jenkins,* 89 N.C. App. 705, 367 S.E.2d 4 (1988) (court need not determine minimum contacts where nonresident defendant was served with process while temporarily in North Carolina for a brief visit related to his employment).]

e. Consent to personal jurisdiction. [G.S. 52C-2-201(a)(2), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

i. Where a nonresident defendant has consented to the jurisdiction of the court, the two-part inquiry to determine personal jurisdiction over a nonresident need not be conducted. [*Montgomery v. Montgomery,* 110 N.C. App. 234, 429 S.E.2d 438 (1993).]

ii. A consent agreement in which the parents agreed that future legal actions regarding their children would be brought where the children reside was a valid consent to the exercise of long-arm personal jurisdiction over the nonresident defendant and waived the minimum contacts/due process analysis usually required in the two-step inquiry. [*Montgomery v. Montgomery,* 110 N.C. App. 234, 429 S.E.2d 438 (1993) (consent agreement acted as a waiver of the requirements usually necessary to invoke personal jurisdiction).]

iii. G.S. 52C-2-201(a)(2), *amended by* S.L. 2015-117, § 1, effective June 24, 2015, is set out in Section I.B.4.a.iii, below.

4. Statutory basis for personal jurisdiction.

a. A North Carolina tribunal has the statutory authority ("long-arm" jurisdiction) to assert personal jurisdiction over a resident or nonresident parent or custodian who is a defendant in a civil action seeking to establish or enforce a support order for a minor child:

i. If the defendant is personally served with a summons and complaint within this state; [G.S. 52C-2-201(a)(1); 1-75.4(1)a. See Section I.B.3.d, above, on service within state negating need for minimum contacts inquiry.]

ii. If the defendant is domiciled in this state at the time she is served with process; [G.S. 1-75.4(1)b.]

iii. If the defendant submits to jurisdiction by consent in a record, by entering a general appearance in the action, or by filing a responsive document that has the effect of waiving his right to contest personal jurisdiction; [G.S. 52C-2-201(a)(2), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; 1-75.7(1) (general appearance). See Section I.B.3.e, above, on consent to jurisdiction negating need for two-part inquiry.]

(a) "Record" is defined as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." [G.S. 52C-1-101(13c), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

iv. If the defendant is engaged in substantial activity within this state at the time she is served with process; [G.S. 1-75.4(1)d.]

v. If the defendant has promised the plaintiff, or a third party for the plaintiff's benefit, to deliver or receive within this state, things of value; [G.S. 1-75.4(5)c.]

vi. If things of value have been shipped from this state by the plaintiff to the defendant on his order or direction; [G.S. 1-75.4(5)d.]

vii. When the child support claim arises out of the marital relationship within this state, notwithstanding subsequent departure from the state, if the other party to the marital relationship continues to reside in this state; [G.S. 1-75.4(12).]

viii. If the defendant resided in this state with the child; [G.S. 52C-2-201(a)(3).]

ix. If the defendant resided in this state and provided prenatal expenses or support for the child; [G.S. 52C-2-201(a)(4).]

x. If the child resides in this state as the result of the defendant's acts or directives; [G.S. 52C-2-201(a)(5).]

xi. If the child may have been conceived as a result of sexual intercourse by the defendant within this state; [G.S. 52C-2-201(a)(6); 49-17.]

(a) G.S. 49-17 creates special jurisdiction under very limited circumstances as set out therein, i.e., an act of sexual intercourse within North Carolina. [*Cochran v. Wallace,* 95 N.C. App. 167, 381 S.E.2d 853 (1989).]

xii. If there is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction; [G.S. 52C-2-201(a)(8).]

xiii. G.S. 52C-2-201 was amended in 2015 to delete as a basis for jurisdiction over a nonresident that the defendant asserted paternity in an affidavit filed with the clerk. [S.L. 2015-177, § 1, effective June 24, 2015, deleting G.S. 52C-2-201(7).]

5. Cases on statutory authority for personal jurisdiction.

a. Defendant served with process in the state. [G.S. 1-75.4(1)a.; 52C-2-201(a)(1).]

i. Defendant, an Ohio resident, was personally served with summons and complaint while in North Carolina visiting his parents and children. [*Brookshire v. Brookshire*, 89 N.C. App. 48, 365 S.E.2d 307 (1988).]

ii. Defendant, a Virginia resident, was personally served in North Carolina at his business. [*Morris v. Morris,* 91 N.C. App. 432, 371 S.E.2d 756 (1988).]

iii. It is not necessary to apply the minimum contacts test of due process set forth in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945), and later cases when the defendant is personally served in the forum state. [*Lockert v. Breedlove*, 321 N.C. 66, 361 S.E.2d 581 (1987); *Jenkins v. Jenkins,* 89 N.C. App. 705, 367 S.E.2d 4 (1988) (court need not determine minimum contacts where nonresident defendant was served with process while temporarily in North Carolina for a brief visit related to his employment).]

b. Defendant domiciled in the state when service of process is made. [G.S. 1-75.4(1)b.]

i. "Domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence. . . . It is the place where he intends to remain permanently, or for an indefinite length of time." [*Atassi v. Atassi,* 117 N.C. App. 506, 511, 451 S.E.2d 371, 374 (quoting *Farnsworth v. Jones*, 114 N.C. App. 182, 186, 441 S.E.2d 597, 600 (1994)) (question of fact as to whether husband's domicile was in Syria or North Carolina precluded summary judgment on certain domestic issues), *review denied,* 340 N.C. 109, 456 S.E.2d 310 (1995). *See also Hall v. Wake Cty. Bd. of Elections,* 280 N.C. 600, 187 S.E.2d 52 (1972) (deciding question of a student's domicile).]

c. Defendant makes a general appearance. [G.S. 1-75.7(1); 52C-2-201(a)(2), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

i. By submitting to the court information relevant to the merits of the case (documents containing financial information relevant to the issue of child support and a letter setting forth other factors to be considered in setting an amount for child support, such as defendant's upcoming expenses), defendant made a general appearance prior to his assertion of lack of personal jurisdiction. [*Bullard v. Bader*, 117 N.C. App. 299, 450 S.E.2d 757 (1994) (noting very liberal interpretation and that almost anything other than a challenge to personal jurisdiction or a request for an extension of time will be considered a general appearance).]

ii. By filing an answer containing counterclaims for child custody and support and equitable distribution without contesting personal jurisdiction, defendant made a general appearance. [*Judkins v. Judkins*, 113 N.C. App. 734, 441 S.E.2d 139, *review denied,* 336 N.C. 781, 447 S.E.2d 424 (1994).]

iii. Answer to complaint, in which husband did not contest personal jurisdiction, constituted general appearance such that husband waived challenge to court's exercise of personal jurisdiction in wife's subsequent motion in the cause for child support. [*Stern v. Stern*, 89 N.C. App. 689, 367 S.E.2d 7 (1988). *See also Barclay v. Makarov,* 237 N.C. App. 398, 767 S.E.2d 152 (2014) (**unpublished**) (not paginated on Westlaw) (defendant's answer constituted a general appearance when it "addressed factual discrepancies in the complaint" and requested child support in accordance with the law of British Columbia without asserting that the trial court lacked personal jurisdiction over defendant).]

iv. A general appearance in a support action is a submission to jurisdiction in that action only and does not waive a defendant's right to object to jurisdiction in separate causes of action. [*Buck v. Heavner*, 93 N.C. App. 142, 377 S.E.2d 75 (1989) (while the support action was connected with the parties' former marital relationship, it was not, for the purposes of a minimum contacts analysis, related to a breach of contract action arising from obligations imposed by a Colorado distribution order; no personal jurisdiction over defendant in a separate action to enforce a promissory note).]

d. Defendant is engaged in substantial activity within the state when service of process is made. [G.S. 1-75.4(1)d.]

i. Defendant's activities prior to service of process can be considered when determining whether defendant was engaged in substantial activity within the state. [*Lang v. Lang,* 157 N.C. App. 703, 709, 579 S.E.2d 919. 923 (2003) (noting that "our courts have consistently looked to a defendant's conduct prior to service of process to find the existence of minimum contacts").]

ii. Activities constituting "substantial activity."

(a) *Lang v. Lang*, 157 N.C. App. 703, 579 S.E.2d 919 (2003) (defendant, over the course of ten years, was engaged in the business of selling real estate in Henderson County, North Carolina; executed and filed in North Carolina a power of attorney; admitted in an answer in an unrelated matter that he was a resident of North Carolina; detailed in a deposition his extensive involvement with investing in and selling real estate in Henderson County; obtained and renewed a North Carolina driver's license; and with his wife purchased and registered a car in North Carolina).

(b) *Strother v. Strother*, 120 N.C. App. 393, 462 S.E.2d 542 (1995) (third-party defendant was present in North Carolina for several days to finalize establishment of a business relationship with husband and wife, North Carolina residents; third-party defendant received substantial fees as a financial, investment, and tax advisor to husband and wife; prepared monthly financial statements for business entities of the parties and mailed them to husband and wife in North Carolina and prepared personal tax returns for husband and wife; third-party defendant incorporated and owned stock in two North Carolina corporations that husband and wife claimed as marital assets; and until recently third-party defendant owned in trustee capacity several parcels of real property in North Carolina).

e. In any action which may be brought under statutes of this state that specifically confer grounds for personal jurisdiction. [G.S. 1-75.4(2) (special jurisdiction statutes); *Butler v. Butler*, 152 N.C. App. 74, 80 n.5, 566 S.E.2d 707, 711 n.5 (2002) (a determination that statutory jurisdiction exists pursuant to the Uniform Interstate Family Support Act (UIFSA) is also a determination that it exists pursuant to G.S. 1-75.4(2), which confers personal jurisdiction whenever any special personal jurisdiction statute applies).]

f. Action under G.S. Chapter 50 that arises out of marital relationship within North Carolina, notwithstanding one party's subsequent departure from the state, if the other party to the marital relationship continues to reside in this state. [G.S. 1-75.4(12).]

i. Personal jurisdiction over defendant was proper when parties were married in North Carolina and wife continued to reside in North Carolina; action arose under Chapter 50 and sought resolution of issues pertaining to dissolution of parties' marriage. [*Sherlock v. Sherlock,* 143 N.C. App. 300, 545 S.E.2d 757 (2001).]

ii. Because child support action under Chapter 50 arose out of parties' marital relationship within this state, G.S. 1-75.4(12) authorized exercise of personal

jurisdiction over nonresident defendant. [*Harris v. Harris*, 104 N.C. App. 574, 410 S.E.2d 527 (1991).]

iii. When plaintiff sought an initial judicial determination of child support, action was brought under Chapter 50; parties' marriage took place in North Carolina and children were born in and resided in this state when action was filed, so action arose out of marital relationship, despite a temporary move out of state by mother and children after divorce. [*Powers v. Parisher*, 104 N.C. App. 400, 409 S.E.2d 725 (1991) (existence of an unincorporated separation agreement relating to child support did not prevent plaintiff's action for judicial determination of support), *review denied,* 331 N.C. 286, 417 S.E.2d 254 (1992).]

g. Defendant resided with the child in this state. [G.S. 52C-2-201(a)(3).]

i. Fact that defendant during the marriage visited his wife and daughter in Moore County at least once per month for two years and resided in the marital residence for three or more days at a time supported conclusion that defendant "resided with the child in this State." [*Butler v. Butler,* 152 N.C. App. 74, 80, 566 S.E.2d 707, 711 (2002) (quoting former G.S. 52C-2-201(3)).]

h. Defendant resided in this state and provided prenatal expenses or support for the child. [G.S. 52C-2-201(a)(4).]

i. No cases to date.

i. Child resides in this state as the result of defendant's acts or directives. [G.S. 52C-2-201(a)(5).]

i. When defendant purchased a house in North Carolina, partially to allow his daughter to attend school in this state, court properly found that defendant's child resided in this state as a result of defendant's acts or directives. [*Butler v. Butler,* 152 N.C. App. 74, 566 S.E.2d 707 (2002).]

j. Child may have been conceived as a result of sexual intercourse in this state. [G.S. 52C-2-201(a)(6); 49-17.]

i. Defendant's fathering of the infant in North Carolina and his signing of an acknowledgment of paternity and a voluntary support agreement indicated "that defendant engaged in some act or conduct by which he may be said to have invoked the benefits and protections of the law of the forum." [*Moore v. Wilson*, 62 N.C. App. 746, 748, 303 S.E.2d 564, 565 (1983) (defendant's contacts with North Carolina were sufficient to meet both the statutory requirements of G.S. 1-75.4 and due process standards).]

k. Defendant has promised plaintiff or a third party for plaintiff's benefit to deliver or receive within this state things of value. [G.S. 1-75.4(5)c.]

i. A separation agreement executed within this state, which included child support provisions, provided basis for asserting long-arm jurisdiction over nonresident defendant under G.S. 1-75.4(5)c.; separation agreement was a local contract and the support payments were a "thing of value" that were sent into this state. [*Pope v. Pope*, 38 N.C. App. 328, 248 S.E.2d 260 (1978).]

ii. See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

6. Compliance with due process standards.
    a. Due process requires that defendant have minimum contacts with the state. [*Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001).]
    b. A summary of the aspects of a defendant's situation that have proven useful in an analysis of "minimum contacts" with a jurisdiction include:
        i. The quantity of the contacts;
        ii. The nature and quality of the contacts;
        iii. The source and connection of the cause of action to the contacts;
        iv. The interest of the forum state;
        v. The convenience of the parties; and
        vi. The interests of, and fairness to, the parties. [*Hamilton v. Johnson,* 228 N.C. App. 372, 747 S.E.2d 158 (2013) (first five factors); *Shaner v. Shaner,* 216 N.C. App. 409, 717 S.E.2d 66 (2011), and *Sherlock v. Sherlock,* 143 N.C. App. 300, 545 S.E.2d 757 (2001) (both citing *Filmar Racing, Inc. v. Stewart,* 141 N.C. App. 668, 541 S.E.2d 733 (2001)).]
    c. In contrast to child custody proceedings, North Carolina courts have consistently required minimum contacts with North Carolina by nonresident defendants in child support actions. [*Harris v. Harris*, 104 N.C. App. 574, 581, 410 S.E.2d 527, 531 (1991) (quoting certain commentators who agree that "this double standard of jurisdiction for child custody and child support actions 'has created a splintered domestic relations jurisdiction' ").]
    d. Cases finding minimum contacts requirement met.
        i. An assortment of financial, legal, and personal connections within North Carolina sustained over a period of years were sufficient contacts, even though parties lived primarily overseas. [*Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001) (parties married in Durham; while parties were overseas, defendant used Durham address to receive important mail, including federal income tax documents; defendant's salary was directly deposited into an account in Durham; defendant had a North Carolina driver's license; defendant executed and filed in Durham a power of attorney, pursuant to which attorney-in-fact conducted business for parties; defendant made a will naming Durham residents as executors; defendant hired Durham accountant to receive and pay bills on his behalf; and parties opened an investment account in North Carolina; court noted unusual history of the parties, characterized by frequent moves from one foreign country to another and their failure to establish a permanent home anywhere in the U.S. or abroad).]
        ii. Defendant's substantial past and present contacts with North Carolina were sufficient. [*Harris v. Harris*, 104 N.C. App. 574, 410 S.E.2d 527 (1991) (defendant was former resident of North Carolina; he married plaintiff in this state, had a child here, and lived here for three years as husband and wife; after moving out of state, defendant maintained contact with family members in North Carolina, visiting them during holidays; since the parties' separation, defendant visited family members in this state at least twice; defendant established and

maintained business contacts in North Carolina and traveled routinely to state to participate in business-related activities).]

iii. Defendant had substantial long-term contacts with North Carolina. [*Powers v. Parisher*, 104 N.C. App. 400, 409 S.E.2d 725 (1991) (defendant was former resident of North Carolina for some fifteen years; parties resided in this state at time of divorce; two children were born of the marriage in North Carolina; parties entered into separation agreements in state; and defendant regularly visited North Carolina to see his children and other family members), *review denied,* 331 N.C. 286, 417 S.E.2d 254 (1992).]

iv. In the "unusual" situation where the couple moved frequently throughout the marriage and never established a residence in any other state or country, defendant had sufficient contacts with North Carolina to support the exercise of personal jurisdiction for alimony, child support, and equitable distribution, even though he never resided in North Carolina. [*Bradley v. Bradley*, 256 N.C. App. 1, 25, 20, 806 S.E.2d 58, 73, 70 (2017) (parties married in North Carolina, defendant directed certain mail to be delivered to his parents' house in North Carolina during the marriage, defendant directed father-in-law to secure a storage unit and stored marital and separate property in North Carolina, and defendant "orchestrated events" so wife and child would live in North Carolina after parties separated).]

e. Cases finding minimum contacts requirement not met.

i. The fact that a defendant makes trips to North Carolina in order to exercise his visitation rights cannot supply the necessary minimum contacts for the purposes of a child support action. [*Miller v. Kite*, 313 N.C. 474, 329 S.E.2d 663 (1985) (father's only contacts were six trips over nine years to visit his daughter and that he mailed the monthly support checks to the plaintiff at her North Carolina residence); *Hamilton v. Johnson,* 228 N.C. App. 372, 747 S.E.2d 158 (2013) (citing *Miller*) (that child had lived since birth with mother in North Carolina, defendant had visited child three times over six months, and defendant's corporate and personal bank statements listed a Charlotte address found insufficient to justify in personam jurisdiction).]

ii. Defendant did not have minimum contacts with North Carolina when plaintiff alleged only that defendant abandoned plaintiff within this state and that the marital relationship still existed when plaintiff initiated action for alimony and equitable distribution. [*Tompkins v. Tompkins*, 98 N.C. App. 299, 304, 390 S.E.2d 766, 769 (1990) (plaintiff's allegation of abandonment within North Carolina was "simply insufficient" without allegations that would show a nexus between defendant's misconduct and North Carolina, such as parties were married in North Carolina or resided here during the marriage or at the time of separation; plaintiff's allegation that the marriage was still in existence when the action was initiated "cannot of itself constitute sufficient contacts to establish personal jurisdiction").]

7. Defense of lack of personal jurisdiction raised by special appearance. A defendant may, by special appearance or motion filed pursuant to G.S. 1A-1, Rule 12(b)(2), challenge the

court's lack of personal jurisdiction in an action for child support. [*See Shores v. Shores*, 91 N.C. App. 435, 371 S.E.2d 747 (1988) (defendant who makes a general appearance and does not raise defense of lack of personal jurisdiction by motion or answer pursuant to G.S. 1A-1, Rule 12 waives the defense of lack of personal jurisdiction).]

8. Notice.

   a. In addition to the requirement that the court have personal jurisdiction over the defendant, a court may not enter an order for support unless the defendant is properly served with process pursuant to G.S. 1A-1, Rule 4 or makes a general appearance in the action. [G.S. 1-75.3(b)(1) (Rule 4 service required).]

      i. When determining the sufficiency of service pursuant to G.S. 1A-1, Rule 4(j)(1)d. and 1-75.10(a)(5), both of which require "delivery to the addressee," the crucial inquiry is whether the defendant in fact received the summons and complaint, not whether the delivery service employee personally served the individual addressee or his service agent. [*Washington v. Cline*, 233 N.C. App. 412, 761 S.E.2d 650 (citing *Granville Med. Ctr. v. Tipton,* 160 N.C. App. 484, 586 S.E.2d 791 (2003)) (service on city employees and current and former police officers was proper under G.S. 1A-1, Rule 4(j)(1)d., even though no employee or officer was personally served (one FedEx package was left at the side door of addressee's home, one FedEx package was left with a visiting 12-year-old grandson, one FedEx package was left with the defendant's receptionist, and six FedEx packages were delivered to the police department loading dock to person responsible for receiving deliveries); evidence of service by designated delivery service, which included delivery receipts and affidavits from defendants admitting that they all, in fact, received the packages met requirements for proof of service in G.S. 1-75.10(a)(5)), *review denied, dismissed,* 367 N.C. 788, 766 S.E.2d 657 (2014); *Carpenter v. Agee,* 171 N.C. App. 98, 613 S.E.2d 735 (2005) (delivery receipt signed by person other than defendant in certified mail case raised presumption that person who signed was acting as agent of defendant; service was presumed valid). *But see Hamilton v. Johnson,* 228 N.C. App. 372, 747 S.E.2d 158 (2013) (service by delivery service under G.S. 1A-1, Rule 4(j)(1)d. was insufficient when delivery receipt was not personally signed by defendant; appellate court rejected plaintiff's argument that signature of another person on the receipt raised a presumption of proper service and that person signing was acting as agent of the defendant).] **NOTE:** The *Washington* decision distinguishes *Hamilton* by stating that in *Hamilton*, "the Court makes no mention of whether the defendant actually received the summons and complaint, or more specifically, whether the plaintiff attempted to prove service under section 1-75.10 with affidavits indicating that the defendant received the summons and complaint." *Washington*, 233 N.C. App. at 426, 761 S.E.2d at 659–60.

      ii. Service on defendant in Virginia by a process server over the age of 18, and affidavit of service filed by the server, were sufficient under North Carolina law. [*New Hanover Cty. ex rel. Beatty v. Greenfield,* 219 N.C. App. 531, 723 S.E.2d 790 (2012) (first, process server was qualified to make service under Virginia law, allowing service by a nonparty 18 years or older, thus making server qualified to make service under G.S. 1A-1, Rule 4(a); second, affidavit filed by server met

proof of service requirements set out in G.S. 1-75.10(a)(1); denial of defendant's motion to dismiss for insufficient process affirmed).]

9. Appeal.
    a. The denial of a defendant's motion to dismiss for lack of personal jurisdiction, though interlocutory, is immediately appealable or the defendant may preserve her exception for determination upon any subsequent appeal in the cause. [G.S. 1-277(b); *Lang v. Lang,* 157 N.C. App. 703, 704 n.1, 579 S.E.2d 919, 920 n.1 (2003); *Sherlock v. Sherlock,* 143 N.C. App. 300, 545 S.E.2d 757 (2001).]
    b. In reviewing an order determining whether personal jurisdiction is statutorily and constitutionally permissible, "[t]he trial court's findings of fact are conclusive if supported by any competent evidence and judgment supported by such findings will be affirmed, even though there may be evidence to the contrary." [*Butler v. Butler,* 152 N.C. App. 74, 76, 566 S.E.2d 707, 708 (2002) (quoting *Shamley v. Shamley*, 117 N.C. App. 175, 180, 455 S.E.2d 435, 438 (1994)).] For more on appeal, see Section I.I, below.

C. Venue

1. A civil action for child support or custody may be commenced in the county in which the child resides or is physically present or in a county in which either of the child's parents resides. [G.S. 50-13.5(f).]
    a. However, an objection to improper venue is waived if not raised by defendant. In a case brought by a grandmother seeking custody of her grandchildren, the trial court erred when it transferred venue *sua sponte* to Lee County, where the grandmother and children lived, when defendant parents had not objected to or requested a transfer of venue and grandchildren were physically present in Durham County District Court when case was called for hearing. [*Zetino-Cruz v. Benitez-Zetino*, 249 N.C. App. 218, 791 S.E.2d 100 (2016) (location of defendant parents was unknown and residence or presence of grandmother, since she was not a parent, was not relevant to proper venue under G.S. 50-13.5(f)).]
    b. Even if Durham County was not a proper venue under G.S. 50-13.5(f), the trial court could not change venue unless a defendant filed a written request for a change of venue pursuant to G.S. 1-83. [*Zetino-Cruz v. Benitez-Zetino*, 249 N.C. App. 218, 791 S.E.2d 100 (2016).]
2. When other actions are pending between the parties.
    a. Prior pending action seeking different relief.
        i. A claim for child support must be joined with, or be filed as a motion in the cause in, a pending action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce involving the child's parents if a final judgment has not been entered in the pending action. [G.S. 50-13.5(f).]
        ii. If an action for custody and support is pending and an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce is subsequently instituted in the same or another county, the court having jurisdiction of the prior action may, in its discretion, direct that the actions be

consolidated and in the event consolidation is ordered, must determine in which court the consolidated action will be heard. [G.S. 50-13.5(f).]

b. Prior pending action seeking the same relief.

i. Upon timely motion, an action for, or to modify, child support filed in one county or district in North Carolina is abated if a pending action for child support was filed previously in a court of competent jurisdiction within North Carolina. [*Brooks v. Brooks*, 107 N.C. App. 44, 47, 418 S.E.2d 534, 536 (1992) (quoting *Clark v. Craven Reg'l Med. Auth.*, 326 N.C. 15, 20, 387 N.C. App. 168, 171 (1990)) (until children are emancipated, the case in which custody and support are originally determined remains pending and, if the parties remain the same, this prior pending action "works an abatement of a subsequent action . . . in another court of the state having like jurisdiction"); *Basinger v. Basinger*, 80 N.C. App. 554, 342 S.E.2d 549 (1986) (husband's motion in the cause for support, filed in earlier divorce and equitable distribution proceeding, was dismissed based on wife's prior pending action in same county seeking same relief). *Cf. Cushing v. Cushing,* 263 N.C. 181, 139 S.E.2d 217 (1964) (pending action for alimony and child support in South Carolina could not abate subsequent action filed in North Carolina for the same relief; former action must be pending within this state).]

ii. A plea of abatement based upon a prior pending action, although not specifically enumerated in G.S. 1A-1, Rule 12(b), is a preliminary motion of the type enumerated in Rule 12(b)(2)–(5) and also an affirmative defense. Accordingly, the plea in abatement based on a prior pending action must be raised either in a pre-answer motion or set forth affirmatively in the answer and is waived if not timely raised. [*See Brooks v. Brooks*, 107 N.C. App. 44, 418 S.E.2d 534 (1992) (father's action to modify custody and support was improperly dismissed, even though venue was not proper where filed, because mother's objection to venue was not timely made; oral motion at trial, after pleadings were complete, was not timely and therefore was ineffective to raise the issue of the prior pending action).]

c. Effect of final judgment in the prior action on later action for child support.

i. When a final judgment of divorce had been entered in a prior proceeding and child support was not brought to issue or determined in that proceeding, a party may file an independent proceeding for child support. [*Powers v. Parisher,* 104 N.C. App. 400, 409 S.E.2d 725 (1991), *review denied,* 331 N.C. 286, 417 S.E.2d 254 (1992).]

3. Court of original venue is proper court for subsequent actions. [*Tate v. Tate*, 9 N.C. App. 681, 683, 177 S.E.2d 455, 457 (1970) (emphasis added) (the court first obtaining jurisdiction "is the only proper court . . . [for] an action for the modification of an order *establishing* custody and support"); *Broyhill v. Broyhill*, 81 N.C. App. 147, 343 S.E.2d 605 (1986) (interpreting *Tate* not to preclude a court from transferring venue).]

a. The statute relating to venue of an action for custody and support, G.S. 50-13.5(f), set out in Sections I.C.1 and I.C.2, above, applies only to the institution of an action for custody and support and does not apply to a proceeding for modification of an existing order. [*Tate v. Tate*, 9 N.C. App. 681, 177 S.E.2d 455 (1970) (Forsyth County court

was the proper court to modify its child support obligation; modification action filed in Mecklenburg County properly dismissed).]

b. However, an action to modify custody and support may proceed in a county other than the original county if no objection to venue is raised in a timely manner. [*Brooks v. Brooks*, 107 N.C. App. 44, 418 S.E.2d 534 (1992) (mother waived right to remove custody and support modification case to New Hanover County, where earlier child support order was entered, when she did not seek removal either in a pre-answer motion or answer; mother's oral motion at trial not timely).]

c. For venue when a party seeks modification, see *Modification of Child Support Orders,* Part 3 of this Chapter, Section II.D.

4. Transfer of venue.

a. The most common reasons for a change of venue in custody and support cases are found in G.S. 1-83, which provides that a court may change the place of trial when:

i. The county in which the action is brought is not the proper one [G.S. 1-83(1) (venue is improper).] or

(a) "May change" venue as used in G.S. 1-83(1) has been interpreted to mean "*must* change" venue. [*Zetino-Cruz v. Benitez-Zetino*, 249 N.C. App. 218, 225, 791 S.E.2d 100, 105 (2016) (quoting *Kiker v. Winfield*, 234 N.C. App. 363, 364, 759 S.E.2d 372, 373 (2014)) (custody action).]

(b) When an action is instituted in the wrong county, the court should, upon apt motion, remove the action, not dismiss it. [*Coats v. Sampson Cty. Mem'l Hosp.*, 264 N.C. 332, 141 S.E.2d 490 (1965).]

ii. The convenience of witnesses and the ends of justice would be promoted by the change. [G.S. 1-83(2) (venue is proper but may be changed for reasons in the statute); *Zetino-Cruz v. Benitez-Zetino*, 249 N.C. App. 218, 791 S.E.2d 100 (2016) (change of venue under G.S. 1-83(2) is discretionary with the court); *Broyhill v. Broyhill*, 81 N.C. App. 147, 343 S.E.2d 605 (1986) (court of original venue may, in its discretion, transfer the venue of an ongoing action for custody or support to a more appropriate county based on convenience of witnesses and parties and the best interest of the child); *Brooker v. Brooker,* 133 N.C. App. 285, 515 S.E.2d 234 (1999) (trial court did not abuse its discretion by denying defendant's motion to transfer venue to Forsyth County based on its determination that Iredell County remained the most convenient forum, even though neither party lived in Iredell).]

(a) G.S. 1-83(2) does not authorize a change of venue for the "convenience of the court." [*Zetino-Cruz v. Benitez-Zetino*, 249 N.C. App. 218, 231, 791 S.E.2d 100, 108 (2016).]

b. A court may not change venue *sua sponte* under G.S. 1-83, whether under 1-83(1) or 1-83(2), when no defendant had answered or objected to venue. [*Zetino-Cruz v. Benitez-Zetino*, 249 N.C. App. 218, 791 S.E.2d 100 (2016) (trial court's authority to change venue under G.S. 1-83(1) **or** (2) is triggered by a defendant's objection to venue).] For more on this case, see Cheryl Howell, *No Sua Sponte Change of Venue Allowed*, UNC Sch. of Gov't: On the Civil Side Blog (Aug. 26, 2016), http://civil.sog.unc.edu/no-sua-sponte-change-of-venue-allowed.

5. Time for filing request to transfer venue.
    a. A defendant must request a change of venue based on improper venue before the time of answering expires [G.S. 1-83.] or before pleading if a further pleading is permitted. [G.S. 1A-1, Rule 12(b)(3); *Stokes v. Stokes*, 371 N.C. 770, 821 S.E.2d 161 (2018).]
    b. Objection to **improper venue** pursuant to G.S. 1-83(1) in a custody or support proceeding must be raised either in a pre-answer motion pursuant to G.S. 1A-1, Rule 12 or be set forth affirmatively in the answer. [*Stokes v. Stokes*, 371 N.C. 770, 821 S.E.2d 161 (2018); *Brooks v. Brooks*, 107 N.C. App. 44, 418 S.E.2d 534 (1992) (failure to raise the defense in this manner constitutes a waiver of the defense; mother's oral motion at trial, after the pleadings were complete, was not timely and therefore was ineffective to raise the issue of the prior pending support action).]
    c. Motions for change of venue based on **convenience of witnesses** pursuant to G.S. 1-83(2) are addressed to the discretion of the judge. A party may file a motion to change venue for the convenience of the witnesses at any time before trial if the party can make the required showing. [*Stokes v. Stokes*, 371 N.C. 770, 821 S.E.2d 161, *aff'g as modified* 258 N.C. App. 165, 811 S.E.2d 693 (2018).]
        i. For earlier cases *contra*, see *Thompson v. Horrell,* 272 N.C. 503, 158 S.E.2d 633 (1968); *Zetino-Cruz v. Benitez-Zetino*, 249 N.C. App. 218, 791 S.E.2d 100 (2016) (motion for change of venue for convenience of the witnesses must be filed after the answer is filed); *Smith v. Barbour,* 154 N.C. App. 402, 571 S.E.2d 872 (2002) (citing *McCullough v. Branch Banking & Tr. Co.,* 136 N.C. App. 340, 524 S.E.2d 569 (2000)) (motion pursuant to G.S. 1-83(2) must be filed **after** an answer has been filed; in custody and paternity action, trial court did not abuse its discretion by denying mother's motion to change venue based on G.S. 1-83(2), which was filed before she answered), *cert. denied,* 599 S.E.2d 408 (N.C. 2004).
        ii. In *Stokes v. Stokes,* 371 N.C. 770, 821 S.E.2d 161, *aff'g as modified* 258 N.C. App. 165, 811 S.E.2d 693 (2018), the supreme court noted that the earlier cases were decided based on case law decided under code pleading. The court held that neither the Rules of Civil Procedure nor G.S. 1-83 prohibits a party from filing a motion to change venue before the filing of an answer.
6. Waiver of objection to venue.
    a. Venue requirements are *not* jurisdictional and may be waived by express or implied consent. [G.S. 1A-1, Rule 12(h)(1) (a defense of improper venue is waived under certain circumstances set out therein).]
    b. Venue may be waived by any party. [*Chillari v. Chillari,* 159 N.C. App. 670, 583 S.E.2d 367 (2003) (citing *Teer Co. v. Hitchcock Corp.,* 235 N.C.741, 71 S.E.2d 54 (1952)); *Bass v. Bass*, 43 N.C. App. 212, 258 S.E.2d 391 (1979).]
    c. An objection to venue is waived if not timely filed. [*Chillari v. Chillari,* 159 N.C. App. 670, 583 S.E.2d 367 (2003) (in custody action, objection to venue based on improper county waived when included in an untimely answer); *Brooks v. Brooks*, 107 N.C. App. 44, 418 S.E.2d 534 (1992) (mother waived right to remove custody and support modification case to New Hanover County, where earlier child support order was entered, when she did not seek removal either in a pre-answer motion or answer;

mother's oral motion at trial not timely). *See also Bass v. Bass*, 43 N.C. App. 212, 258 S.E.2d 391 (1979) (if father had objection to venue of support proceeding, he waived it by voluntarily appearing and participating in hearing).]

d. Whether a defendant has waived objection to venue is reviewed on appeal de novo. [*Zetino-Cruz v. Benitez-Zetino*, 249 N.C. App. 218, 791 S.E.2d 100 (2016).]

7. Appeal of an order granting or denying a motion for change of venue pursuant to G.S. 1-83.

a. An order granting or denying a motion to change venue based on improper venue pursuant to G.S. 1-83(1) affects a substantial right and is immediately appealable. [*Stokes v. Stokes*, 371 N.C. 770, 821 S.E.2d 161, *aff'g as modified* 258 N.C. App. 165, 811 S.E.2d 693 (2018).]

b. An order granting or denying a discretionary transfer of venue based on convenience of witnesses pursuant to G.S. 1-83(2) does not affect a substantial right and is not subject to immediate appeal. [*Stokes v. Stokes*, 371 N.C. 770, 821 S.E.2d 161, *aff'g as modified* 258 N.C. App. 165, 811 S.E.2d 693 (2018).]

8. Transfer of venue in a IV-D case.

a. A "IV-D case" is a case in which services have been applied for or are being provided by a child support enforcement agency established pursuant to Title IV-D of the Social Security Act, as amended, and Article 9 of G.S. Chapter 110. [G.S. 110-129(7).] A "non-IV-D case" is any case, other than a IV-D case, in which child support is legally obligated to be paid. [G.S. 110-129(7).]

b. In a IV-D case, state law authorizes a IV-D agency to transfer a pending child support case from one jurisdiction to another within the state without obtaining a court order. [G.S. 110-129.1(a)(8)(d).]

c. Orders entered in IV-D cases must require the clerk of superior court to transfer the case to another jurisdiction in the state if the IV-D agency requests the transfer on the basis that the obligor, the child's custodian, and the child no longer reside in the jurisdiction in which the order was issued. The IV-D agency must give notice of the transfer to the obligor in accordance with G.S. 1A-1, Rule 5(b). Nothing in G.S. 50-13.4(e1) is to be construed as preventing a party from contesting the transfer. [G.S. 50-13.4(e1).]

D. Application of Foreign Law

1. Application of foreign law is prohibited if it results in a violation of constitutional rights.

a. The application of foreign law in cases under G.S. Chapters 50 (Divorce and Alimony) and 50A (Uniform Child Custody Jurisdiction and Enforcement Act) is prohibited when it would violate a fundamental right of a person under the federal or state constitution. A motion to transfer a proceeding to a foreign venue must be denied when doing so would have the same effect. [See G.S. 1-87.14, 1-87.17, and other provisions in Article 7A in G.S. Chapter 1, *added by* S.L. 2013-416, effective Sept. 1, 2013, and applicable to proceedings, agreements, and contracts entered into on or after that date.]

E. Parties and Standing

1. A civil action for child support may be brought by:
    a. A parent, person, agency, organization, or institution that has custody of a minor child or has filed a legal proceeding seeking custody of a minor child. [G.S. 50-13.4(a).]
        i. Physical or "de facto," rather than judicially determined or legal, custody of a child may be sufficient to confer standing to bring a civil action for child support. [*See Craig v. Kelley*, 89 N.C. App. 458, 366 S.E.2d 249 (1988) (noting that G.S. 50-13.4(a) does not require a judicial determination of custody before a person or agency can bring an action for support).]
    b. A minor child through the child's guardian. [G.S. 50-13.4(a).]
    c. A IV-D agency on behalf of a minor child, the child's guardian, the child's custodial parent, or the child's custodian if the child's right to child support has been assigned to the state or county pursuant to G.S. 110-137 or the child, guardian, parent, or custodian is receiving services from the IV-D agency pursuant to G.S. 110-130.1 and federal IV-D law and regulations. [G.S. 110-130 and 110-130.1(c).]
        i. In an action brought by a IV-D agency pursuant to Article 9 of G.S. Chapter 110 to establish, enforce, or modify child support or to establish paternity, collateral disputes between a custodial parent and a noncustodial parent involving visitation, custody, and similar issues shall be considered only in separate proceedings. [G.S. 110-130.1(c).] Collateral issues regarding visitation and custody cannot be filed in IV-D cases. [*Watauga Cty. ex rel. McKiernan v. Shell*, 264 N.C. App. 608, 826 S.E.2d 739 (2019) (trial court erred in "combining" a IV-D child support action with a custody proceeding as that act was prohibited by G.S. 110-130.1(c)).]
        ii. A similar prohibition applies to UIFSA proceedings. [*See* G.S. 52C-1-103(b)(2) (G.S. Chapter 52C does not grant a North Carolina tribunal jurisdiction to render judgment or issue an order relating to child custody or visitation in a proceeding under Chapter 52C; pursuant to G.S. 52C-1-101(22), "tribunal" includes an administrative agency or quasi-judicial entity authorized to establish, enforce, or modify support orders or to determine parentage of a child).]
2. The minor child is not a necessary party.
    a. Even though the legal right to child support accrues primarily for the benefit of the minor child, [*See Appert v. Appert*, 80 N.C. App. 27, 341 S.E.2d 342 (1986).] the child is not a necessary party to a civil action seeking support on behalf of the child.
    b. If a minor child is joined as a party in a civil action for child support, the child must be represented by the child's guardian or through a guardian ad litem appointed pursuant to G.S. 1A-1, Rule 17.
3. Real party in interest.
    a. Parent or caretaker as real party in interest.
        i. A child's custodial parent or caretaker is the real party in interest in a civil action for child support to the extent that the custodial parent or caretaker provides support that the noncustodial parent was legally obligated to provide. [*See*

Griffith v. Griffith, 38 N.C. App. 25, 247 S.E.2d 30 (dismissing father's argument, in an action brought after the child turned 18 for arrearage accruing before the child reached majority, that the minor child was the real party in interest, rather than the mother), *review denied,* 296 N.C. 106, 249 S.E.2d 804 (1978).]

ii. Even when the state or county is a real party in interest as discussed in Section I.E.3.b, immediately below, the child, guardian, parent, or caretaker remains a real party in interest in a civil action for child support to the extent that the child's right to support has not been completely assigned to the state or county. [*State ex rel. Crews v. Parker*, 319 N.C. 354, 354 S.E.2d 501 (1987) (grandmother allowed to intervene in action for support to assert her right to compensation for support she paid for child before receipt of Aid to Families with Dependent Children benefits).]

b. State or county as real party in interest.

i. For extensive discussion of the parties and their legal relationship in a child support enforcement action, see John L. Saxon, *Who Are the Parties in IV-D Child Support Proceedings? And What Difference Does It Make?*, Fam. L. Bull. No. 22 (UNC School of Government, Jan. 2007), https://www.sog.unc.edu/file/1601/download?token=uGDTiPeY.

ii. The state or county is the real party in interest in an action to establish a child support obligation when the child's right to support has been assigned to the state or county as a condition of receiving public assistance pursuant to G.S. 110-137. [*State ex rel. Crews v. Parker*, 319 N.C. 354, 354 S.E.2d 501 (1987).]

iii. G.S. 110-137 limits the assignment of the child's right to support to the amount of public assistance paid on behalf of the child.

iv. The IV-D agency is not a real party in interest in a civil action for child support when the child has never received public assistance and the child's right to child support has not been assigned to the state or county pursuant to G.S. 110-137.

4. A civil action for child support may be commenced against a minor unemancipated parent of a minor child, but the minor unemancipated parent must have a guardian ad litem appointed pursuant to G.S. 1A-1, Rule 17. [See G.S. 50-13.4(b) and *Liability and Amount*, Part 1 of this Chapter, Section I.B for discussion of when grandparents may be liable for support of a child when one or both of the child's parents are unemancipated minors.]

F. Pleading and Procedure

1. The procedure in an action for child support is the same as in other civil actions, unless a specific statute provides otherwise. [G.S. 50-13.5(a).]

2. Type of action. An action for support may be:

a. Maintained as an independent civil action; [G.S. 50-13.5(b)(1).]

i. If an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce involving the child's parents is pending and final judgment has not been entered, the support action **must** be joined as a claim in the pending action for divorce, etc. "or be by motion in the cause in such action." [G.S. 50-13.5(f).]

ii. An independent civil action for child support may be prosecuted during the pendency of a subsequently filed action for divorce, etc. filed in the same or a different county or may, at the discretion of the court having jurisdiction of the prior proceeding, be consolidated with the action for divorce, etc. [G.S. 50-13.5(f).]

iii. After a final judgment has been entered in an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce involving a minor child's parents, the prior action for divorce, etc. does not preclude either parent from filing a separate action seeking child support in the same county or district or in a different county or district unless the prior divorce, annulment, or alimony judgment also determined the parents' child support obligations. [*See Powers v. Parisher*, 104 N.C. App. 400, 409 S.E.2d 725 (1991), *review denied,* 331 N.C. 286, 417 S.E.2d 254 (1992).]

b. Joined as a claim in an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce; [G.S. 50-13.5(b)(3).]

i. If an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce involving the child's parents is pending and final judgment has not been entered, an action for child support **must** be joined as a claim in the pending action for divorce, etc. "or be by motion in the cause in such action." [G.S. 50-13.5(f).]

ii. *See Holbrook v. Holbrook,* 38 N.C. App. 303, 247 S.E.2d 923 (1978) (because husband's divorce action was pending in Forsyth County when wife filed custody action in Guilford County, Guilford County was without jurisdiction), *review denied,* 296 N.C. 411, 251 S.E.2d 469, 470 (1979).

c. Filed as a cross action in an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce; [G.S. 50-13.5(b)(4).]

d. Joined with or filed as a counterclaim in a civil action seeking custody or visitation of a minor child; [G.S. 50-13.5(b)(4). *But see* G.S. 110-130.1(c) (in IV-D cases, visitation, custody, and other "collateral issues" must be considered in separate actions; collateral issues regarding visitation and custody cannot be filed in IV-D cases; *Watauga Cty. ex rel. McKiernan v. Shell*, 264 N.C. App. 608, 826 S.E.2d 739 (2019) (trial court erred in "combining" a IV-D child support action with a custody proceeding as that act was prohibited by G.S. 110-130.1). A similar prohibition applies to UIFSA proceedings. [G.S. 52C-1-103(b)(2) (G.S. Chapter 52C does not grant a North Carolina tribunal jurisdiction to render judgment or issue an order relating to child custody or visitation in a proceeding under Chapter 52C; pursuant to G.S. 52C-1-101(22), "tribunal" includes an administrative agency or quasi-judicial entity authorized to establish, enforce, or modify support orders or to determine parentage of a child).]

e. Filed by motion in the cause (either before or after judgment) in an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce; [G.S. 50-13.5(b)(5); *Bottomley v. Bottomley*, 82 N.C. App. 231, 346 S.E.2d 317 (1986) (plaintiff-husband not precluded from having his child support obligation determined through a motion in the cause in the divorce action by the fact that the divorce

judgment had been entered and the court had not previously entered support orders in that action).]

f. Maintained on the court's own motion in an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce; [G.S. 50-13.5(b)(6).]

g. Joined with a claim to recover public assistance debts pursuant to G.S. 110-135 or with a claim for prior maintenance of a child;

h. In the context of a paternity determination:

i. Joined with or filed as a counterclaim in a civil action to determine the paternity of a child born out of wedlock; [*See* G.S. 1A-1, Rule 18(a); 49-15.]

ii. Prosecuted by the issuance by the court, upon application of an interested party, of a summons signed by a judge, clerk of superior court, or assistant clerk of superior court, requiring a putative father who has executed an affidavit of parentage under G.S. 110-132 to appear and show cause why he should not be ordered to pay child support. [G.S. 110-132(b).] See *Paternity*, Bench Book, Vol. 1, Chapter 10.

3. Civil action for support generally.

a. Civil actions for child support are heard and decided by the district court judge without a jury. [G.S. 50-13.5(h).]

b. A court does not have jurisdiction to try a civil action for child support at a session designated only for civil motions. [*Schumacher v. Schumacher*, 109 N.C. App. 309, 426 S.E.2d 467 (1993) (even though all parties may consent, district judge has no authority to hold a trial when only authorized to conduct a civil motions session).]

c. Except as otherwise provided, the rules of civil procedure apply in civil child support actions pursuant to G.S. 50-13.4 *et seq.* [G.S. 1A-1, Rule 1; 50-13.5(a).]

d. An individual who brings an action or motion in the cause seeking support for a minor child, and the individual who defends the action, must provide their Social Security numbers to the clerk of superior court. [G.S. 50-13.4(g).] G.S. 50-13.4(g), (h), *amended by* S.L. 2008-12, § 1, effective Oct. 1, 2008, no longer requires Social Security numbers of the parties in a child support order.

e. Arrest and bail, attachment and garnishment, and other prejudgment remedies are available in civil actions for child support. [G.S. 50-13.4(f)(3) (remedy of arrest and bail), (4) (remedy of attachment and garnishment); G.S. Chapter 1, Articles 34 (arrest and bail) and 35 (attachment).]

4. When action may be brought generally.

a. A civil action for child support may be commenced at any time before the child's 18th birthday. [*Freeman v. Freeman,* 103 N.C. App. 801, 407 S.E.2d 262 (1991) (noting that it is well accepted in North Carolina that courts have no authority to order child support for a child who has reached the age of majority and has become emancipated).]

b. An action seeking reimbursement for past support expenditures may be brought after the child has turned 18, subject to G.S. 1-52(2), which limits recovery to those expenditures incurred within three years before the date the action for support is filed. [*Freeman v. Freeman,* 103 N.C. App. 801, 407 S.E.2d 262 (1991).]

c. Under appropriate circumstances, a parent may bring an action for child support against his spouse when the parents have neither physically separated nor asserted a claim for divorce from bed and board, at least when one party expresses an intent to leave the marital residence as soon as custody is settled. [*Baumann-Chacon v. Baumann,* 212 N.C. App. 137, 710 S.E.2d 431 (2011) (trial court erred when it dismissed claim for child support for lack of subject matter jurisdiction based on fact that spouses had not separated as of date complaint was filed or when matter was heard). *But cf. Harper v. Harper,* 50 N.C. App. 394, 273 S.E.2d 731 (1981) (indicating that there is no justiciable issue regarding custody and support when parties live together).]

5. Notice requirements.
   a. Motions for support filed in a pending action must be served on the nonmoving parties at least ten days before the date of the hearing on the motion. [G.S. 50-13.5(d)(1).]
   b. The minor child's parents (if their addresses are reasonably ascertainable), any person, agency, organization, or institution that has actual custody of the child, and any person, agency, organization, or institution that has been ordered to support the child must be given notice of a civil action for child support if they have not been named as parties and served with process. Failure to provide notice, however, does not affect the validity of a child support order, unless otherwise ordered. [G.S. 50-13.5(e).]
6. Intervention.
   a. The child's parents, any person, agency, organization, or institution that has actual custody of the child, and any person, agency, organization, or institution that has been ordered to support the child may intervene in a civil action for child support by filing a notice of appearance and other appropriate pleadings if they have not been named as parties. [G.S. 50-13.5(e)(4).]
   b. *See also* G.S. 1A-1, Rule 24; *State ex rel. Crews v. Parker*, 319 N.C. 354, 354 S.E.2d 501 (1987) (grandmother had right to intervene in state's action against putative father for child support and reimbursement of past paid public assistance to assert her right to reimbursement of support she paid for child before receipt of public assistance).
   c. *See* Cheryl Howell, *Intervention in Custody and Child Support Cases*, UNC Sch. of Gov't: On the Civil Side Blog (May 16, 2018), https://civil.sog.unc.edu/intervention-in-custody-and-child-support-cases.
7. Financial affidavits.
   a. Local rules may require the parties to file financial affidavits.
   b. Sworn financial affidavits have been found to be competent evidence as to the information contained therein. [*See Row v. Row*, 185 N.C. App. 450, 650 S.E.2d 1 (2007) (duly-sworn affidavits were competent evidence upon which the trial court could rely to determine the cost of raising the parties' children; father's argument that some expenses credited to mother were either incorrect or not calculated for him was dismissed based on fact that father's financial affidavit, but not mother's, failed to attribute to the children any part of his monthly expenses for mortgage or car payments, taxes, insurance, utilities, telephone, grocery, and other expenditures), *review*

denied, 362 N.C. 238, 659 S.E.2d 741, *cert. denied*, 555 U.S. 824, 129 S. Ct. 144 (2008); *Kleoudis v. Kleoudis*, 271 N.C. App. 35, 843 S.E.2d 277 (2020) (citing *Row*, 185 N.C. App. at 460, 650 S.E.2d at 7) child's accustomed standard of living established by parties' financial affidavits, which set out expenses that each party incurred for the child's benefit); *Parsons v. Parsons,* 231 N.C. App. 397, 752 S.E.2d 530 (2013) (citing *Row*) (affidavit of expenses itself is evidence of a party's expenses, thus, wife's affidavit as to child's educational expenses did not need to be supported by other evidence to be competent and relevant).]

c. Contrary to defendant's assertion that plaintiff's affidavit did not constitute evidence of actual expenditures, an affidavit is recognized by this court as a basis of evidence for obtaining support. [*Savani v. Savani*, 102 N.C. App. 496, 403 S.E.2d 900 (1991) (plaintiff's affidavit setting out the expenses she incurred while child was in her custody was sufficient basis for an order reimbursing her for past support).]

8. Language access services in child support proceedings.

a. As of Oct. 14, 2013, language services have been expanded to all child custody and child support proceedings for all spoken foreign languages. Court interpreters shall be provided at state expense for all limited English proficient parties in interest who require interpreting services during a child custody or child support proceeding. ["Expansion of Language Access Services to All Child Custody and Child Support Proceedings," Memorandum from Brooke A. Bogue, N.C. Administrative Office of the Courts, Office of Language Access Services, to various judges, clerks, administrators, and others (Sept. 25, 2013), https://www.lep.gov/NC_int_memo_0913.pdf.]

b. Information about Language Access Services is available at https://www.nccourts.org/LanguageAccess/. The North Carolina Judicial Branch's Standards for Language Access Services in North Carolina State Courts (July 1, 2017) are available at https://www.nccourts.gov/assets/inline-files/02_2_NC_Standards_for_Language_Access_0.pdf.

9. Presentation of evidence.

a. "The trial judge has inherent authority to supervise and control trial proceedings. The manner of the presentation of evidence is largely within the sound discretion of the trial judge and his control of a case will not be disturbed absent a manifest abuse of discretion." [*Price v. Biggs*, 272 N.C. App. 315, 320, 846 S.E.2d 781, 785 (2020) (quoting *State v. Da*vis, 317 N.C. 315, 318, 345 S.E.2d 176, 178 (1986)).]

b. N.C. R. Evid. 611(a) requires a court to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . ascertain[] . . . the truth, . . . avoid needless consumption of time, and . . . protect witnesses from harassment or undue embarrassment."

i. A trial judge's questioning of an unrepresented defendant seeking to reduce his child support obligation did not prejudice the defendant and complied with Rule 611 when the judge's inquiries were focused, and not impermissibly leading, and addressed defendant's previous employment, which defendant voluntary had left weeks after entry of a temporary support order, and his educational and career goals. [*Cumberland Cty. ex rel. Rettig v. Rettig,* 231 N.C. App. 170, 753 S.E.2d 740

(2013) (**unpublished**) (recognizing practice of treating unrepresented litigants no differently than those represented by counsel).]

c. Time limits on presentation of evidence.

i. Parties must be given an adequate time to be heard since an obligation for child support is recognized as a property right, triggering procedural due process protections. [*Price v. Biggs*, 272 N.C. App. 315, 846 S.E.2d 781 (2020) (at a second hearing on a motion to modify child support, defendant's due process rights were violated when each party was allowed twenty minutes to present evidence, given that plaintiff had presented evidence for one hour and forty minutes at an earlier hearing on the same issue; a court-ordered recess for settlement purposes ended that hearing without defendant having presented any evidence).]

ii. For a case finding no abuse of discretion from a trial court's imposition of a two-day limitation on the presentation of evidence during a custody trial when the parties had agreed to that limitation in a pretrial conference and made no objection at later pretrial conferences or at trial, see *Wolgin v. Wolgin*, 217 N.C. App. 278, 719 S.E.2d 196 (2011) (citing N.C. R. Evid. 611(a)). *See also* Michael Crowell, *Time Limits in Family Law Cases*, UNC Sch. of Gov't: On the Civil Side Blog (Mar. 11, 2016), https://civil.sog.unc.edu/time-limits-in-family-law-cases.

10. Disposition.

a. Except when paternity is at issue, within sixty days from the date of service (or within ninety days from the date of service if the parties have consented to an extension of time or if additional time is required because a party or the party's attorney cannot be present at a hearing), a district court judge must enter:

i. An order dismissing a claim for child support,

ii. A temporary order awarding child support, or

iii. A final order awarding child support. [G.S. 50-32 and 50-31(2), (5).]

b. *See also* 45 C.F.R. § 303.101 (75 percent of all IV-D cases must be decided within six months from date of service; 90 percent of all IV-D cases must be decided within twelve months). For definition of a IV-D case and a non-IV-D case, see Section I.C.8, above.

11. Applicability of G.S. 1A-1, Rule 41 (dismissal of action) in child support actions.

a. Voluntary dismissal pursuant to G.S. 1A-1, Rule 41(a).

i. A plaintiff may dismiss an action or claim without order of court by filing:

(a) A notice of dismissal at any time before plaintiff rests his case or

(b) A stipulation of dismissal signed by all parties who have appeared in the action. [G.S. 1A-1, Rule 41(a)(1).]

ii. Once plaintiff rests his case, plaintiff cannot terminate the case by taking a voluntary dismissal. At that point only a judge can dismiss the case. Unless otherwise specified, a dismissal under Rule 41(a)(2) is without prejudice. [G.S. 1A-1, Rule 41(a)(2).]

iii. Plaintiff cannot take a voluntary dismissal any time after a "final" custody and support order has been entered. [*Massey v. Massey,* 121 N.C. App. 263, 465

S.E.2d 313 (1996) (stipulation of dismissal filed by the parties after reconciliation was void and of no effect as to the child custody and child support issues previously resolved by "final" judgment; parties were not free to dismiss voluntarily under Rule 41(a) a final determination of child custody and support; moreover, express language of G.S. 1A-1, Rule 41(a)(1) provides for dismissal of an action or claim, not an order).]

iv. Voluntary dismissal of a support claim probably vacates a temporary child support order, as long as no affirmative relief has been requested by the nondismissing party. [*See Doe v. Duke Univ.*, 118 N.C. App. 406, 408, 455 S.E.2d 470, 471 (1995) (quoting *Gibbs v. Carolina Power & Light Co.,* 265 N.C. 459, 464, 144 S.E.2d 393, 398 (1965)) (protective order entered during medical malpractice case was nullified by voluntary dismissal; dismissal "carries down with it previous rulings and orders in the case"); *Barham v. Hawk*, 165 N.C. App. 708, 600 S.E.2d 1 (2004) (voluntary dismissal nullified discovery order entered in case), *aff'd without precedential value,* 360 N.C. 358, 625 S.E.2d 778 (2006).] For more on this topic, see Cheryl Howell, *What Happens to Temporary Orders When a Case Is Dismissed?,* UNC Sch. of Gov't: On the Civil Side Blog (Oct. 27, 2017), https://civil.sog.unc.edu/what-happens-to-temporary-orders-when-a-case-is-dismissed.

b. Involuntary dismissal pursuant to G.S. 1A-1, Rule 41(b) for failure to prosecute.

i. Under G.S. 1A-1, Rule 41, a defendant may move for dismissal of an action or of any claim therein for failure of plaintiff to prosecute or to comply with the rules of civil procedure or any court order. [G.S. 1A-1, Rule 41(b).]

ii. Unless the court in its order for dismissal otherwise specifies, a dismissal pursuant to Rule 41(b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication on the merits, meaning it is a dismissal with prejudice. [G.S. 1A-1, Rule 41(b).]

iii. When a motion or complaint is involuntarily dismissed with prejudice, the party is precluded from filing another motion or complaint with identical allegations. The party is not precluded from filing another motion or complaint asserting different allegations and requesting different relief. [*Hebenstreit v. Hebenstreit*, 240 N.C. App. 27, 769 S.E.2d 649 (2015) (trial court *sua sponte* involuntarily dismissed for failure to prosecute father's motion for modification of custody and for contempt, the contempt motion being based on a single allegation that mother had left the state with the child, completely denying father access to the child in violation of an earlier order awarding father secondary physical custody and liberal visitation; trial court erred when it dismissed father's second motion for temporary emergency custody and for contempt based on its conclusion that all matters raised in the second motion for contempt had previously been adjudicated by the involuntary dismissal of the first contempt motion; father's second contempt motion contained additional allegations not included in the first contempt motion, alleged additional acts of contempt, and requested additional relief not requested in the first motion and, thus, was not barred).]

iv. The court of appeals has held that defendant who presented evidence after his motion for involuntary dismissal was denied by the trial court waived his right to appeal the denial of the motion. [*Jarrett v. Jarrett*, 249 N.C. App. 269, 790 S.E.2d 883 (domestic violence proceeding), *review denied*, *stay dissolved*, 369 N.C. 194, 793 S.E.2d 259 (2016).]

12. Automatic stay of proceedings.

a. Filing of a bankruptcy petition by an obligor does not automatically stay a civil proceeding to establish support. [*See* 11 U.S.C. § 362 (b)(2)(A)(ii).] The automatic stay does not apply to:

i. "[T]he commencement or continuation of a civil action or proceeding . . . for the establishment or modification of an order for domestic support obligations." [11 U.S.C. § 362(b)(2)(A)(ii).]

ii. For a more complete discussion on the automatic stay in the context of child support, see *Enforcement of Child Support Orders*, Part 4 of this Chapter, Section XI.

b. The stay may affect the court's ability to enforce a support order through civil contempt or to enter wage withholding in cases filed before Oct. 17, 2005. [See *Enforcement of Child Support Orders*, Part 4 of this Chapter, Section XI.]

c. A defendant who is on active military duty may request that the court stay a civil action for child support if the defendant's military service would materially affect her ability to defend herself. [50 U.S.C. § 3932 (Servicemembers Civil Relief Act (SCRA)). *See Cromer v. Cromer*, 303 N.C. 307, 278 S.E.2d 518 (1981); *Judkins v. Judkins*, 113 N.C. App. 734, 441 S.E.2d 139, *review denied,* 336 N.C. 781, 447 S.E.2d 424 (1994).] For more on the SCRA, see *Child Custody*, Bench Book, Vol. 1, Chapter 4.

13. The Uniform Deployed Parents Custody and Visitation Act (UDPCVA or "the Act"), *added by* S.L. 2013-27, § 3, effective Oct. 1, 2013.

a. The Act provides a procedure whereby parents may enter into a temporary agreement for custodial responsibility of their child(ren) during deployment; in cases where there is no agreement, the Act sets out a judicial procedure for entry of a temporary custody order.

b. With respect to child support, the Act provides that if an agreement granting caretaking authority is executed, the court may enter a temporary order for child support consistent with the laws of North Carolina if the court has jurisdiction under the Uniform Interstate Family Support Act, G.S. Chapter 52C. [G.S. 50A-378.] The parties may not modify existing support obligations in an agreement executed pursuant to G.S. 50A-360. For more on the UDPCVA, see *Child Custody*, Bench Book, Vol. 1, Chapter 4.

G. Defenses in an Action for Support

1. Lack of jurisdiction.

a. A defendant may raise lack of subject matter jurisdiction (including lack of subject matter jurisdiction arising from the existence of a controlling child support order entitled to recognition under the federal Full Faith and Credit for Child Support

Orders Act (FFCCSOA) (applicable to a child support order issued by a state tribunal but not to a foreign support order) or the Uniform Interstate Family Support Act (UIFSA) (applicable to a child support order issued by a state tribunal and to a foreign support order)) or lack of personal jurisdiction as a defense in a civil action for child support. See Sections I.A and I.B, above.

2. Laches or equitable estoppel.
   a. Laches/estoppel when North Carolina law applied.
      i. There do not appear to be any reported cases in which a defendant has successfully asserted the defense of laches in a proceeding to collect vested, past due child support arrearages under a North Carolina or a foreign order, to the extent not barred by North Carolina's ten-year statute of limitations. [*See Malinak v. Malinak*, 242 N.C. App. 609, 775 S.E.2d 915 (2015) (citing *Larsen v. Sedberry*, 54 N.C. App. 166, 282 S.E.2d 551 (1981)) (trial court erred in applying the doctrine of laches to bar recovery of court-ordered child support not barred by the statute of limitations); *Larsen* (laches did not bar mother's action against father's estate to collect child support owed under a Florida judgment entered fourteen years before; recovery allowed except to the extent barred by the ten-year statute of limitations), *review denied,* 304 N.C. 728, 288 S.E.2d 381 (1982).]
      ii. North Carolina's court of appeals has not recognized equitable estoppel as a valid defense against the enforcement of an obligor's legal obligation to pay court-ordered child support. [*See Meehan v. Lawrance,* 166 N.C. App. 369, 602 S.E.2d 21 (2004) (wife not estopped from enforcing child support order when husband failed to show detrimental reliance on alleged oral agreement that changed his obligation to provide health insurance); *Baker v. Showalter*, 151 N.C. App. 546, 566 S.E.2d 172 (2002) (when obligor was unable to demonstrate that she relied to her detriment on the written and oral agreement of the parties for reduced child support, the trial court did not err by declining to apply the doctrine of equitable estoppel; wife's reduced payments were to wife's benefit, as they allowed her to buy a townhome); *Webber v. Webber*, 32 N.C. App. 572, 232 S.E.2d 865 (1977) (wife not estopped from bringing an action in North Carolina for divorce, alimony, and child support by agreeing that she would not contest divorce action filed by husband in Georgia in exchange for title to marital residence and a car; wife did not contest Georgia divorce and was entitled to assert her right to alimony and child support).]
   b. Laches when law of another state applied.
      i. Trial court correctly vacated mother's registration of an Illinois child support order based on laches, as construed by the Illinois courts, even though laches is not a defense available in North Carolina in a proceeding to enforce vested, past due child support arrearages. Under the federal Full Faith and Credit for Child Support Orders Act (FFCCSOA), father, as nonregistering party, was permitted to assert any defense recognized in Illinois, the issuing state, including the equitable defense of laches. [*Tepper v. Hoch*, 140 N.C. App. 354, 536 S.E.2d 654 (2000) (denial of wife's claim for child support arrears affirmed; father prejudiced by mother's decision to seek arrearages seven years after child

emancipated).] For more on equitable estoppel and laches, see *Enforcement of Child Support Orders,* Part 4 of this Chapter, Section I.F.

3. Statute of limitations. See *Enforcement of Child Support Orders,* Part 4 of this Chapter, Section I.F.

4. Nonpaternity when issue was previously decided.

   a. If paternity has not been established by court order, a party may raise the issue of the child's paternity in a child support proceeding. The party may request a paternity test pursuant to G.S. 8-50.1(b1), which provides for blood or genetic marker testing in the trial of any civil action in which the question of parentage arises.

   b. Attempts to challenge paternity have been rejected on the following grounds.

      i. A prior determination of paternity is itself a bar. [*See Helms v. Landry,* 363 N.C. 738, 686 S.E.2d 674 (finding in 2002 custody order involving unmarried parents that plaintiff was the biological father was a judicial determination of paternity and was binding in a 2007 proceeding filed by mother contesting paternity; trial court properly denied mother's motion for paternity testing), *rev'g per curiam for reasons stated in dissenting opinion in* 194 N.C. App. 787, 671 S.E.2d 347 (2009) (Jackson, J., concurring in part and dissenting in part); *see also* G.S. 52C-3-314 *and Reid v. Dixon,* 136 N.C. App. 438, 524 S.E.2d 576 (2000) (when paternity was previously established by Alaska legal proceeding based on father's admission of paternity, father could not later plead nonparentage as a defense in a UIFSA enforcement proceeding); *Heavner v. Heavner,* 73 N.C. App. 331, 326 S.E.2d 78 (parentage already decided when former husband pled guilty in criminal nonsupport action and admitted paternity in divorce complaint), *review denied,* 313 N.C. 601, 330 S.E.2d 610 (1985).]

      ii. A prior determination of paternity is res judicata in a later proceeding. [*Williams v. Holland*, 39 N.C. App. 141, 249 S.E.2d 821 (1978) (defendant barred by res judicata from putting paternity in issue in child support enforcement action based on Nevada divorce decree that found child to be child of the marriage; when defendant is barred from raising issue, it follows that court should deny motion for paternity testing).]

      iii. A paternity judgment based on an unrescinded affidavit of paternity pursuant to G.S. 110-132 is res judicata in a later proceeding relating to support. [*See Person Cty. ex rel. Lester v. Holloway*, 74 N.C. App. 734, 329 S.E.2d 713 (1985) (defendant could not attack, in an enforcement proceeding relating solely to support, a judgment of paternity based on defendant's acknowledgement of paternity under G.S. 110-132(a)); *Leach v. Alford*, 63 N.C. App. 118, 304 S.E.2d 265 (1983) (language in G.S. 110-132(b) that a "judgment of paternity shall be res judicata as to that issue and shall not be reconsidered by the court" applies to child support proceedings, recognizing the established rule that judgments of paternity are res judicata in later support proceedings; quoted language is not an absolute bar to a party seeking relief under G.S. 1A-1, Rule 60(b) from an acknowledgment of paternity based on G.S. 110-132(a) when support is not at issue).] Note that before Oct. 1, 1997, an acknowledgment of paternity executed pursuant to G.S. 110-132(a) filed with and approved by a district court judge had the same

force and effect as a judgment of the court. Between Oct. 1, 1997, and Oct. 1, 1999, an acknowledgment of paternity pursuant to G.S. 110-132(a) constituted an admission of paternity, subject to a right of rescission. [S.L. 1997-433, § 4.7.] Since Oct. 1, 1999, the admission of paternity arising from an acknowledgment of paternity (now affidavit of parentage) under G.S. 110-132(a) has the same legal effect as a judgment of paternity for the purpose of establishing a child support obligation.

iv. For a discussion on setting aside a voluntary support agreement based on a subsequent denial of paternity, see Section III.A.7, below.

c. A party is entitled to testing under G.S. 8-50.1(b1) to contest paternity if there is no judgment determining paternity and the party never formally acknowledged paternity in the manner prescribed by G.S. 110-132 or in another sworn written statement. [*See Ambrose v. Ambrose*, 140 N.C. App. 545, 536 S.E.2d 855 (2000) (former husband not barred from contesting paternity of child born during marriage because the issue had not been litigated and he had never formally acknowledged paternity under G.S. 110-132 for purposes of child support; blood test could be used to rebut presumption of paternity attaching to child born of the marriage).]

i. In North Carolina, there is no presumption that a father who is named on a birth certificate has had his paternity *judicially* established. [Sara DePasquale, Fathers and Paternity: Applying the Law in North Carolina Child Welfare Cases 42 n.7 (UNC School of Government, 2016) (hereinafter Fathers and Paternity) (emphasis in original) (citing G.S. 130A-101(e), (f); 49-12; 49-13; 130A-118(b)(2), (3); Title 10A of the North Carolina Administration Code, Ch. 41H, § .0910, and *In re J.K.C.,* 218 N.C. App. 22, 721 S.E.2d 264 (2012), and *Gunter v. Gunter,* 228 N.C. App. 138, 746 S.E.2d 22 (2013) **(unpublished)**). *But see J.K.C.* (in a termination of parental rights proceeding brought on the ground set forth in the version of G.S. 7B-1111(a)(5) then in effect (that unwed father failed to acknowledge or establish paternity before the termination of parental rights action was initiated), there is a rebuttable presumption that respondent father took the required legal steps necessary to establish paternity if he is named on the child's amended birth certificate); *Gunter* (mother could not rely on the holding in *J.K.C.* to support her argument that husband's name on child's birth certificate judicially established his paternity of the child).]

d. G.S. 50-13.13, *added by* S.L. 2011-328, § 3, effective Jan. 1, 2012, sets out a process to set aside an order of paternity or an affidavit of parentage under limited circumstances. See *Liability and Amount,* Part 1 of this Chapter, Section II.D.1(e).

e. See *Paternity,* Bench Book, Vol. 1, Chapter 10, for more on paternity, including a discussion of res judicata and collateral estoppel as defenses in a civil action to establish paternity.

5. Defenses found not valid.

a. A claim that one of the child's parents tricked the other parent into conceiving the child is not a valid defense in a suit to establish paternity and for child support brought against the deceived parent. [*Smith v. Price*, 74 N.C. App. 413, 328 S.E.2d

811 (1985), *aff'd in part, rev'd in part on other grounds,* 315 N.C. 523, 340 S.E.2d 408 (1986).]

b. A defendant may not raise as a defense the custodial parent's or the caretaker's waiver of the child's right to support or release of the defendant by agreement or contract, either with or without consideration, from her child support obligation. [*See Cartrette v. Cartrette*, 73 N.C. App. 169, 325 S.E.2d 671 (1985) (a parent cannot contract away her obligation to support a dependent child, nor can a parent by contract diminish the rights of the state or a county to seek reimbursement for public assistance paid); *see also Voss v. Summerfield*, 77 N.C. App. 839, 336 S.E.2d 144 (1985) (trial court erred in denying motion of the custodial parent, in this case the father, to modify a consent order to allow for child support where the trial court's denial was based on father's waiver of child support in a separation agreement and was entered without consideration of father's evidence on changed circumstances; while the court of appeals cited precedent holding that parents cannot by contract withdraw their children from the "protective custody" of the court, on remand, father would have the burden to show a substantial change in circumstances affecting the welfare of the child, with the court giving due deference to father's waiver of child support in the separation agreement, which gave rise to a presumption that, absent contrary evidence, the amount agreed upon, in this case zero, was just and reasonable).] For more on the effect of support provisions in incorporated and unincorporated separation agreements, see Section I.G.6., below

c. The significant, separate income or estate of a minor child does not relieve a parent of his responsibility to support the child to the extent he is able to do so. [*See Browne v. Browne*, 101 N.C. App. 617, 400 S.E.2d 736 (1991) (separate property of each child in excess of $300,000 did not diminish or relieve former husband's obligation to provide for their support); *Sloop v. Friberg*, 70 N.C. App. 690, 320 S.E.2d 921 (1984) (no error when court did not consider that children each had substantial trust accounts arising from a wrongful death suit on behalf of their mother's estate).]

d. A noncustodial parent's legal obligation to support her child generally is not dependent or contingent on whether the custodial parent allows her to visit the child or to exercise visitation rights pursuant to a court order. [*See Appert v. Appert*, 80 N.C. App. 27, 341 S.E.2d 342 (1986) (trial court erred when it ordered that child support paid by father be placed in escrow in the event the minor children failed or refused to abide by the visitation privileges allowed the father); *McGee v. McGee,* 118 N.C. App. 19, 453 S.E.2d 531 (duty to pay child support is wholly independent of the noncustodial parent's right to visitation), *review denied,* 340 N.C. 359, 458 S.E.2d 189 (1995).]

e. Fact that children's grandparents had paid private school tuition in the past did not relieve the mother of her obligation to pay her share of that expense. [*Allen v. Allen*, 201 N.C. App. 159, 688 S.E.2d 118 (2009) (**unpublished**).]

6. Effect of support provisions in a separation agreement.

a. Unincorporated separation agreements.

i. The fact that the parents of a minor child have entered into a binding separation agreement that includes provisions for child support does not preclude the custodial parent from instituting a civil action for support pursuant to G.S. 50-13.4

et seq. and does not deprive the district court of jurisdiction to enter an order requiring the noncustodial parent to pay support without proof of a change in circumstances. [*Powers v. Parisher*, 104 N.C. App. 400, 409 S.E.2d 725 (1991) (unincorporated agreement), *review denied,* 331 N.C. 286, 417 S.E.2d 254 (1992); *Brind'Amour v. Brind'Amour,* 196 N.C. App. 322, 674 S.E.2d 448 (2009) (unincorporated Memorandum of Agreement of Equitable Distribution and Support).]

ii. However, there is a presumption that the amount of support set in an unincorporated separation agreement is reasonable. [*Pataky v. Pataky,* 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004).]

iii. A court must set prospective support in accordance with the agreement unless the presumption is rebutted. [*Pataky v. Pataky,* 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004).]

iv. The *Pataky* presumption is rebutted by evidence that the amount of support in the agreement does not meet the reasonable needs of the children. The *Pataky* presumption is not rebutted by evidence that that an obligor does not have the ability to pay the amount required by the contract. [*Lasecki v. Lasecki*, 257 N.C. App. 24, 809 S.E.2d 296 (2017).]

v. If the *Pataky* presumption is rebutted, the court may enter an order of prospective support establishing child support in an amount less than the amount established by a separation or child support agreement. [*Brind'Amour v. Brind'Amour,* 196 N.C. App. 322, 674 S.E.2d 448 (2009) (citing *Bottomley v. Bottomley*, 82 N.C. App. 231, 346 S.E.2d 317 (1986)). *Cf. Lasecki v. Lasecki*, 257 N.C. App. 24, 32, 809 S.E.2d 296, 304 (2017) ("[T]he question for the trial court was limited to . . . whether the amount of child support should be *increased* . . . .").]

vi. However, the court of appeals also has held that while parties may contract that support will be paid in a higher amount or for longer than required by statute, if the contract amount or duration is less generous than statutory provisions, the obligee can recover support for the amount or the duration period provided by G.S. 50-13.4. [*Malone v. Hutchinson-Malone*, 246 N.C. App. 544, 784 S.E.2d 206 (2016).]

vii. For a discussion of the application of the N.C. Child Support Guidelines when there is an unincorporated separation agreement, see *Liability and Amount*, Part 1 of this Chapter.

b. Incorporated separation agreements.

i. An incorporated separation agreement is treated as a court order and, as such, is enforceable by contempt and may be modified only upon a showing of changed circumstances. [*Beamer v. Beamer,* 169 N.C. App. 594, 610 S.E.2d 220 (2005) (incorporated support agreements modifiable only upon a showing of changed circumstances); *Powers v. Powers,* 103 N.C. App. 697, 407 S.E.2d 269 (1991) (incorporated separation agreement considered a court order enforceable by contempt).]

ii. A separation agreement approved by the court is treated as a court-ordered judgment. [*Walters v. Walters,* 307 N.C. 381, 298 S.E.2d 338 (1983) (applicable to judgments entered on or after Jan. 11, 1983).]

iii. After *Walters v. Walters,* 307 N.C. 381, 298 S.E.2d 338 (1983), a separation agreement entered as a consent judgment is treated the same as a judgment entered after litigation. There is no difference between an agreement that the court adopted or simply signed off on as in other civil cases. [*See Walters v. Walters,* 307 N.C. 381, 298 S.E.2d 338 (1983) (consent judgments are modifiable and enforceable in the same manner as any other judgment in a domestic relations case); *Fucito v. Francis,* 175 N.C. App. 144, 622 S.E.2d 660 (2005) (for practical purposes, in *Walters*, the court fashioned a "one-size-fits-all" rule applicable to incorporated settlement agreements in the area of domestic law, holding that when parties present their separation agreement to the court for approval, the agreement will no longer be considered a contract between the parties, but rather a court-ordered judgment).]

iv. Parties may contract that support will be paid in a higher amount or for longer than required by statute, but if the contract amount or duration is less generous than statutory provisions, the obligee can recover support for the amount or the duration period provided by G.S. 50-13.4. [*Malone v. Hutchinson-Malone*, 246 N.C. App. 544, 547–48, 784 S.E.2d 206, 209 (2016).]

c. See Section III.C, below, and *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1for more on the effect of child support provisions in a separation agreement.

H. Child Support Orders

1. Checklists setting out the findings for initial support orders, modification of orders, and attorney fees are included at the end of this Chapter.

2. Generally.

a. All child support orders must contain a finding as to the obligor's actual present income.

b. Orders setting support by application of the child support guidelines do not need specific findings of fact regarding a child's reasonable needs or the relative ability of each parent to provide support. [N.C. Child Support Guidelines, 2020 Ann. R. N.C. 49 (effective March 1, 2020, and applicable to child support actions heard on or after that date) (hereinafter referred to as 2020 Guidelines).] The guidelines revised in 2014 apply to child support actions **heard** on or after January 1, 2015. For more on the 2020 Guidelines, see Cheryl Howell, *Amendments to Chapter 50B and to the Child Support Guidelines*, UNC Sch. of Gov't: On the Civil Side Blog (Feb. 12, 2020), https://civil.sog.unc.edu/amendments-to-chapter-50b-and-to-the-child-support-guidelines. For more on the 2015 Guidelines, see Cheryl Howell, *We Have New Child Support Guidelines*, UNC Sch. of Gov't: On the Civil Side Blog (Jan. 28, 2015), http://civil.sog.unc.edu/we-have-new-child-support-guidelines.

c. Findings of fact are required when a court considers a request to deviate from the guidelines. [See *Liability and Amount*, Part 1 of this Chapter, Sections IV.F and G.]

d. Findings of fact also are required to show changed circumstances in modification cases. [See *Modification of Child Support Orders*, Part 3 of this Chapter, Section II.G.10.]

e. In all orders, the decretal part of the order should include a provision directing the parent to pay child support in the amount and manner ordered. However, an order that included a directive requiring a parent to pay child support only in the findings portion of the order, and not in the decretal portion of the order, has been found to be a decree of the trial court enforceable by contempt. [*See Langston v. Johnson,* 142 N.C. App. 506, 543 S.E.2d 176 (2001).]

f. **NOTE:** G.S. 50-13.13(f) provides a procedure for relief from a child support order based on a finding of nonpaternity under certain circumstances. [G.S. 50-13.13(f), *added by* S.L. 2011-328, § 1, effective Jan. 1, 2012, and applicable to motions or claims for relief filed on or after that date.]

3. Default judgment. A district court judge may enter a default judgment pursuant to G.S. 1A-1, Rule 55 in a civil action for child support. [*Boyd v. Marsh*, 47 N.C. App. 491, 267 S.E.2d 394 (1980) (order setting aside paternity and child support default judgments reversed).]

a. The Servicemembers Civil Relief Act (SCRA) was enacted by Congress, effective Dec. 19, 2003. It is a complete revision of the Soldiers' and Sailors' Civil Relief Act (SSCRA).

b. The SCRA and SSCRA were previously codified in the Appendix to Title 50 of the United States Code and cited as 50 U.S.C. app. § ___. In December 2015, the SCRA was recodified at 50 U.S.C. §§ 3901 *et seq*. This section of the Bench Book cites sections of the SCRA as recodified. For a chart setting out the former and current statutory cites, see *Silent Partner*, "The Old and The New"—SCRA Concordance," A.B.A. Sec. Fam. L. (Dec. 16, 2015).

c. For an overview of the SCRA, see Cheryl Howell, *Servicemembers' Civil Relief Act Applies to Family Cases Too*, UNC Sch. of Gov't: On the Civil Side Blog (Feb. 13, 2015), http://civil.sog.unc.edu/servicemembers-civil-relief-act-applies-to-family-cases-too.

d. The SCRA limits the court's authority to enter a default judgment against a defendant who is on active military duty.

i. The SCRA prohibits entry of a "default" judgment against a servicemember who has not made an appearance until after the court appoints an attorney for the defendant servicemember. [50 U.S.C. § 3931(b)(2). *See Smith v. Davis*, 88 N.C. App. 557, 559, 364 S.E.2d 156, 158 (1988) (stating that the "purpose of [SCRA] section 520 [now 521, recodified as 50 U.S.C. § 3931(b)] in particular is to protect persons in the military from having default judgments entered against them without their knowledge and without an opportunity to defend their interests").]

ii. The term "default judgment" has broad meaning under the SCRA and includes any order or judgment adverse to the interests of the servicemember entered when the servicemember has not made an appearance.

iii. Default judgments against defendants in violation of the SCRA, however, are voidable, not void. [50 U.S.C. § 3931(g) (authorizing a court to vacate or set

aside a default judgment against a servicemember); *United States v. Hampshire,* 892 F. Supp. 1327 (D. Kan. 1995) (district court holding that a judgment rendered in violation of the SSCRA (predecessor of the SCRA) is voidable), *aff'd on other grounds,* 95 F.3d 999 (10th Cir. 1996), *cert. denied,* 519 U.S. 1084, 117 S. Ct. 753 (1997); *Taylor v. Ferguson*, 437 S.W.3d 799, 804 (Mo. Ct. App. 2014) (citing *Klaeser v. Milton*, 47 So. 3d 817 (Ala. Civ. App. (2010)) ("A default judgment entered without fulfilling the affidavit requirement—indeed all requirements of the SCRA—is voidable.").]

iv. To reopen a default judgment, a defendant servicemember must make a timely motion and show that he did not appear in the action, that he has a meritorious or legal defense, and that he was materially affected by reason of military service in making a defense to the action. [50 U.S.C. § 3931(g); *Smith v. Davis*, 88 N.C. App. 557, 364 S.E.2d 156 (1988) (active duty servicemember entitled to reopen pursuant to Soldiers' and Sailors' Civil Relief Act default judgment that increased amount of child support).]

e. For more on the Servicemembers Civil Relief Act, see *Child Custody*, Bench Book, Vol. 1, Chapter 4, Section VIII.

4. Temporary orders. A court may enter a temporary child support order pending the trial of a civil action for child support.

a. Jurisdiction.

i. If the circumstances of the case render it appropriate, the district court has jurisdiction to enter temporary custody and support orders for minor children. [G.S. 50-13.4(d)(2).]

ii. G.S. Chapter 50B gives the district court jurisdiction to enter temporary custody and support orders as part of a domestic violence protection order. [G.S. 50B-3(a)(4), (6).]

iii. In a UIFSA proceeding, a North Carolina tribunal may issue a temporary child support order if the tribunal determines it is appropriate and the individual ordered to pay is:

(a) A presumed father of the child,

(b) Petitioning to have his paternity adjudicated,

(c) Identified as the father of the child through genetic testing,

(d) An alleged father who has declined to submit to genetic testing,

(e) Shown by clear and convincing evidence to be the father of the child,

(f) An acknowledged father as provided by Chapter 110 of the General Statutes,

(g) The mother of the child, or

(h) An individual who has been ordered to pay child support in a previous proceeding and the order has not been reversed or vacated. G.S. 52C-4-401(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

b. Generally.

i. A temporary child support order may be entered ex parte under appropriate circumstances, pending service of process or notice. [G.S. 50-13.5(d)(2).]

ii. The guidelines must be used when the court enters a temporary child support order in a noncontested case or in a contested hearing. [2020 Guidelines.]

iii. Absent grounds for deviation, the amount of a parent's court-ordered child support obligation under a temporary order must be determined pursuant to North Carolina's child support guidelines. [G.S. 50-13.4(c) (the court shall determine amount of support by applying the guidelines); 2020 Guidelines.]

c. Whether an order is temporary or permanent.

i. A child support order is "permanent" when it is based on the merits of the case and is intended to be final. [*Gray v. Peele*, 235 N.C. App. 554, 761 S.E.2d 739 (2014) (citing *Miller* (*Sikes*) *v. Miller,* 153 N.C. App. 40, 568 S.E.2d 914 (2002)).]

ii. When determining whether a child support order is temporary or permanent, the appellate court has looked to the intent behind the trial court's order, considering whether the order explicitly identifies itself as a temporary order and whether the language of the order contemplates that another permanent order will be entered in the future. [*Gray v. Peele*, 235 N.C. App. 554, 761 S.E.2d 739 (2014) (citing *Miller* (*Sikes*) *v. Miller,* 153 N.C. App. 40, 568 S.E.2d 914 (2002), and *Cole v. Cole*, 149 N.C. App. 427, 562 S.E.2d 11 (2002)).]

iii. Where an unincorporated separation agreement contained a provision for child support, there was no provision in the agreement setting a deadline for court action or placing an expiration date on the agreement, the parties were free to abide by the agreement indefinitely and complied with it for more than eight years, the court found the agreement was not intended to be temporary and was not analogous to an interim court order, even though the parties had agreed to "attempt to negotiate the provisions of a child support and custody consent order for entry prior to March 1, 1999." [*Carson v. Carson,* 199 N.C. App. 101, 103, 680 S.E.2d 885, 887 (2009); *Harnett Cty. ex rel. De la Rosa v. De la Rosa,* 240 N.C. App. 15, 770 S.E.2d 106 (2015) (2011 child support order was a permanent order when it did not set a future hearing date to determine permanent child support and the parties and the trial court treated it as a permanent child support order in subsequent pleadings and at a later hearing, even though the order was entered without prejudice and stated that it was a temporary order).]

iv. When there is an interim court order, the court clearly intends to take further action. [*Carson v. Carson,* 199 N.C. App. 101, 680 S.E.2d 885 (2009).]

v. A temporary order probably converts into a final order when neither party requests calendaring of the matter addressed in the temporary order within a reasonable time after entry of the temporary order. [*See Harnett Cty. ex rel. De la Rosa v. De la Rosa,* 240 N.C. App. 15, 22, 770 S.E.2d 106, 112 (2015) (adopting the reasoning in *LaValley v. LaValley*, 151 N.C. App. 290, 564 S.E.2d 913 (2002); although *LaValley* was a custody case, the court of appeals found "its logic instructive"); *LaValley* (since temporary custody order had converted into final order, trial court was to employ substantial change of circumstances test).]

vi. For a discussion of when an order is temporary or permanent in the context of child custody, see *Child Custody*, Bench Book, Vol. 1, Chapter 4. The rules used to determine whether a child custody order is temporary or permanent "logically apply to the child support context as well." [*Sarno v. Sarno*, 235 N.C. App. 597, 600, 762 S.E.2d 371, 373 (2014); *Harnett Cty. ex rel. De la Rosa v. De la Rosa,* 240 N.C. App. 15, 22, 770 S.E.2d 106, 112 (2015) (even though *LaValley v. LaValley*, 151 N.C. App. 290, 564 S.E.2d 913 (2002), addressed whether an order was temporary or permanent in the context of child custody, its logic was "instructive" in a case considering whether a child support order was temporary or permanent).]

d. Effect of temporary order.

i. The amount of support in the final order may be more or less than the support required in the temporary order. [*See Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 596 S.E.2d 285 (2004) (where guidelines did not apply because of parties' high combined annual income, court ordered permanent support in an amount less than that ordered as temporary support), *review on additional issues denied,* 359 N.C. 643, 617 S.E.2d 662 (2005); *Sikes v. Sikes*, 330 N.C. 595, 411 S.E.2d 588 (1992) (court may enter a final support order that requires a parent to pay more support than that required under the temporary order); *Bookholt v. Bookholt*, 136 N.C. App. 247, 523 S.E.2d 729 (1999) (where guidelines did not apply because of parties' high combined annual income, the amount of temporary child support agreed to by the parties, $2,000 per month, did not bind trial court as to the amount of permanent support awarded, $2,350).]

ii. The court may order final support in an amount different from that required in the temporary support order without finding a substantial change of circumstances since entry of the temporary order. [*Sikes v. Sikes*, 330 N.C. 595, 411 S.E.2d 588 (1992); *Harnett Cty. ex rel. De la Rosa v. De la Rosa,* 240 N.C. App. 15, 770 S.E.2d 106 (2015) (if child support order is temporary, a parent does not have to demonstrate a change of circumstances to modify the order); *Miller* (*Sikes*) *v. Miller,* 153 N.C. App. 40, 568 S.E.2d 914 (2002). *See also McKyer v. McKyer,* 179 N.C. App. 132, 632 S.E.2d 828 (2006) (noting that, under *Miller,* a permanent support order may not be retroactively modified without a showing of a substantial change of circumstances, while a temporary support order may be retroactively modified without showing such a change).]

iii. The court may make its award of final support effective as of the date the complaint was filed (prospective support); cases barring courts from ordering retroactive increases in child support without some evidence of an emergency situation are not applicable to temporary orders, as rule set out in those cases applies to ordering child support before action is filed. [*Cole v. Cole*, 149 N.C. App. 427, 562 S.E.2d 11 (2002). *See also McKyer v. McKyer,* 179 N.C. App. 132, 632 S.E.2d 828 (2006) (citing *Miller* (*Sikes*) *v. Miller,* 153 N.C. App. 40, 568 S.E.2d 914 (2002)) (a permanent support order may not be retroactively modified without a showing of an emergency, while a temporary support order may be retroactively modified without a showing of such emergency); *Sikes v. Sikes*, 330 N.C. 595, 411 S.E.2d 588 (1992) (until a final order is entered as to child support,

G.S. 50-13.10, on vesting, does not come into play).] See *Liability and Amount*, Part 1 of this Chapter.

iv. A trial court has been found not to have abused its discretion when it made a final order effective at a date prior to entry of the final order but not back to the filing date of the complaint. [*Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 596 S.E.2d 285 (2004) (September 2002 order made permanent support retroactive to Feb. 1, 2002, two weeks before trial started, but not back to Feb. 1, 2000, date complaint was filed), *review on additional issues denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). *But see State ex rel. Miller v. Hinton*, 147 N.C. App. 700, 556 S.E.2d 634 (2001) (citing *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998)) (there is an implied presumption that prospective child support payments begin at the time of the filing of the complaint).]

e. Appeal of a temporary order.

i. An order providing for temporary child support is interlocutory and not an immediately appealable final order. [*Banner v. Hatcher,* 124 N.C. App. 439, 477 S.E.2d 249 (1996). *Cf. Hamilton v. Johnson,* 228 N.C. App. 372, 747 S.E.2d 158 (2013) (appeal of an order finding defendant in contempt of a temporary child support order affected a substantial right, making appeal proper; no final child support order had been entered in the matter).] See Section I.I, below, for more on appeals.

ii. G.S. 50-19.1, *added by* S.L. 2013-411, § 2, effective Aug. 23, 2013, providing for immediate appeal of certain actions when other claims are pending in the same action, does not change the nonappealability of an order for temporary child support. [*See Watauga Cty. ex rel. McKiernan v. Shell*, 264 N.C. App. 608, 826 S.E.2d 739 (2019) (trial court did not have jurisdiction to enter a temporary child support order, or any other child support order, after appeal of an order staying the IV-D child support order).]

iii. A temporary order must in fact be temporary and not just designated as such to prevent appellate review. [*See Cox v. Cox,* 133 N.C. App. 221, 515 S.E.2d 61 (1999) (agreeing with defendant's argument that she should not be denied appellate review based on trial court's statement that the order was temporary, because in reality, order was permanent).]

f. Temporary order pursuant to The Uniform Deployed Parents Custody and Visitation Act (UDPCVA or "the Act"), *added by* S.L. 2013-27, § 3, effective Oct. 1, 2013.

i. The Act provides a procedure whereby parents may enter into a temporary agreement for custodial responsibility of their child(ren) during deployment; in cases where there is no agreement, the Act sets out a judicial procedure for entry of a temporary custody order.

ii. With respect to child support, the Act provides that if an agreement granting caretaking authority is executed, the court may enter a temporary order for child support consistent with the laws of North Carolina if the court has jurisdiction under the Uniform Interstate Family Support Act, G.S. Chapter 52C. [G.S. 50A-378.] The parties may not modify existing support obligations in an agreement

executed pursuant to G.S. 50A-360. For more on the UDPCVA, see *Child Custody*, Bench Book, Vol. 1, Chapter 4.

g. Temporary order required in a IV-D case pending paternity determination. For definition of a IV-D case and a non-IV-D case, see Section I.C.8, above.

i. A court must enter a temporary child support order in a IV-D case pending a determination of paternity upon motion and a showing of clear, cogent, and convincing evidence of paternity (including genetic test results indicating a probability of paternity of at least 97 percent). [G.S. 49-14(f).]

ii. If paternity is not thereafter established, the putative father must be reimbursed the full amount of support paid pursuant to the temporary order. [G.S. 49-14(f).]

h. For discussion of temporary orders in the custody context, see *Child Custody*, Bench Book, Vol. 1, Chapter 4.

5. Consent judgment.

a. The court's authority to enter a consent judgment depends upon the consent of all parties to entry of the order at the time the court approves it. [*Rockingham Cty. Dep't of Soc. Servs. ex rel. Walker v. Tate*, 202 N.C. App. 747, 689 S.E.2d 913 (2010) (citing *Tevepaugh v. Tevepaugh,* 135 N.C. App. 489, 521 S.E.2d 117 (1999)).]

b. When defendant had not consented to entry of a consent judgment reinstating a previous child support order, the trial court did not have authority to enter a consent order providing for reinstatement of the obligation. [*Rockingham Cty. Dep't of Soc. Servs. ex rel. Walker v. Tate,* 202 N.C. App. 747, 689 S.E.2d 913 (2010) (there was no written memorandum of the terms of the order signed by all parties and the trial court, no order was dictated in the record at the time of the hearing, defendant was not present at the hearing to indicate his consent to the terms or entry of the consent judgment, no substantive hearing occurred when neither mother nor father, nor father's counsel, were present and no evidence or testimony was presented; defendant's signed and notarized statement presented by plaintiff's counsel in which defendant agreed to have his child support obligation reinstated was not sufficient when it was unclear how the trial court obtained the "consent statement," as it was not presented as an exhibit at the hearing and had no filing date).]

c. A consent judgment need not contain findings of fact or conclusions of law. [*Rockingham Cty. Dep't of Soc. Servs. ex rel. Walker v. Tate*, 202 N.C. App. 747, 689 S.E.2d 913 (2010) (citing *Buckingham v. Buckingham*, 134 N.C. App. 82, 516 S.E.2d 869, *review denied,* 351 N.C. 100, 540 S.E.2d 353 (1999)); *Balawejder v. Balawejder,* 216 N.C. App. 301, 721 S.E.2d 679 (2011) (citing *Buckingham*) (noting, however, that when the trial court is considering a motion to modify a consent order that contains no findings of fact, it must take evidence and make findings about the circumstances existing at the time the initial order was entered for the court to have a "base line" to determine whether there has been a substantial change warranting modification) (consent custody order was at issue).]

i. Consent judgments entered in domestic relations cases are treated as court-ordered judgments for all purposes and, as such, may be modified and are enforceable by contempt. [*Walters v. Walters,* 307 N.C. 381, 298 S.E.2d 338 (1983) (consent judgments are modifiable and enforceable by contempt); *Mason v. Erwin,*

157 N.C. App. 284, 579 S.E.2d 120 (2003) (modification of consent order for child support); *Fucito v. Francis,* 175 N.C. App. 144, 622 S.E.2d 660 (2005) (for practical purposes, in *Walters*, the court fashioned a "one-size-fits-all" rule applicable to incorporated settlement agreements in the area of domestic law, holding that when parties present their separation agreement to the court for approval, the agreement will no longer be considered a contract between the parties, but rather a court-ordered judgment); *Hess v. Hermann-Hess,* 228 N.C. App. 281, 748 S.E.2d 773 (2013) (**unpublished**) (recognizing that alimony and child support agreements approved by the court are court-ordered judgments).]

6. Amount of support.

   a. The ultimate objective in setting awards for child support is to secure support commensurate with the needs of the children and the ability of the obligor to meet the needs. [*Cauble v. Cauble*, 133 N.C. App. 390, 515 S.E.2d 708 (1999); *Shaw v. Cameron,* 125 N.C. App. 522, 481 S.E.2d 365 (1997); *Hammill v. Cusack*, 118 N.C. App. 82, 453 S.E.2d 539, *review denied,* 340 N.C. 359, 458 S.E.2d 187 (1995) (all three cases citing *Pittman v. Pittman,* 114 N.C. App. 808, 443 S.E.2d 96 (1975)).]

   b. Payments ordered for the support of a minor child must be in an amount that will meet the reasonable needs of the child for health, education, and maintenance, considering the estates, earnings, conditions, and accustomed living standard of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case. [G.S. 50-13.4(c).]

      i. On remand of an order in a high-income case, the trial court was directed to take into account the relative abilities and financial circumstances of both parties. Even though one parent's earnings and estate may be far greater than that of the other parent, the circumstances of the less wealthy parent must be taken into account. [*Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014).]

      ii. While the child care and homemaker contributions of a party may not be quantifiable in monetary terms, when one parent has no role at all in the child's daily life and care, it is appropriate for a trial court to consider that the other parent bears 100 percent of the daily child care responsibilities. [*Loosvelt v. Brown*, 235 N.C. App. 88, 107, 760 S.E.2d 351, 363 (2014) (on remand, if the trial court recognizes mother's "non-monetary, but truly priceless" contribution as sole caregiver, trial court should make findings regarding those contributions sufficient for appellate review).]

   c. Unless the amount of support determined under the child support guidelines would not meet or would exceed the child's reasonable needs considering the relative ability of each parent to provide support, the amount of a parent's court-ordered child support obligation must be determined by applying North Carolina's child support guidelines. [G.S. 50-13.4(c); 2020 Guidelines.]

   d. Regardless of whether the court enters a child support order determined pursuant to the child support guidelines or deviates from the guidelines, a copy of the worksheet used to determine a parent's presumptive child support obligation should be attached to the child support order, be incorporated by reference into the child support order,

or be included in the case file. [2020 Guidelines; G.S. 52C-3-305(c).] See *Liability and Amount*, Part 1 of this Chapter, Section III.M.

e. A court may not order that child support payments automatically increase on an annual or periodic basis to take inflation or cost-of-living increases into account. [*See Snipes v. Snipes*, 118 N.C. App. 189, 454 S.E.2d 864 (1995) (agreeing with trial court's implicit determination that judgment which increased payments according to increases in consumer price index was void ab initio); *Falls v. Falls*, 52 N.C. App. 203, 278 S.E.2d 546 (award of annual increases in child support based upon "Cost of Living Index" was improper), *review denied,* 304 N.C. 390, 285 S.E.2d 831 (1981); *Wilson v. Wilson,* 214 N.C. App. 541, 714 S.E.2d 793 (2011) (citing *Snipes* and *Falls*) (order implementing provisions in an incorporated agreement that provided for automatic yearly increases in child support, based on a percentage of bonuses and salary increases received by defendant, was reversed; trial court's calculation of the increases in defendant's salary, and its application of those increases to defendant's payments over an eighteen-year period without a finding of a substantial change of circumstances, constituted an impermissible modification of the child support order).]

f. If a court order requires the payment of both child support and alimony or post-separation support, it must separately state and identify the amount awarded as alimony or postseparation support and the amount awarded as child support. [G.S. 50-13.4(e); 50-16.7(a).]

g. For more on the amount and scope of a child support obligation, see *Liability and Amount*, Part 1 of this Chapter, Section III.

7. Prospective support payable from date support claim filed.

a. There is an implied presumption that prospective child support payments begin at the time of the filing of the complaint. [*State ex rel. Miller v. Hinton,* 147 N.C. App. 700, 556 S.E.2d 634 (2001) (citing *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998)) (unless a trial court finds that beginning the prospective child support payments on the date the complaint was filed would be unjust or inappropriate, it is error to order prospective support to begin at any time other than the date the support claim was filed).] For more on prospective support, see Cheryl Howell, *Prospective Child Support: What Is It and How Is the Amount Determined?* UNC Sch. of Gov't: On the Civil Side Blog (Feb. 10, 2021), https://civil.sog.unc.edu/prospective-child-support-what-is-it-and-how-is-the-amount-determined.

i. Pursuant to G.S. 1A-1, Rule 3, a civil action is commenced by filing a complaint with the court.

ii. If an action is discontinued because a summons expires but the action is later revived by issuance of an alias and pluries summons or by an endorsement of the original summons pursuant to G.S. 1A-1, Rule 4(d), the date the action is commenced is the date the summons is revived, not the date the complaint was filed. [*See Moore v. McLaughlin,* 240 N.C. App. 88, 772 S.E.2d 14 (2015) (**unpublished**) (complaint originally filed on July 23, 2010, was discontinued twice but was revived when a third summons was issued on Feb. 14, 2012, with proper service on Feb. 24, 2012; an order for child support was entered on May 1, 2014,

awarding prospective support from Aug. 1, 2010, the month after the complaint was filed; the court of appeals remanded for a determination of retroactive support for the period between Aug. 1, 2010, and Feb. 14, 2012, and a determination of prospective support after Feb. 14, 2012).]

b. Prospective child support payments begin at the time of the filing of the complaint even when the parties have entered a temporary support order by consent shortly after the complaint was filed. [*Cole v. Cole,* 149 N.C. App. 427, 562 S.E.2d 11 (2002) (rejecting defendant's argument that consent order established his support obligation while action was pending). *But cf. Zaliagiris v. Zaliagiris,* 164 N.C. App. 602, 596 S.E.2d 285 (2004) (trial court did not abuse its discretion when it made a final order effective at a date prior to entry of the final order but not back to the filing date of the complaint; amount of permanent support less than temporary support), *review on additional issues denied,* 359 N.C. 643, 617 S.E.2d 662 (2005).]

c. A decision not to order prospective support is a deviation from the guidelines, and the order must include findings of fact to support the decision to deviate. [*State ex rel. Gillikin v. McGuire,* 174 N.C. App. 347, 620 S.E.2d 899 (2005) (citing *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998)) (trial court found that prospective child support back to the date of the filing of the complaint was owed but did not order payment thereof because court was unable to determine amount due to receipt by both parents of disability income during relevant period; decision not to order prospective support required findings to support deviation).]

d. A court may award prejudgment interest at the legal rate with respect to unpaid child support that has accrued between the date the action was commenced and the date an order is entered. [*See Taylor v. Taylor*, 128 N.C. App. 180, 493 S.E.2d 819 (1997).] For interest on past due child support, see *Enforcement of Child Support Orders,* Part 4 of this Chapter, Section V.A.3.

8. Treatment of credits and tax exemptions.

a. A credit is not an automatic right even when the trial court finds that one party has overpaid his child support obligation. [*Brinkley v. Brinkley,* 135 N.C. App. 608, 522 S.E.2d 90 (1999) (in a modification action, father not entitled to a credit against future child support for the amount he paid above his court-ordered child support obligation or for the amount the other spouse owed pursuant to an equitable distribution judgment); *Jones v. Jones*, 52 N.C. App. 104, 278 S.E.2d 260 (1981) (decision whether to allow a credit is not bound by hard and fast rules but is to be decided according to the equitable considerations of the facts and circumstances in each case).]

b. In those rare cases in which a trial court properly awards a credit against future child support, it should conclude in its written order that, as a matter of law, an injustice would exist if the credit were not allowed, and it should support that conclusion by findings of fact based on competent evidence. [*Brinkley v. Brinkley,* 135 N.C. App. 608, 522 S.E.2d 90 (1999).] Examples of credits allowed include:

i. Father given a credit for travel expenses related to visitation with the minor children. [*Meehan v. Lawrance,* 166 N.C. App. 369, 602 S.E.2d 21 (2004).]

ii. Father given a credit against his ongoing support obligation for amounts expended for clothing, food, day-care costs, YMCA fees, and medical expenses he incurred for the children during their visitation with him. [*Jones v. Jones*, 52 N.C. App. 104, 278 S.E.2d 260 (1981).]

iii. Instead of compelling father to immediately pay an arrearage owed to the mother, after custody change mother was given a credit in that amount against her future support obligation as the secondary custodial parent. [*Shipman v. Shipman,* 155 N.C. App. 523, 573 S.E.2d 755 (2002), *aff'd,* 357 N.C. 471, 586 S.E.2d 250 (2003).]

iv. Father given a credit for child support payments made by his mother on his behalf to his former wife. [*Transylvania Cty. Dep't of Soc. Servs. ex rel. Dowling v. Connolly*, 115 N.C. App. 34, 443 S.E.2d 892 (applying Georgia law, credit allowed as a matter of equity; Judge Greene concurring and noting that credits on a court-ordered child support obligation are permitted if the obligor has substantially complied with the child support order), *review denied*, 337 N.C. 806, 449 S.E.2d 758 (1994).]

v. For discussion of credits against arrearages, see *Enforcement of Child Support Orders*, Part 4 of this Chapter, Section I.F.3.

c. A child support order may require the custodial parent to waive her right to claim the federal and state income tax exemption for a child for whom support is paid. [*Rowan Cty. Dep't of Soc. Servs. ex rel. Brooks v. Brooks,* 135 N.C. App. 776, 522 S.E.2d 590 (1999) (district court acted within its authority in ordering the custodial parent to waive her dependency exemption in favor of the noncustodial parent); *Cohen v. Cohen*, 100 N.C. App. 334, 396 S.E.2d 344 (1990), *review denied*, 328 N.C. 270, 400 S.E.2d 451 (1991).]

9. Orders for support of more than one child.

a. In cases involving multiple children, the court is not required to designate in the order the amount of support for each individual child. [*See Christie v. Christie*, 59 N.C. App. 230, 296 S.E.2d 26 (1982) (rejecting father's objection to being required to pay support in one sum for all children rather than having support payments allotted among the children); *Brooks v. Brooks*, 12 N.C. App. 626, 184 S.E.2d 417 (1971) (law does not require trial court to designate the amount of support for each child). *See* 2020 Guidelines (awarding one lump sum based on the total number of children covered by the order).]

b. The payor under an order for support of multiple children may not unilaterally terminate or proportionally reduce his child support payments upon one child's emancipation, graduation from high school, or reaching the age of majority. The payor may file a motion seeking modification of the order pursuant to G.S. 50-13.7. [See *Modification of Child Support Orders*, Part 3 of this Chapter.] Note that to terminate a parent's obligation to pay support because of the child's emancipation other than by marriage, the child must be judicially emancipated pursuant to G.S. Chapter 7B, Article 35. [*Morris v. Powell*, 269 N.C. App. 496, 840 S.E.2d 223 (2020).]

10. Payment of current support by lump sum, periodic payments, or transfer of property.
    a. A court may order that current child support payments be made by lump sum or by periodic payments. [G.S. 50-13.4(e).]
        i. A trial court did not abuse its discretion when it ordered that child support be paid by both ongoing monthly payments and a one-time lump sum award. [*Simms v. Bolger*, 264 N.C. App. 442, 826 S.E.2d 522 (2019).]
        ii. The court of appeals has found that a directive for payment of private school tuition is a "periodic payment, whether [plaintiff] chooses to pay it once a year, once a semester or over ten months[.]" [*Smith v. Smith*, 247 N.C. App. 166, 170, 785 S.E.2d 434, 438 (2016) (construing *Brown v. Brown*, 171 N.C. App. 358, 615 S.E.2d 39 (2005)).]
    b. When income is received on an irregular, nonrecurring, or one-time basis, the court may average or prorate the income over a specified period of time or require an obligor to pay as child support a percentage of the nonrecurring income that is equivalent to the percentage of the obligor's recurring income paid for child support. [2020 Guidelines.]
        i. A trial court may use a formula to determine the amount of child support to be paid from nonrecurring income, provided the formula is based on logic and reason and meets the child's reasonable needs in light of the parties' accustomed standard of living and the parent's ability to pay. [*See Spicer v. Spicer,* 168 N.C. App. 283, 607 S.E.2d 678 (2005) (a personal injury settlement paid to the father on a one-time, nonrecurring basis and placed in a family trust with the father as grantor was nonrecurring income; after determining that application of the guidelines to the trust principal would be unjust to the father, the court properly applied a formula, not specified in the case, to order a lump sum payment from the trust principal to be placed in a second trust to secure or provide for the child's support); *see also Simms v. Bolger*, 264 N.C. App. 442, 826 S.E.2d 522 (2019) (citing *Spicer*) (order affirmed that required obligor to transfer for the benefit of the child 19% of the funds received in settlement of obligor's workers' compensation disability claim and a claim against a third-party; the two large monetary distributions to obligor were properly considered nonrecurring income subject to the application of the Guidelines).]
    c. Although most court orders require payment of child support in cash, a court also may order payment of current child support by transfer of title or possession of personal property or by transfer of possession or a security interest in real property. [G.S. 50-13.4(e).]
        i. When ordering the transfer of personal property under G.S. 50-13.4(e), the trial court is not required to value the property transferred so that the value could be deducted from the amount of support awarded. [*Respess v. Respess,* 232 N.C. App. 611, 754 S.E.2d 691 (2014) (in this case, the property transferred was a vehicle that was fifteen years old, had high mileage, and on which wife had paid all post-transfer expenses, and husband had consented to the transfer as a form of support and did not assert any prejudice from the failure to value).]

ii. When a child support order grants the custodial parent exclusive possession of the marital residence, it is good practice to provide in the order that possession is only until entry of the final equitable distribution order.

d. A North Carolina court does not have authority to order a parent to transfer to the other parent past Social Security disability payments made to that parent on behalf of their children. [*O'Connor v. Zelinske,* 193 N.C. App. 683, 668 S.E.2d 615 (2008) (citing *Brevard v. Brevard,* 74 N.C. App. 484, 328 S.E.2d 789 (1985)) (noting that two later appellate opinions conflict with *Brevard*).]

e. A trial court is not limited to ordering any one of the designated methods of payment or to the methods of payment specified in the statute. [*Spicer v. Spicer,* 168 N.C. App. 283, 607 S.E.2d 678 (2005) (no error when father required to pay both monthly payments and a lump sum payment to be placed in trust).]

11. Order for establishment of arrearages.

a. An order determining the amount of child support arrearages must be based on evidence to support the trial court's finding on the amount owed. [*Harnett Cty. ex rel. De la Rosa v. De la Rosa,* 240 N.C. App. 15, 770 S.E.2d 106 (2015) (at modification hearing, no evidence was presented to the trial court regarding arrearages or any payments father had made thereon; appellate court was unable to determine how the trial court calculated arrearages of $7,728 or the actual time period for which arrearages were calculated, requiring reversal of the trial court's determination of the amount of the arrearages).]

12. Mandatory provisions.

a. All child support orders must require that periodic payment of child support be made on a monthly basis and that monthly child support payments are due and payable on the first day of each month. [G.S. 50-13.4(c).]

b. All child support orders entered in IV-D cases must include a provision ordering immediate income withholding. [G.S. 110-136.3(a).] For definition of a IV-D case and a non-IV-D case, see Section I.C.8, above.

c. All child support orders entered in non-IV-D cases must order that child support payments be made through immediate income withholding unless the court finds that there is good cause not to require immediate income withholding or the parties agree in writing to an alternate method of payment. [G.S. 50-13.4(d1), 50-13.9(a), 110-136.3(a), 110-136.5(c1).]

i. "Good cause" includes a reasonable and workable plan for consistent and timely payments by some means other than income withholding. [G.S. 110-136.5(c1).]

ii. In considering whether a plan is reasonable, the court may consider the obligor's employment history and record of meeting financial obligations in a timely manner. [G.S. 110-136.5(c1).]

d. In most cases, payments must be made through the State Child Support Collection and Disbursement Unit.

i. In IV-D cases, child support orders must require that child support payments be made through the State Child Support Collection and Disbursement Unit. [G.S. 50-13.4(d).]

ii. In non-IV-D cases in which child support is paid through income withholding under an order entered on or after Jan. 1, 1994, child support payments must be made through the State Child Support Collection and Disbursement Unit. [G.S. 110-139(f).]

iii. In non-IV-D cases in which child support is not paid through income withholding, child support payments may be ordered paid through the State Child Support Collection and Disbursement Unit or paid to the person who has custody of the child or to another proper person, agency, organization, or institution. [G.S. 50-13.4(d).]

e. All child support orders entered or modified on or after Oct. 1, 1998, must state the name and date of birth of each party. [G.S. 50-13.4(h).]

i. G.S. 50-13.4(g)(8) and (h), *amended by* S.L. 2008-12, § 1, effective Oct. 1, 2008, no longer require Social Security numbers of the parties in a child support order.

ii. Form AOC-CV-607, Voluntary Support Agreement and Approval by Court, does not require Social Security numbers of the parties or the child.

f. All child support orders entered in IV-D cases and all child support orders in non-IV-D cases in which income withholding is ordered must:

i. Require the obligor to keep the clerk of superior court or the IV-D agency informed of the obligor's current residence and mailing address; [G.S. 110-136.3(a)(1).]

ii. Require the obligor to cooperate fully with the initiating party in verifying the amount of the obligor's disposable income and to keep the initiating party informed of the name and address of any payor of the obligor's disposable income and of the amount and effective date of any substantial change in this disposable income; [G.S. 110-136.3(a)(3), (5).]

iii. Require the custodial party to keep the obligor informed of the custodial party's disposable income and the amount and effective date of any substantial change in this disposable income; [G.S. 110-136.3(a)(4).] and

iv. Include the current residence and mailing address of the custodial parent, or the address of the child if the address of the custodial parent and the address of the child are different. There is no requirement that the child support order contain the address of the custodial parent or the child if (1) there is an existing order prohibiting disclosure of the custodial parent's or child's address to the obligor or (2) the court has determined that notice to the obligor is inappropriate because the obligor has made verbal or physical threats of violence that constitute domestic violence under G.S. Chapter 50B. [G.S. 110-136.3(a)(4a), *amended by* S.L. 2014-115, § 44.5, effective Aug. 11, 2014.]

g. If a North Carolina tribunal determines by order which is the controlling order under G.S. 52C-2-207(b)(1), (b)(2), or (c), or issues a new controlling order under G.S. 52C-2-207(b)(3), the order must state:

i. The basis upon which it made its determination;

ii. The amount of the prospective support, if any; and

iii. The total amount of consolidated arrearages and accrued interest, if any, under all of the orders after all payments made are credited as provided by G.S. 52C-2-209. [G.S. 52C-2-207(e), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

13. Assignment of pension benefits.

a. An order that requires an employee to assign an interest in his right to pension benefits or other deferred compensation that would otherwise be protected against alienation under the federal Employee Retirement Income Security Act (ERISA) to the employee's spouse, former spouse, or child as child support will be honored by the pension or deferred compensation plan only if it meets ERISA's definition of a qualified domestic relations order (QDRO). [29 U.S.C. § 1056(d)(3).]

b. ERISA applies to most, but not all, pension plans and to employee 401(k) plans, simplified employee pensions (SEP), and employee stock ownership plans (ESOP).

c. A QDRO must:

i. Include the name and last known mailing address of the employee and each alternate payee covered by the order, [29 U.S.C. § 1056(d)(3)(C)(i).]

ii. State the amount or percentage of the employee's benefits that must be paid by the plan to the alternate payee or the manner in which the amount or percentage to be paid is to be determined, [29 U.S.C. § 1056(d)(3)(C)(ii).]

iii. State the number of payments or period of time covered by the order, [29 U.S.C. § 1056(d)(3)(C)(iii).] and

iv. Designate the plan to which the order applies. [29 U.S.C. § 1056(d)(3)(C)(iv).]

d. A QDRO must be served on and approved by the pension plan administrator. [29 U.S.C. § 1056(d)(3)(G)(i) (implied service requirement). *See Sippe v. Sippe,* 101 N.C. App. 194, 398 S.E.2d 895 (1990) (pension plan itself makes initial determination of whether a domestic relations order issued by the district court is a QDRO under the terms of the plan), *review denied*, 329 N.C. 271, 407 S.E.2d 840 (1991).]

e. A QDRO may direct the payment of plan benefits to an alternate payee as of the date the employee is first eligible to receive benefits under the plan (earliest retirement date). [29 U.S.C. § 1056(d)(3)(E)(i)(I).]

I. Appeal

1. Right to take an immediate appeal.

a. A final order may be appealed as a matter of right to the court of appeals. [G.S. 7A-27(b)(2), *added by* S.L. 2013-411, § 1, effective Aug. 23, 2013; 1-277(a).] A final judgment is one that disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. [*Hausle v. Hausle,* 226 N.C. App. 241, 739 S.E.2d 203 (2013); *Duncan v. Duncan,* 366 N.C. 544, 742 S.E.2d 799 (2013) (final judgment generally is one that ends the litigation on the merits).]

i. An alimony order was final and immediately appealable as of right pursuant to G.S. l-277(a), even though it reserved the issue of attorney fees. Attorney fees and costs are collateral issues and not part of the parties' substantive claims. [*Duncan v. Duncan,* 366 N.C. 544, 742 S.E.2d 799 (2013) (citing *Budinich*

v. Becton Dickinson & Co., 486 U.S. 196, 202–03, 108 S. Ct. 1717, 1722 (1988)) (announcing a bright-line rule applicable to any civil case disposing of the parties' substantive claims but leaving open the issue of attorney fees and costs); *Lucas v. Lucas,* 209 N.C. App. 492, 706 S.E.2d 270 (2011) (citing *Bumpers v. Cmty. Bank of N. Va.,* 364 N.C. 195, 695 S.E.2d 442 (2010)) (alimony and equitable distribution judgment final for purposes of appeal, even if a claim for attorney fees under G.S. 50-16.4 remained pending; claim for attorney fees under G.S. 50-16.4 is not a substantive issue or part of the merits of an alimony claim under G.S. 50-16.3A). *See also Ray Haluch Gravel Co. v. Cent. Pension Fund,* 571 U.S. 177, 134 S. Ct. 773 (2014) (holding, for federal appellate jurisdictional purposes, that whether a claim for attorney fees is based on a statute, a contract, or both, a pending claim for fees and costs does not prevent, as a general rule, the merits judgment from becoming "final" for purposes of appeal).]

ii. But when a child support order is appealed, the trial court loses jurisdiction to consider a request for attorney fees arising from the child support case. [*Balawejder v. Balawejder,* 216 N.C. App. 301, 721 S.E.2d 679 (2011) (appeal from an order for custody and child support).] *But see Duncan v. Duncan,* 366 N.C. 544, 742 S.E.2d 799 (2013), discussed immediately above and in Section I.I.6.d.ii, below. Because *Duncan* identified attorney fees as a "collateral issue," separate from the parties' substantive claims, court of appeals opinions holding that trial courts lose jurisdiction to determine attorney fees while the support order is on appeal because the fee issue is affected by child support may be called into question.

b. Generally there is no right of immediate appeal of an interlocutory order. An interlocutory order is one made during the pendency of an action that does not dispose of the case but leaves it for further action by the trial court in order to settle and determine the entire controversy. [*Peters v. Peters,* 232 N.C. App. 444, 754 S.E.2d 437 (2014) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)); *Sarno* v. *Sarno*, 235 N.C. App. 597, 599, 762 S.E.2d 371, 373 (2014), and *Gray v. Peele*, 235 N.C. App. 554, 557, 761 S.E.2d 739, 741 (2014) (both quoting *Banner v. Hatcher,* 124 N.C. App. 439, 441, 477 S.E.2d 249, 250 (1996)) (a child support order "is not a final order for purposes of appeal until no further action is necessary before the trial court upon the motion or pleading then being considered").]

c. Appeal of child support order was dismissed as interlocutory in each of the following cases when a motion to modify custody was pending:

i. *Gray v. Peele*, 235 N.C. App. 554, 761 S.E.2d 739 (2014) (father filed motion to modify custody and later filed motions in the IV-D case to modify support, based in part on an informal change in custody to a week on/week off schedule; even though the amount of child support was dependent on the custodial schedule, the IV-D court could hear only the motion to modify support, which it denied; appeal from that order was dismissed as interlocutory because of the pending motion to modify custody, the disputed custodial schedule, and the legal interdependence of the support and custody claims).

ii. *Sarno* v. *Sarno*, 235 N.C. App. 597, 762 S.E.2d 371 (2014) (mother's claims for custody and support were heard at one trial conducted over two sessions that

resulted in (1) after first session, a March 2012 custody order based on mother's representation that she was moving out of state, which reserved issue of child support, noting insufficient time to rule on that claim; (2) mother's motion to modify custody filed July 2012 based on her decision not to relocate, and (3) after second session, an April 2013 order setting child support which "clearly anticipated" that child support would need to be revisited after modification of custody was resolved; appeal from the child support order was dismissed as interlocutory because of the pending motion to modify custody and the fact that the establishment of child support "depended heavily" on the determination of mother's custodial time).

d. Immediate appeal of an interlocutory order is allowed in three instances:

i. When the order affects a substantial right. [G.S. 7A-27(b)(3)a., *added by* S.L. 2013-411, § 1, effective Aug. 23, 2013; 1-277(a). *See Beasley v. Beasley*, 259 N.C. App. 735, 816 S.E.2d 866 (2018) (the traditional "substantial right" exception continues to apply to interlocutory orders entered in a family case, such as a claim for attorney fees, that are not covered by the recently enacted G.S. 50-19.1, discussed in Section I.I.1.d.iii, immediately below).]

(a) A substantial right is one that "will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." [*Peters v. Peters,* 232 N.C. App. 444, 448, 754 S.E.2d 437, 440 (2014) (quoting *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000)).]

(b) Orders dealing with prospective child support payments have been found to affect a substantial right, [*Appert v. Appert*, 80 N.C. App. 27, 341 S.E.2d 342 (1986) (appeal of an order that affected parent's right to receive monthly child support in an amount found reasonably necessary affected a substantial right); *Gunter v. Gunter,* 228 N.C. App. 138, 746 S.E.2d 22 (2013) (**unpublished**) (citing *Appert)* (order dismissing mother's claim for child support affected a substantial right).] while an order that denied a claim for retroactive support was found not to affect a substantial right. [*Peters v. Peters,* 232 N.C. App. 444, 754 S.E.2d 437 (2014).]

ii. In cases involving multiple parties or claims, when the order is final as to some but not all of the claims or parties and the trial judge certifies the order for immediate appeal by including in the order "that there is no just reason for delay." [G.S. 1A-1, Rule 54(b); *Duncan v. Duncan,* 366 N.C. 544, 742 S.E.2d 799 (2013) (certification under Rule 54(b) permits an interlocutory appeal from orders that are final as to a specific portion of the case but which do not dispose of all claims as to all parties).]

(a) Appeal of an alimony order that was interlocutory when filed because of pending child support and equitable distribution (ED) claims was no longer interlocutory when those claims had been resolved by the time the appeal was heard. [*Crowley v. Crowley,* 203 N.C. App. 299, 691 S.E.2d 727 (granting defendant's motion to amend the record on appeal to reflect entry of a judgment resolving claims for ED, child support, and attorney fees), *review denied,* 364 N.C. 749, 700 S.E.2d 749 (2010).]

iii. For appeals taken on or after Aug. 23, 2013, G.S. 7A-27 allows for an immediate appeal of an order or judgment resolving a claim listed in G.S. 50-19.1, without requiring certification from the trial judge pursuant to G.S. 1A-1, Rule 54(b) that "there is no just reason for delay". [*See* G.S. 7A-27(b)(3)e., *added by* S.L. 2013-411, § 1, effective Aug. 23, 2013.] G.S. 50-19.1 provides:

(a) Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, the validity of a premarital agreement as defined by G.S. 52B-2(1), child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action.

(1) An order was not a final judgment under G.S. 1A-1, Rule 54(b) as required by G.S. 50-19.1 when mother's visitation was not finally determined based on order for review hearings to be held in thirty, sixty, and ninety days so trial court could consider mother's mental health evaluation and its effect on her visitation. [*Lueallen v. Lueallen*, 249 N.C. App. 292, 790 S.E.2d 690 (2016) (appeal proceeded on other grounds).]

(b) A party does not forfeit the right to appeal under this section if the party fails to immediately appeal from an order or judgment described in [G.S. 50-19.1].

(c) An appeal from an order or judgment under [G.S. 50-19.1] shall not deprive the trial court of jurisdiction over any other claims pending in the same action. [G.S. 50-19.1, *amended by* S.L. 2018-86, § 1, effective June 25, 2018, and applicable to appeals filed on or after that date.]

e. Note also that the court of appeals has discretion to treat an appeal as a petition for certiorari to review an interlocutory appeal. [N.C. R. App. P. 21(a)(1).]

f. Before the effective date of G.S. 50-19.1, final judgments of equitable distribution, alimony, child support, custody, absolute divorce, and divorce from bed and board could not be appealed if other claims remained pending in the case, unless the trial judge certified that there is no just reason for delay pursuant to G.S. 1A-1, Rule 54(b) or unless the judgment affected a substantial right.

g. A temporary child support order is interlocutory and is not immediately appealable. [*Banner v. Hatcher,* 124 N.C. App. 439, 477 S.E.2d 249 (1996).] Whether a child support order is temporary or final depends on its purpose, form, and content, not merely its designation. [*See Cox v. Cox*, 133 N.C. App. 221, 515 S.E.2d 61 (1999) (agreeing with defendant's argument that she should not be denied appellate review based on trial court's statement that the order was temporary, because in reality the order was permanent).] For more on temporary orders, see, above.

h. A trial court did not have jurisdiction to enter a temporary child support order after appeal of an order staying the IV-D child support claim. [*Watauga Cty. ex rel. McKiernan v. Shell*, 264 N.C. App. 608, 826 S.E.2d 739 (2019).]

2. Treatment of findings of fact and conclusions of law by an appellate court.
    a. Court of appeals evaluates whether a trial court's findings of fact are supported by substantial evidence and then determines if the factual findings support the conclusions of law. [*Smart v. State ex rel. Smart,* 198 N.C. App. 161, 678 S.E.2d 720 (2009) (citing *Shipman v. Shipman,* 155 357 N.C. 471, 586 S.E.2d 250 (2003)).]
    b. Findings of fact are conclusive if supported by competent evidence, irrespective of evidence to the contrary. [*Row v. Row*, 185 N.C. App. 450, 650 S.E.2d 1 (2007), *review denied*, 362 N.C. 238, 659 S.E.2d 741, *cert. denied*, 555 U.S. 824, 129 S. Ct. 144 (2008); *Meehan v. Lawrance,* 166 N.C. App. 369, 602 S.E.2d 21 (2004) (if the record indicates substantial evidence to support the trial court's findings, the findings are conclusive on appeal, even if evidence might sustain findings to the contrary).] "[A]rguments of counsel are not evidence." [*Crews v. Paysour*, 261 N.C. App. 557, 561, 821 S.E.2d 469, 472 (2018).]
    c. The trial court must make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law. [*Johnston Cty. ex rel. Bugge v. Bugge,* 218 N.C. App. 438, 722 S.E.2d 512 (2012) (citing *Spicer v. Spicer,* 168 N.C. App. 283, 607 S.E.2d 678 (2005)); *Brind'Amour v. Brind'Amour,* 196 N.C. App. 322, 674 S.E.2d 448 (2009) (citing *Roberts v. McAllister,* 174 N.C. App. 369, 621 S.E.2d 191 (2005)).]
3. Standard of review.
    a. Generally.
        i. Review of child support orders is limited to a determination of whether the trial court abused its discretion. [*Johnston Cty. ex rel. Bugge v. Bugge,* 218 N.C. App. 438, 722 S.E.2d 512 (2012) (citing *Spicer v. Spicer,* 168 N.C. App. 283, 607 S.E.2d 678 (2005)); *Brind'Amour v. Brind'Amour,* 196 N.C. App. 322, 674 S.E.2d 448 (2009) (citing *Roberts v. McAllister,* 174 N.C. App. 369, 621 S.E.2d 191 (2005)).]
        ii. To reverse a trial court's award of child support, an appellant must show that the trial court's actions were manifestly unsupported by reason. [*Madar v. Madar*, 275 N.C. App. 600, 853 S.E.2d 916 (2020); *State ex rel. Godwin v. Williams*, 163 N.C. App. 353, 593 S.E.2d 123 (2004) (citing *Bowers v. Bowers*, 141 N.C. App. 729, 541 S.E.2d 508 (2001)).]
        iii. "A [trial] court by definition abuses its discretion when it makes an error of law." [*In re A.F.*, 231 N.C. App. 348, 352, 752 S.E.2d 245, 248 (2013) (quoting *Koon v. United States,* 518 U.S. 81, 100, 116 S. Ct. 2035, 2047 (1996)).]
        iv. The appellate court's review is limited to the record on appeal and to the verbatim transcript of the proceedings. [*Cunningham v. Cunningham,* 171 N.C. App. 550, 615 S.E.2d 675 (2005) (court of appeals refusing to take judicial notice of a document, in this case a school calendar, not available to the trial court).]
    b. Standard of review in appeal of the following matters is de novo:
        i. Review of questions concerning constitutional rights; [*Row v. Row*, 185 N.C. App. 450, 650 S.E.2d 1 (2007) (reviewing constitutionality of the guidelines), *review denied*, 362 N.C. 238, 659 S.E.2d 741, *cert. denied*, 555 U.S. 824, 129 S. Ct. 144 (2008).]

ii. Review of a question of subject matter jurisdiction; [*Catawba Cty. ex rel. Rackley v. Loggins*, 370 N.C. 83, 804 S.E.2d 474 (2017) (decision to dismiss an action for lack of subject matter jurisdiction is reviewed de novo); *Watkins v. Benjamin*, 267 N.C. App. 122, 833 S.E.2d 22 (2019) (a trial court's exercise of subject matter jurisdiction is reviewed de novo); *Halterman v. Halterman*, 276 N.C. App. 66, 855 S.E.2d 812 (2021) (order allowing a motion to dismiss for lack of subject matter jurisdiction pursuant to G.S. 1A-1, Rule 12(b)(1) is reviewed de novo); *Smith v. Smith*, 247 N.C. App. 166, 785 S.E.2d 434 (2016) (quoting *Keith v. Wallerich,* 206 N.C. App. 550, 554, 687 S.E.2d 299, 302 (2009)); *Tardani v. Tardani,* 201 N.C. App. 728, 689 S.E.2d 601 (2010) (**unpublished**) (citing *In re K.A.D.,* 187 N.C. App. 502, 653 S.E.2d 427 (2007)).]

iii. Review of whether a trial court's findings support its conclusions of law; [*Respess v. Respess,* 232 N.C. App. 611, 754 S.E.2d 691 (2014) (custody case).]

iv. When the issue concerns a question of statutory interpretation, full review is appropriate and the conclusions of law are reviewable de novo; [*Smith v. Smith*, 247 N.C. App. 166, 169, 785 S.E.2d 434, 437 (2016) (quoting *Romulus v. Romulus,* 216 N.C. App. 28, *32,* 715 S.E.2d 889, 892 (2011)).]

v. When an issue concerns a matter of law; [*Romulus v. Romulus,* 216 N.C. App. 28, 715 S.E.2d 889 (2011) (questions of law are reviewable de novo); *Carson v. Carson,* 199 N.C. App. 101, 680 S.E.2d 885 (2009).]

vi. Review of a decision to deny registration and enforcement of an out-of-state child support order; [*Carteret Cty. ex rel. Amor v. Kendall,* 231 N.C. App. 534, 752 S.E.2d 764 (2014) (amounts to a conclusion of law); *Hart v. Hart*, 268 N.C. App. 172, 836 S.E.2d 244 (2019) (a trial court's compliance with UIFSA registration procedures is a question of law).]

vii. Review of an order allowing a motion to dismiss for failure to state a claim pursuant to G.S. 1A-1, Rule 12(b)(6); [*Halterman v. Halterman*, 276 N.C. App. 66, 855 S.E.2d 812 (2021).]

viii. Review of whether the statutory requirements in G.S. 50-13.6 for an award of attorney fees have been met; [*Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980) (presents a question of law); *Bramblett v. Bramblett,* 218 N.C. App. 454, 721 S.E.2d 763 (2012) (**unpublished**) (citing *Hudson*).]

ix. Review of whether a trial court has properly interpreted the statutory framework applicable to costs; [*Peters v. Pennington*, 210 N.C. App. 1, 707 S.E.2d 724 (2011).]

x. Review of a decision granting intervention of right under G.S. 1A-1, Rule 24(a): [*Hunt v. Hunt*, 246 N.C. App. 475, 784 S.E.2d 219 (2016).]

xi. Whether an order is temporary or final in nature. [*Summerville v. Summerville*, 259 N.C. App. 228, 814 S.E.2d 887 (2018).]

c. An appellate court reviews for abuse of discretion a trial court's decision regarding:

i. The amount of child support; [*Ludlam v. Miller,* 225 N.C. App. 350, 739 S.E.2d 555 (2013) (citing *Robinson v. Robinson,* 210 N.C. App. 319, 707 S.E.2d 785 (2011)); *Row v. Row*, 185 N.C. App. 450, 650 S.E.2d 1 (2007) (a trial court's

determination as to the proper amount of child support will not be disturbed on appeal absent a clear abuse of discretion, i.e., only if manifestly unsupported by reason), *review denied*, 362 N.C. 238, 659 S.E.2d 741, *cert. denied*, 555 U.S. 824, 129 S. Ct. 144 (2008), and *Hartley v. Hartley,* 184 N.C. App. 121, 645 S.E.2d 408, *appeal dismissed,* 654 S.E.2d 475 (2007) (both citing *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998)).]

ii. The establishment of an appropriate remedy; [*Ludlam v. Miller,* 225 N.C. App. 350, 739 S.E.2d 555 (2013) (citing *Moore v. Onafowora,* 208 N.C. App. 674, 703 S.E.2d 744 (2010)).]

iii. A deviation from the child support guidelines; [*Row v. Row*, 185 N.C. App. 450, 650 S.E.2d 1 (2007), *review denied*, 362 N.C. 238, 659 S.E.2d 741, *cert. denied*, 555 U.S. 824, 129 S. Ct. 144 (2008), and *Beamer v. Beamer,* 169 N.C. App. 594, 610 S.E.2d 220 (2005) (both citing *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998)).]

iv. The manner of the presentation of evidence; [*Wolgin v. Wolgin*, 217 N.C. App. 278, 719 S.E.2d 196 (2011) (citing *State v. Harris,* 315 N.C. 556, 340 S.E.2d 383 (1986), and G.S. 8C-1, Rule 611(a)).]

v. The supervision and control of a trial; [*Cumberland Cty. ex rel. Rettig v. Rettig,* 231 N.C. App. 170, 753 S.E.2d 740 (2013) (**unpublished**) (citing *State v. Bethea,* 173 N.C. App. 43, 617 S.E.2d 687 (2005)).]

vi. The reasonableness and necessity of an award of attorney fees. [*Peters v. Pennington,* 210 N.C. App. 1, 707 S.E.2d 724 (2011); *Simpson v. Simpson,* 209 N.C. App. 320, 703 S.E.2d 890 (2011) (amount of attorney fees awarded is reviewed for an abuse of discretion).]

vii. A motion under G.S. 1A-1, Rule 60(b). [*Gyger v. Clement*, 263 N.C. App. 118. 823 S.E.2d 400 (2018), *rev'd on other grounds,* 375 N.C. 80, 846 S.E.2d 496 (2020).]

d. Standard of review for findings and conclusions.

i. The standard of review for findings made by a trial court sitting without a jury is "whether any competent evidence exists in the record to support" such findings. [*Row v. Row*, 185 N.C. App. 450, 460, 650 S.E.2d 1, 7 (2007) (quoting *Hollerbach v. Hollerbach*, 90 N.C. App. 384, 387, 368 S.E.2d 413, 415 (1988)), *review denied*, 362 N.C. 238, 659 S.E.2d 741, *cert. denied*, 555 U.S. 824, 129 S. Ct. 144 (2008); *Thomas v. Thomas*, 200 N.C. App. 436, 683 S.E.2d 791 (2009) (**unpublished**).]

4. Requirement of an appeal bond.

a. An order for child support is a money judgment under G.S. 1-289, which authorizes the trial court to require an appeal bond as security for payment of amount owing under the order. [*Clark v. Gragg,* 171 N.C. App. 120, 614 S.E.2d 356 (2005) (trial court did not err when it required that appellant file an appeal bond).]

b. G.S. 1-289 addresses a bond for the purpose of staying execution on a money judgment but does not "specifically address the ability to hold a party in contempt during an appeal." In child support matters, G.S. 50-13.4(f)(9) addresses that issue, providing that an order for the payment of child support is enforceable in the trial court,

pending appeal of that order. [*Smith v. Smith*, 247 N.C. App. 166, 171, 785 S.E.2d 434, 438 (2016).] An award for attorney fees is "an enforceable component of child custody, child support, and alimony awards pending appeal." Thus, when defendant did not seek to stay an award of attorney fees included in a child support order by posting bond pursuant to G.S. 1-289, the trial court had jurisdiction to find defendant in contempt pursuant to G.S. 50-13.4(f)(9) for failure to pay the fees while the matter was on appeal. [*Simms v. Bolger*, 264 N.C. App. 456, 459, 826 S.E.2d 467, 469 (2019).] For more on the enforceability of a child support order during appeal pursuant to G.S. 50-14.3(f)(9), see *Enforcement of Child Support Orders*, Part 4 of this Chapter, Section VII.B.19.

5. Post-remand procedure.
   a. When case remanded to trial court for additional findings:
      i. Absent direction from the court of appeals, the trial court has discretion to receive new evidence or to rely on evidence previously submitted. [*Hicks v. Alford,* 156 N.C. App. 384, 576 S.E.2d 410 (2003) (when court of appeals did not order trial court to hold a new hearing or receive new evidence, trial court was not required to take additional evidence on modification motion).]
      ii. A trial court on remand may enter an order containing findings as to circumstances and events occurring after the case was appealed only if new evidence is received on remand. Otherwise, a trial court on remand can make findings and conclusions based only on the existing record. [*Crews v. Paysour*, 261 N.C. App. 557, 821 S.E.2d 469 (2018).]
   b. When case remanded with specific instructions:
      i. It is error not to follow the mandate of the appellate court. [*McKinney v. McKinney,* 228 N.C. App. 300, 745 S.E.2d 356 (2013) (when the court of appeals gave specific instructions to compensate an expert only for time spent testifying, as provided in G.S. 7A-305(d)(11), and not for time expert spent waiting in court, trial court on remand was bound by that mandate and erred in awarding compensation for court time pursuant to G.S. 7A-314(d)), *review denied,* 367 N.C. 288, 753 S.E.2d 678, *review dismissed,* 753 S.E.2d 679 (2014); *Lasecki v. Lasecki*, 257 N.C. App. 24, 40, 809 S.E.2d 296, 308 (2017) (quoting *D & W, Inc. v. City of Charlotte*, 286 N.C. 720, 722, 152 S.E.2d 199, 202 (1966)) (appellate mandate "is binding upon [the trial court] and must be strictly followed without variation or departure;" on remand, a trial court lacks authority to alter any part of a trial court order affirmed on appeal but is "free to address anew" portions of the order vacated on appeal).]
      ii. G.S. 7A-314(d) was amended in 2015 to clarify that an award of expert witness costs is subject to G.S. 7A-305(d)(11). [G.S. 7A-314(d), *amended by* S.L. 2015-153, § 2, effective Oct. 1, 2015, and applicable to motions or applications for costs filed on or after that date, now provides that compensation and allowances awarded to an expert witness are "[s]ubject to the specific limitations set forth in G.S. 7A-305(d)(11)."]

c. When no additional evidence is presented on remand:

i. In any case in which no additional evidence is presented on remand, the trial court is to make findings of fact and conclusions of law based only on the existing record. [*Crews v. Paysour*, 261 N.C. App. 557, 562, 821 S.E.2d 469, 472 (2018) (order on remand can address only the facts as of the date of the last evidentiary hearing, that being "the only evidence in the record".]

6. Effect of an appeal on jurisdiction.

a. Pursuant to G.S. 1-294, when an appeal is perfected, the trial court is divested of jurisdiction "upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure." [G.S. 1-294, *amended by* S.L. 2015-25, § 2, effective May 21, 2015.]

b. The court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. [G.S. 1-294, *amended by* S.L. 2015-25, § 2, effective May 21, 2015.]

i. Pursuant to G.S. 1-294, a trial court has jurisdiction to enter an order on matters other than child support while a child support order is on appeal.

ii. Likewise, a trial court has jurisdiction to enter an order for child support while matters other than child support are on appeal. [*See McKyer v. McKyer,* 179 N.C. App. 132, 632 S.E.2d 828 (2006) (citing *Rosero v. Blake,* 150 N.C. App. 250, 563 S.E.2d 248, *rev'd on other grounds,* 357 N.C. 193, 581 S.E.2d 41 (2003), *cert. denied,* 540 U.S. 1177, 124 S. Ct. 1407 (2004)) (appeal of a custody order, which did not address child support, did not divest the trial court of jurisdiction to decide question of child support; court noting, however, that appeal of earlier custody order, expressly providing for child support by ordering mother to provide insurance, fell within scope of G.S. 1-294 so that husband's complaint for past and future child support, filed while appeal pending, was properly dismissed); *Watauga Cty. ex rel. McKiernan v. Shell*, 264 N.C. App. 608, 826 S.E.2d 739 (2019) (a trial court improperly relied on G.S. 1-294 to stay a IV-D proceeding to establish child support pending appeal of a child custody order involving the same child); *Cox v. Cox,* 33 N.C. App. 73, 234 S.E.2d 189 (1977) (child support can be modified while property division issue on appeal); *see also Huang v. Huang*, 151 N.C. App. 752, 567 S.E.2d 469 (2002) (**unpublished**) (trial court could enter order for child support while custody order on appeal; while there was an "obvious relationship" between the two, under the facts presented, one did not directly affect the other).]

iii. Note also that an appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, the validity of a premarital agreement as defined by G.S. 52B-2(1), child custody, child support, alimony, or equitable distribution, where the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), does not deprive the trial court of jurisdiction over any other claims pending in the same action. [G.S. 50-19.1, *added by* S.L. 2013-411, § 2, effective Aug. 23, 2013; *amended by* S.L. 2018-86, § 1, effective June 25, 2018; *Watauga Cty. ex rel. McKiernan v. Shell*, 264 N.C. App. 608, 826 S.E.2d 739 (2019) (trial court had jurisdiction to

proceed with a IV-D support claim after appeal of a custody order in the "same action" involving the same child but did not have jurisdiction to enter a temporary child support order after appeal of an order staying the IV-D child support proceeding).]

c. G.S. 50-13.4(f)(9) provides that a child support order is enforceable by civil contempt and that failing to obey the order may be punished by criminal contempt. Notwithstanding the provisions of G.S. 1-294, child support orders are enforceable in the trial court by civil contempt pending appeal. [G.S. 50-13.4(f)(9).] An award for attorney fees is "an enforceable component of child custody, child support, and alimony awards pending appeal." [*Simms v. Bolger*, 264 N.C. App. 456, 459, 826 S.E.2d 467, 469 (2019).] See *Enforcement of Child Support Orders,* Part 4 of this Chapter, Section VII for more on contempt.

d. When request for attorney fees is pending when support order is appealed.

i. After a child support order is appealed, the trial court lacks jurisdiction to consider a request for attorney fees arising from the child support case. [*Balawejder v. Balawejder,* 216 N.C. App. 301, 721 S.E.2d 679 (2011) (citing *McClure v. Cty. of Jackson,* 185 N.C. App. 462, 648 S.E.2d 546 (2007)) (stating rule in context of appeal from order for custody); *In re Scearce,* 81 N.C. App. 662, 345 S.E.2d 411, *review denied,* 318 N.C. 415, 349 S.E.2d 590 (1986).]

ii. However, the North Carolina Supreme Court has held that an alimony order was final and immediately appealable as of right pursuant to G.S. l-277(a), even though it reserved the issue of attorney fees, reasoning that attorney fees and costs are collateral issues and not part of the parties' substantive claims. [*Duncan v. Duncan,* 366 N.C. 544, 742 S.E.2d 799 (2013) (citing *Budinich v. Becton Dickinson & Co.,* 486 U.S. 196, 202–03, 108 S. Ct. 1717, 1722 (1988)) (announcing a bright-line rule applicable to any civil case disposing of the parties' substantive claims but leaving open the issue of attorney fees and costs); *Lucas v. Lucas*, 209 N.C. App. 492, 706 S.E.2d 270 (2011) (citing *Bumpers v. Cmty. Bank of N. Va.,* 364 N.C. 195, 695 S.E.2d 442 (2010)) (alimony and equitable distribution judgment final for purposes of appeal, even if a claim for attorney fees under G.S. 50-16.4 remained pending; claim for attorney fees under G.S. 50-16.4 is not a substantive issue or part of the merits of an alimony claim under G.S. 50-16.3A).] Because *Duncan* identified attorney fees as a "collateral issue," separate from the parties' substantive claims, court of appeals opinions holding that trial courts lose jurisdiction to determine attorney fees while the support order is on appeal because the fee issue is affected by child support may be called into question. *See* G.S. 1-294 (an appeal divests the court of jurisdiction with regard to "the judgment appealed from, or upon the matter embraced therein," but the court below may proceed upon any other matter "not affected by the judgment appealed from").

iii. The attorney fee issue may be addressed by the trial court after the appeal is resolved. [*In re Scearce,* 81 N.C. App. 662, 345 S.E.2d 411 (holding that a request for attorney fees may be raised by a motion in the cause subsequent to the determination of the main custody action; if the matter is on appeal, trial court can

properly consider the motion for attorney fees upon resolution of the appeal), *review denied,* 318 N.C. 415, 349 S.E.2d 590 (1986).] Alternatively, the trial court could defer entry of the written judgment until after a ruling is made on the issue of attorney fees and incorporate all of its rulings into a single, written judgment, from which appeal could be taken. [*McClure v. Cty. of Jackson,* 185 N.C. App. 462, 648 S.E.2d 546 (2007) (suggesting procedure).]

II. UIFSA Proceedings to Establish Child Support Orders (G.S. Chapter 52C)

A. Overview

1. The Uniform Interstate Family Support Act (UIFSA) (G.S. Chapter 52C) sets out procedures for the interstate establishment, enforcement, and modification of child and spousal support obligations. [*Lombardi v. Lombardi,* 157 N.C. App. 540, 579 S.E.2d 419 (2003); Official Comment (2015), G.S. 52C-1-103; G.S. Chapter 52C, Articles 3 through 6.]
2. The Preventing Sex Trafficking and Strengthening Families Act of 2014: Improving Child Support Recovery, Pub. L. No. 113-183, required North Carolina to adopt the most recent amendments to the 2008 version of UIFSA to bring it into compliance with the Hague Convention on International Recovery of Child Support and Other Forms of Family Maintenance. S.L. 2015-117, § 1, effective June 24, 2015, made the necessary amendments to G.S. Chapter 52C.
3. G.S. Chapter 52C does not provide the exclusive method of establishing or enforcing a support order under the law of North Carolina. [G.S. 52C-1-103(b)(1), *added by* S.L. 2015-117, § 1, effective June 24, 2015; Official Comment (2015), G.S. 52C-1-103 (new G.S. 52C-1-103(b)(1) "gives notice that UIFSA is not the only means for establishing or enforcing a support order with an interstate aspect").]
4. G.S. 52C-1-104(a), *added by* S.L. 2015-117, § 1, effective June 24, 2015, addresses the application of G.S. Chapter 52C to a resident of a foreign country and to a foreign support proceeding and requires that a North Carolina tribunal apply UIFSA Articles 1 through 6 and, as applicable, UIFSA Article 7, to a support proceeding involving:
   a. A foreign support order; [See definition in G.S. 52C-1-101(3b), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]
   b. A foreign tribunal; [See definition in G.S. 52C-1-101(3c), *added by* S.L. 2015-117, § 1, effective June 24, 2015.] or
   c. An obligee, obligor, or child residing in a foreign country. [See definition of foreign country in G.S. 52C-1-101(3a), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]
5. The new definitions in G.S. 52C-1-101 "are fine-tuned to avoid ambiguity in order to ensure that 'foreign' is used strictly to identify international proceedings and orders." [Official Comment (2015), G.S. 52C-1-101.]
6. UIFSA governs proceedings involving any support order registered in North Carolina after Jan. 1, 1996, UIFSA's effective date, regardless of when entered. [*Uhrig v. Madaras,*

174 N.C. App. 357, 620 S.E.2d 730 (2005), *review denied,* 360 N.C. 367, 630 S.E.2d 455 (2006); *Lombardi v. Lombardi,* 157 N.C. App. 540, 579 S.E.2d 419 (2003).]

7. UIFSA establishes a one-order system whereby all states adopting UIFSA are required to recognize and enforce the same obligation consistently. [*New Hanover Cty. ex rel. Mannthey v. Kilbourne*, 157 N.C. App. 239, 578 S.E.2d 610 (2003); *Uhrig v. Madaras,* 174 N.C. App. 357, 620 S.E.2d 730 (2005) (under UIFSA (applicable to a support order issued by a state tribunal and to a foreign support order) and the Full Faith and Credit for Child Support Orders Act (applicable to a support order issued by a state tribunal but not to a foreign support order), there can only be one controlling support order at any given time), *review denied,* 360 N.C. 367, 630 S.E.2d 455 (2006); *Hart v. Hart*, 268 N.C. App. 172, 836 S.E.2d 244 (2019) (citing *Kilbourne,* 157 N.C. App. at 243, 578 S.E.2d at 614 (2008)).] See also *Modification of Child Support Orders*, Part 3 of this Chapter, Section II.C.]
8. Interstate UIFSA proceedings to establish a child support order are civil, not criminal, actions.
9. A petitioner is not required to pay a filing fee or other costs in connection with a UIFSA proceeding. [G.S. 52C-3-312(a).]
10. If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of specific identifying information, that information must be sealed and may not be disclosed to the other party or made public. After a hearing in which a tribunal takes into consideration the health, safety, or liberty of the party or child, the tribunal may order disclosure of information that the tribunal determines to be in the best interest of justice. [G.S. 52C-3-311, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] Former G.S. 52C-3-311 allowed this determination to be made ex parte.
11. Some UIFSA evidentiary and discovery provisions have general application in interstate cases. [*See* G.S. 52C-3-315 and 52C-3-317, *both amended by* S.L. 2015-117, § 1, effective June 24, 2015.]
12. UIFSA provides two options for a petitioner seeking to establish a child support order against a respondent residing in another state or foreign country without traveling to that other state or foreign country:
    a. First, a petitioner may utilize UIFSA's expanded long-arm statute [G.S. 52C-2-201(a).] to obtain personal jurisdiction over a nonresident respondent when the exercise of personal jurisdiction over the respondent is consistent with due process. In this case, the petitioner files a petition in her state of residence and proceeds to establish support in accordance with the laws of that state. [*Butler v. Butler,* 152 N.C. App. 74, 566 S.E.2d 707 (2002). See Section I.B, above, discussing personal jurisdiction in cases filed in North Carolina.] The limitation in G.S. 52C-2-201(b), *added by* S.L. 2015-117, § 1, effective June 24, 2015, on the use of the jurisdictional bases in G.S. 52C-2-201(a) in proceedings to modify a child support order of another state or a foreign support order does not apply to a proceeding to establish a child support order.
    b. Second, the petitioner may initiate an interstate proceeding to establish a support order in the respondent's state of residence. In this situation, the petitioner may file a petition in an initiating tribunal for forwarding to a responding tribunal or may file a petition or comparable pleading directly in a tribunal of another state or a foreign country which has or can obtain personal jurisdiction over the respondent.

[G.S. 52C-3-301(c), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; *Butler v. Butler,* 152 N.C. App. 74, 566 S.E.2d 707 (2002). See Section II.B, below.]

i. For the definitions of "initiating tribunal" and "responding tribunal", see G.S. 52C-1-101(8) and (17), both of which now include a tribunal of a foreign country.

ii. While the filing of a petition in an initiating tribunal for forwarding is still recognized as an available procedure, the direct filing procedure has proven to be one of the most significant improvements in efficient interstate case management. [Official Comment (2015), G.S. 52C-3-301.]

13. A UIFSA petition seeking establishment of a child support order must do all of the following:

a. Conform substantially with the federally approved UIFSA petition. [*See* G.S. 52C-3-310(b).]

b. Be filed by the petitioner. [G.S. 52C-3-310(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] Before the 2015 amendment, G.S. 52C-3-310(a) required that the petition be verified.

c. State the names, residential addresses, and Social Security numbers of the obligor and obligee or the parent and alleged parent and the name, sex, date of birth, Social Security number, and residential address of each child for whose benefit support is sought or whose parentage is to be determined (if a party has alleged under oath that disclosure of identifying information would jeopardize the health, safety, or liberty of a party or child, a tribunal, after a hearing, may order disclosure of information that the tribunal determines to be in the best interest of justice). [G.S. 52C-3-310(a), 52C-3-311, *both amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

i. The Official Comment (2015) to the confidentiality provision in G.S. 52C-3-311 mentions Social Security numbers of the parties or the child as an example of identifying information that can be shielded from disclosure.

ii. G.S. 50-13.4(g), (h), *amended by* S.L. 2008-12, § 1, effective Oct. 1, 2008, no longer requires Social Security numbers of the parties in a child support order.

d. Have attached to it a certified copy of any support order known to have been issued by another tribunal with respect to the child, unless filed at the time of registration. [G.S. 52C-3-310(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

e. Specify the relief sought. [G.S. 52C-3-310(b).]

B. Interstate Procedure

1. Role of the Responding Tribunal.

a. A North Carolina district court may serve as a "responding tribunal" for proceedings initiated in another state or foreign country. [G.S. 52C-2-203. *See* 52C-1-101(3a) (definition of "foreign country"); 52C-1-101(17) (definition of "responding tribunal"), 52C-1-101(19) (definition of "state"), 52C-1-101(22) (definition of "tribunal"), 52C-1-102(a) (district court is the tribunal of this state), 52C-3-305 (duties and powers of responding tribunal), and 52C-4-401 (establishment of support order), *all amended or added by* S.L. 2015-117, § 1, effective June 24, 2015.]

b. Procedure.

i. An individual petitioner or a support enforcement agency may initiate a UIFSA proceeding to establish a child support order in North Carolina by filing a petition in a tribunal in petitioner's state or foreign country of residence for forwarding to North Carolina or by filing a petition or a comparable pleading directly in North Carolina if North Carolina has or can obtain personal jurisdiction over the respondent. [G.S. 52C-3-301(c), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

ii. If the petitioner files a petition in a tribunal in petitioner's state or foreign country of residence, that tribunal (called the "initiating tribunal") will forward the petition to North Carolina. [G.S. 52C-3-301(c), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; 52C-1-101(8) (definition of "initiating tribunal").] G.S. 2015-117, § 1, effective June 24, 2015, deleted the term "initiating state".

iii. Whether the action is initiated in a state or in a foreign country or in North Carolina by the petitioner, North Carolina is the "responding state" or "responding tribunal" for purposes of UIFSA. [G.S. 52C-1-101(16), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (definition of "responding state"); 52C-1-101(17), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (definition of "responding tribunal").]

iv. If a North Carolina tribunal receives a UIFSA petition and determines that it is not the appropriate tribunal with respect to the proceeding, the North Carolina tribunal must forward the petition and other documents to an appropriate tribunal in this state or in another state and notify the petitioner where and when the petition was sent. [G.S. 52C-3-306, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

v. Except as otherwise provided by UIFSA, a responding tribunal of this state in a UIFSA proceeding seeking establishment of a child support order applies North Carolina's procedural and substantive law generally applicable to similar proceedings originating in this state; may exercise and apply all powers and provide all remedies available in those proceedings; and determines the duty of support and amount payable in accordance with the law and support guidelines of this state. [G.S. 52C-3-303, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] For the choice of law provisions applicable to a proceeding to enforce a registered support order, see G.S. 52C- 6-604, discussed in *Enforcement of Child Support Orders*, Part 4 of this Chapter.

c. In a UIFSA proceeding, a North Carolina support enforcement agency, upon request, must provide services to a petitioner residing in a state, and services to a petitioner requesting services through a central authority of a foreign country as described in G.S. 52C-1-101(3a)a. or d. [G.S. 52C-3-307(a)(1) and (2), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] For duties of a North Carolina support enforcement agency, see G.S. 52C-3-307(b1), (b2), and (b3), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

i. If the North Carolina Department of Health and Human Services, Division of Social Services (Department), determines that the support enforcement agency

is neglecting or refusing to provide services to an individual, the Department may order the agency to perform its duties under UIFSA or may provide those services directly to the individual. [G.S. 52C-3-308(a), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

ii. The Department may determine that a foreign country has established a reciprocal arrangement for child support with North Carolina and take appropriate action for notification of the determination. [G.S. 52C-3-308(b), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

d. An individual may employ private counsel to represent him or her in proceedings authorized by G.S. Chapter 52C. [G.S. 52C-3-308.1, *added by* S.L. 2015-117, § 1, effective June 24, 2015.] Language in former G.S. 52C-3-308, providing for representation of an obligee in a UIFSA proceeding by the district attorney, was repealed by S.L. 2015-117, § 1, effective June 24, 2015.

e. The physical presence of a nonresident individual party before the responding tribunal is not required for the establishment of a child support order. [G.S. 52C-3-315(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; Official Comment (2015), G.S. 52C-3-315 (this provision ensures that a nonresident petitioner or a nonresident respondent may fully participate in a UIFSA proceeding without being required to appear personally).]

i. A petitioner is not subject to service of civil process while physically present in North Carolina to participate in a UIFSA proceeding. [G.S. 52C-3-313(b).]

ii. Participation by the petitioner in a UIFSA proceeding before a responding tribunal does not confer personal jurisdiction over the petitioner in another proceeding. [G.S. 52C-3-313(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015. *See also* G.S. 52C-1-103(b), *added by* S.L. 2015-117, § 1, effective June 24, 2015 (G.S. Chapter 52C does not grant a North Carolina tribunal jurisdiction to render judgment or issue an order relating to child custody or visitation in a Chapter 52C proceeding).] Participation means participation in person, by private attorney, or through services provided by the support enforcement agency. [G.S. 52C-3-313(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

iii. Immunity under G.S. 52C-3-313 does not extend to civil litigation based on acts unrelated to a UIFSA proceeding committed by a party while present in North Carolina to participate in a UIFSA proceeding. [G.S. 52C-3-313(c).]

f. In a UIFSA proceeding, a responding tribunal in this state must permit a party or witness residing outside this state to be deposed or to testify under penalty of perjury by telephone, audiovisual means, or other electronic means at a designated tribunal or other location. A tribunal of this state must cooperate with other tribunals in designating an appropriate location for the deposition or testimony. [G.S. 52C-3-315(f), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] The phrase "outside this state" is used in G.S. Chapter 52C when the application of the provision in which it is included is to be "as broad as possible." [Official Comment (2015), G.S. 52C-1-101.] All nations and political subdivisions are "outside this state" and, for example, use of the phrase in G.S. 52C-315 to -317 allows a North Carolina tribunal to accept information or assistance from "everywhere in the world." [Official Comment (2015), G.S. 52C-1-101.]

i. Affidavits, documents substantially complying with federally mandated forms, or documents incorporated by reference in the affidavits or documents, given under penalty of perjury by a party or witness residing outside this state, are admissible in evidence in a UIFSA proceeding to the extent that they would not be excluded under the hearsay rule if given in person by the declarant. [G.S. 52C-3-315(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] An affidavit given under penalty of perjury pursuant to G.S. 52C-3-315(b) does not require notarization to be admissible. [*Gyger v. Clement*, 375 N.C. 80, 846 S.E.2d 496 (2020), *rev'g* 263 N.C. App. 118, 823 S.E.2d 400 (2018).] For a note about the broad application given to the term "outside this state" and, thus, to G.S. 52C-3-315(b), see Section II.B.1.f, immediately above.

ii. Documentary evidence transmitted from outside this state by telephone, telecopier, or other electronic means that does not provide an original record may not be excluded from evidence based on an objection to the means of transmission. [G.S. 52C-3-315(e), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] For a note about the broad application given to the term "outside this state" and, thus, to the provision cited, see Section II.B.1.f, above.

g. A responding tribunal in this state may assess reasonable attorney fees, filing fees, necessary travel and other reasonable expenses incurred by the obligee and the obligee's witnesses, and other costs against an obligor if the obligee prevails. [G.S. 52C-3-312(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

i. Payment of child support owed to the obligee has priority over fees, costs, and expenses. [G.S. 52C-3-312(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

ii. Attorney fees may be taxed as costs and may be ordered paid directly to the attorney, who may enforce the order in the attorney's own name. [G.S. 52C-3-312(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

iii. The tribunal may not assess fees, expenses, or costs against the obligee or against the support enforcement agency of either the initiating or the responding state or foreign country, except as provided by other law. [G.S. 52C-3-312(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

h. A responding tribunal of this state that issues an order in a UIFSA proceeding must send a copy to the petitioner, the respondent, and the initiating tribunal, if any. [G.S. 52C-3-305(e).] For other powers and duties of a responding tribunal, see G.S. 52C-3-305.

i. Establishment of a support order by a responding tribunal.

i. If a support order entitled to recognition under G.S. Chapter 52C has not been issued, a North Carolina district court serving as a responding tribunal with personal jurisdiction over the parties may issue a support order if:

(a) The individual seeking the order lives outside this state or

(b) The support enforcement agency seeking the order is located outside this state. [G.S. 52C-4-401(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] For a note about the broad application given to the term "outside this state" and, thus, to the provision cited, see Section II.B.1.f, above.

2. Role of the Initiating Tribunal.
   a. A North Carolina district court may serve as an "initiating tribunal" in a UIFSA proceeding to forward proceedings to a tribunal of another state. [G.S. 52C-2-203, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]
   b. As an initiating tribunal, a North Carolina court must forward the UIFSA petition and accompanying documents to the responding tribunal or appropriate support enforcement agency in the responding state or to the state information agency in the responding state if the responding tribunal's identity is unknown. [G.S. 52C-3-304(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] Since 1998, by which time UIFSA had been enacted nationwide, the procedure in 52C-3-304(a) "has gradually become an anachronism." [Official Comment (2015), G.S. 52C-3-304(a).]
   c. A petitioner is not required to pay a filing fee or other costs. [G.S. 52C-3-312(a).]
   d. If requested by the responding tribunal, a tribunal of this state must issue a certificate or other document and make findings required by the law of the responding state. [G.S. 52C-3-304(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]
   e. If the responding tribunal is in a foreign country, upon request, a tribunal of this state must specify the amount of support sought, convert that amount into the equivalent amount in the foreign currency under the applicable official or market exchange rate, and provide any other documents necessary to satisfy the requirements of the responding foreign tribunal. [G.S. 52C-3-304(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] The procedure in G.S. 52C-3-304(b) retains its utility with regard to a support order of a foreign nation. [Official Comment (2015), G.S. 52C-3-305(a).]
   f. A tribunal of this state may communicate with a tribunal outside this state in a record or by telephone, electronic mail, or other means, to obtain or provide information regarding the laws, the legal effect of a judgment, decree, or order of that tribunal, and the status of a proceeding. [G.S. 52C-3-316, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] For a note about the broad application given to the term "outside this state" and, thus, to the provision cited, see Section II.B.1.f, above.
   g. In a UIFSA proceeding, a tribunal of this state must cooperate with other tribunals in designating an appropriate location for a deposition or the taking of testimony under penalty of perjury by telephone, audiovisual means, or other electronic means. [G.S. 52C-3-315(f), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]
   h. A tribunal of this state may request that a tribunal outside this state assist it in obtaining discovery and, upon request, may compel a person over whom it has jurisdiction to respond to a discovery order issued by a tribunal outside this state. [G.S. 52C-3-317, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] For a note about the broad application given to the term "outside this state" and, thus, to the provision cited, see Section II.B.1.f, above.
   i. In a UIFSA proceeding, a North Carolina support enforcement agency, upon request, must provide services to a petitioner residing in a state and to a petitioner requesting services through a central authority of a foreign country as described in G.S. 52C-1-101(3a)a. or d. [G.S. 52C-3-307(a)(1) and (2), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] For duties of a North Carolina support enforcement agency, see G.S. 52C-3-307(b1), (b2), and (b3), *added by* S.L. 2015-117, § 1, effective June 24, 2015.

III. Voluntary Agreements

A. Voluntary Support Agreements [G.S. 110-132(a) and 110-133.]

1. Generally.

a. An order for child support may be established through the execution and approval of a voluntary support agreement (VSA) pursuant to G.S. 110-132(a3) or 110-133.

i. A VSA executed pursuant to G.S. 110-132(a3) establishes support for a child based on affidavits of parentage executed by the putative father and mother in accordance with G.S. 110-132(a), which constitute an admission of paternity and have the same legal effect as a judgment of paternity for the purpose of establishing a child support obligation. [G.S. 110-132(a).]

(a) Before Oct. 1, 1997, G.S. 110-132(a) provided that an acknowledgment of paternity filed with and approved by a district court judge had the same force and effect as a judgment of the court.

(b) S.L. 1997-433, § 4.7 amended G.S. 110-132(a) to provide that an acknowledgment of paternity constituted an admission of paternity, subject to the right to rescind, and deleted the language giving an acknowledgment of paternity the same force and effect as a judgment of the court.

(c) S.L. 1999-293, § 1 amended G.S. 110-132(a) to provide that an acknowledgment of paternity shall have the same legal effect as a judgment of paternity for the purpose of establishing a child support obligation, subject to a right to rescind.

(d) S.L. 2001-237, § 2 amended G.S. 110-132(a) to change the name of the documents executed by the putative father and mother to affidavits of parentage.

(e) S.L. 2011-328, § 2 amended G.S. 110-132 to add a procedure to set aside an affidavit of parentage.

(f) S.L. 2015-117, § 1 amended G.S. 52C-3-315 to add G.S. 52C-3-315(j), effective June 24, 2015, to provide that a voluntary acknowledgment of paternity, certified as a true copy, is admissible to establish paternity of a child.

ii. A VSA executed pursuant to G.S. 110-133 establishes support for a dependent child born of a marriage.

iii. Form AOC-CV-607, Voluntary Support Agreement and Approval by Court, may be used in either case. When used to establish support for a child born out of wedlock, Form AOC-CV-607 may be accompanied by Form AOC-CV-604, Affidavit of Parentage.

b. A voluntary support agreement pursuant to G.S. 110-132(a3) and the affidavits of parentage executed pursuant to G.S. 110-132(a) may be filed in lieu of, or to dispose of, a civil action for child support brought pursuant to G.S. 50-13.4 *et seq.* or any other legal proceeding instituted to obtain child support for a child born out of wedlock. [G.S. 110-132(a), (a3).]

c. A voluntary support agreement pursuant to G.S. 110-133 may be filed in lieu of, or to dispose of, a civil action for child support brought pursuant to G.S. 50-13.4 *et seq.* or any other legal proceeding instituted to obtain child support from a parent of a child born of the marriage. [G.S. 110-133.]

2. Procedure.

a. If a VSA is filed in connection with a pending proceeding to establish support, there is no filing fee. If there is no pending action, the filing fee is as provided in G.S. 110-134.

b. A voluntary support agreement pursuant to G.S. 110-132(a3) and the affidavits of parentage must be acknowledged by the supporting parents before a certifying officer or notary public or the equivalent or corresponding person of the state, territory, or foreign country where the affirmations, affidavits, and agreement were made. [G.S. 110-132(a3).]

c. A voluntary support agreement pursuant to G.S. 110-133 must be acknowledged by the supporting parent before a certifying officer or notary public or the equivalent or corresponding person of the state, territory, or foreign country where the acknowledgment was made. [G.S. 110-133.]

d. The voluntary support agreement, whether executed pursuant to G.S. 110-132(a3) or 110-133, must contain the Social Security number of each of the parties to the agreement. [G.S. 110-132(a3); 110-133.]

i. Note, however, that G.S. 50-13.4(g), (h), *amended by* S.L. 2008-12, § 1, effective Oct. 1, 2008, no longer requires Social Security numbers of the parties in a child support order.

ii. Form AOC-CV-607, Voluntary Support Agreement and Approval by Court, does not require Social Security numbers of the parties or the child.

e. Although the consent or agreement of the child's custodial parent or caretaker is not statutorily required, a voluntary support agreement that is not entered into with the agreement or consent of the child's custodial parent, as evidenced by the custodial parent's or caretaker's execution of the agreement or other factors, may not be legally binding on the custodial parent, caretaker or child with respect to the amount of support provided. [*See Yarborough v. Yarborough*, 27 N.C. App. 100, 218 S.E.2d 411 (husband's confession of judgment for alimony was a nullity when wife had not expressly or impliedly consented to the judgment confessed), *cert. denied*, 288 N.C. 734, 220 S.E.2d 353 (1975).] Form AOC-CV-607 has an "Acknowledgment and Consent by Obligee" section that must be completed by the obligee.

f. G.S. 110-133 provides that the VSA executed pursuant to G.S. 110-133 is to be filed in the county where the custodial parent, noncustodial parent, or child resides or is found.

g. G.S. 110-132(a3) does not set out where a VSA executed pursuant to G.S. 110-132(a3) is to be filed. As set out in Section III.A.2.b, above, G.S. 110-132(a3) requires that the affidavits and voluntary support agreement be sworn to where made.

3. Right of rescission in G.S. 110-132.
    a. There is no right to rescind a voluntary support agreement (VSA). G.S. 110-132(a) contains a sixty-day right of rescission that applies only to affidavits of parentage, not to voluntary support agreements. Similarly, affidavits of parentage established under G.S. 110-132(a) may be set aside pursuant to G.S. 110-132(a2) or 50-13.13, but neither statute speaks to setting aside a VSA. [See *Paternity*, Bench Book, Vol. 1, Chapter 10.]
    b. However, a voluntary support agreement requiring a man to support a child born out of wedlock should not be approved unless the man has executed an unrescinded voluntary affidavit of parentage pursuant to G.S. 110-132(a) or 130A-101 or his paternity of the child has been judicially determined.
    c. **NOTE**: S.L. 2011-328, §§ 2 and 3, effective Jan. 1, 2012, and applicable to motions or claims for relief filed on or after that date, added G.S. 110-132(a2) and 50-13.13, which provide procedures to set aside affidavits of parentage under certain circumstances.
4. Amount of support.
    a. Federal law requires that all support orders, even those entered by consent, comply with the child support guidelines. [See 2020 Guidelines stating that guidelines apply to voluntary support agreements and to consent orders approved by the court; 42 U.S.C. § 667(b)(2) and 45 C.F.R. § 302.56(f).]
    b. Unless the voluntary support agreement states the presumptive amount of support due under the child support guidelines and indicates that the obligor's presumptive child support obligation would exceed or not meet the child's reasonable needs considering the parents' relative abilities to provide support or would otherwise be unjust or inappropriate, the amount of child support provided through a voluntary support agreement must be determined pursuant to North Carolina's child support guidelines.
5. Optional provisions of the agreement. Pursuant to G.S. 110-132(a3), a VSA may provide for:
    a. Reimbursement of medical expenses incident to the pregnancy and birth of the child,
    b. Accrued maintenance (past expenditures or past maintenance), and
    c. Reasonable expenses of prosecution of a paternity action.
6. Legal force and effect.
    a. The VSA is binding on the responsible parent executing it whether that person is an adult or a minor. [G.S. 110-132(a3).]
    b. A voluntary support agreement, filed with and approved by the district court judge, has the same force and effect as an order of support entered by the court. The VSA is enforceable and subject to modification in the same manner as an order of support entered by the court. [G.S. 110-132(a3); 110-133.]
    c. A voluntary child support agreement under G.S. 110-132(a) (now G.S. 110-132(a3)) has been found sufficient to establish paternity of a child born out of wedlock, entitling the child to inherit pursuant to G.S. 29-19(b)(2) when the father died

intestate. [*In re Estate of Potts,* 186 N.C. App. 460, 651 S.E.2d 297 (2007) (VSA met the acknowledgment, execution, and filing requirements of G.S. 29-19(b)(2)).] Strict compliance with the requirement in G.S. 29-19(b)(2) that the instrument acknowledging paternity be filed with the clerk is required. [*In re Estate of Williams,* 246 N.C. App. 76, 783 S.E.2d 253 (2016) (citing *In re Estate of Morris,* 123 N.C. App. 264, 472 S.E.2d 786 (1996)) (rejecting purported heir's argument that substantial compliance with the filing requirement would be sufficient), *review denied, dismissed,* 787 S.E.2d 30 (N.C. 2016).]

7. Setting aside a voluntary support agreement.
   a. Most requests to set aside voluntary support agreements arise when a putative father who has acknowledged paternity subsequently denies paternity.
      i. **NOTE**: S.L. 2011-328, §§ 2 and 3, effective Jan. 1, 2012, and applicable to motions or claims for relief filed on or after that date, added G.S. 110-132(a2) and 50-13.13, which provide procedures to set aside affidavits of parentage under certain circumstances.
      ii. **NOTE**: S.L. 2011-328, § 1, effective Jan. 1, 2012, and applicable to motions or claims for relief filed on or after that date, added G.S. 49-14(h), which provides procedures to set aside orders of paternity under certain circumstances.
   b. A motion pursuant to G.S. 1A-1, Rule 60(b) is the appropriate method of challenging acknowledgments of paternity. [*State ex rel. Davis v. Adams,* 153 N.C. App. 512, 571 S.E.2d 238 (2002) (citing *Leach v. Alford,* 63 N.C. App. 118, 304 S.E.2d 265 (1983)) (trial court properly denied putative father's motion to void his acknowledgment of paternity and voluntary child support agreement and order based on his claim of fraud or mistake where father failed to file motion within one year after entry of the VSA, as required by Rule 60(b)(1)).] **NOTE**: Motions pursuant to Rule 60(b)(4), (b)(5), and (b)(6) are not subject to the one-year limitation but instead must be filed within a reasonable time after entry of judgment. [G.S. 1A, Rule 60(b).]
   c. If the trial court grants the Rule 60(b) motion, the acknowledgment of paternity and voluntary support order are set aside and the issue of paternity is reopened. [*State ex rel. Bright v. Flaskrud,* 148 N.C. App. 710, 559 S.E.2d 286 (2002).] The court in Bright considered an acknowledgment of paternity and voluntary support executed in 1995. Before Oct. 1, 1997, an acknowledgement of paternity executed pursuant to G.S. 110-132(a) filed with and approved by a district court judge had the same force and effect as a judgment of the court.
   d. A trial court must first set aside the acknowledgment pursuant to Rule 60(b) before considering the paternity issue or ordering blood tests. [*State ex rel. Bright v. Flaskrud,* 148 N.C. App. 710, 559 S.E.2d 286 (2002) (error for court to order blood tests before ruling on Rule 60 motion; acknowledgment of paternity was res judicata so had to be first set aside).]
   e. A judgment of paternity arising from an acknowledgment of paternity under G.S. 110-132 may not be reconsidered by the court in a later proceeding relating solely to support. [*Leach v. Alford,* 63 N.C. App. 118, 304 S.E.2d 265 (1983) (an order of paternity cannot be collaterally attacked in a proceeding relating to support; an unrescinded voluntary paternity affidavit under G.S. 110-132(a) is res judicata on

issue of paternity in a subsequent proceeding solely for support); *Person Cty. ex rel. Lester v. Holloway*, 74 N.C. App. 734, 329 S.E.2d 713 (1985) (defendant could not attack, in a contempt proceeding for failure to pay child support, a judgment of paternity arising from defendant's execution of an acknowledgement of paternity under G.S. 110-132(a); enforcement proceeding was one relating solely to support).] Note, that before Oct. 1, 1997, an acknowledgment of paternity executed pursuant to G.S. 110-132(a) filed with and approved by a district court judge had the same force and effect as a judgment of the court.

f. A party is not barred from seeking relief pursuant to Rule 60(b) from an acknowledgment (judgment) of paternity when support is not at issue. [*Leach v. Alford,* 63 N.C. App. 118, 304 S.E.2d 265 (1983).]

g. For a discussion on nonpaternity as a defense in an action for support, see Section I.G.4, above.

h. For a discussion on setting aside a paternity affidavit, see *Paternity*, Bench Book, Vol. 1, Chapter 10.

B. Confession of Judgment

1. If a child support proceeding is not pending, a child support order may be established through confession of judgment. [G.S. 1A-1, Rule 68.1(a).]
2. A confession of judgment for child support must be filed with the clerk of superior court in the county in which the person confessing judgment resides or has property or in the county in which the person to whom support is owed resides. [G.S. 1A-1, Rule 68.1(c).]
3. Confessions of judgment are required to comply with the child support guidelines. [42 U.S.C. § 667(b)(2) and 45 C.F.R. § 302.56(f).] Unless the confession of judgment states the presumptive amount of support due under the child support guidelines and indicates that the obligor's presumptive child support obligation would exceed or not meet the child's reasonable needs considering the parents' relative abilities to provide support or would otherwise be unjust or inappropriate, the amount of child support provided through a confession of judgment must be determined pursuant to North Carolina's child support guidelines.
4. A confession of judgment for child support that is not entered into with the agreement or consent of the child's custodial parent or caretaker, as evidenced by the custodial parent's or caretaker's execution of the agreement or other factors, may not be legally binding on the custodial parent, caretaker, or child with respect to the amount of support provided. [*See Yarborough v. Yarborough*, 27 N.C. App. 100, 218 S.E.2d 411 (husband's confession of judgment for alimony a nullity when wife had not expressly or impliedly consented to the judgment confessed), *cert. denied*, 288 N.C. 734, 220 S.E.2d 353 (1975).]
5. A confession of judgment for child support is enforceable and may be modified in the same manner as a child support order entered by a district court pursuant to G.S. 50-13.4 *et seq.* [*See* G.S. 1A-1, Rule 68.1(e).]
   a. No judgment by confession is res judicata as to any fact in any civil action except in an action on the judgment confessed. [G.S. 1A-1, Rule 68.1(e).]

b. When the judgment confessed is for child support, defendant's failure to make payment as required by the judgment subjects the defendant to the same penalties as in any other case of contempt of a court order. [G.S. 1A-1, Rule 68.1(e).]

c. A court may refuse to enforce provisions in a confession of judgment that are against public policy. [*See Snipes v. Snipes*, 118 N.C. App. 189, 454 S.E.2d 864 (1995) (agreeing with trial court's implicit determination that judgment which increased payments according to increases in consumer price index was void ab initio).]

d. If a confession of judgment gives a party judgment on issues later raised in a complaint, the complaint should be dismissed. [*Pierce v. Pierce,* 58 N.C. App. 815, 295 S.E.2d 247 (1982) (complaint seeking enforcement of separation agreement granting custody to wife and specifying amount of child support to be paid by father should have been dismissed where prior judgment by confession was judgment on the issues raised in the complaint; order to show cause for violation of the judgment of confession pending).]

C. Separation Agreements

1. Generally.

a. The legal obligation of married parents to support a minor child may be established through the execution and acknowledgment of a written separation agreement between the parents. [G.S. 52-10.1.]

b. A parent may assume in a separation agreement a child support obligation that is greater in amount, scope, or duration than that imposed by G.S. Chapter 50 or other state laws. [*Jackson v. Jackson,* 360 N.C. 56, 620 S.E.2d 862 (provision in unincorporated separation agreement that required father to pay monthly child support beyond age of majority enforceable), *rev'g per curiam for reasons stated in dissenting opinion in* 169 N.C. App. 46, 610 S.E.2d 731 (2005) (Hunter, J., dissenting); *Shaffner v. Shaffner*, 36 N.C. App. 586, 244 S.E.2d 444 (1978) (father agreed in separation agreement to support child until he reached age 21).]

c. However, no agreement between the parents can fully deprive the courts of their authority to protect the best interests of minor children. [*Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003) (quoting *Fuchs v. Fuchs,* 260 N.C. 635, 639, 133 S.E.2d 487, 491 (1963)), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004); *Bottomley v. Bottomley,* 82 N.C. App. 231, 346 S.E.2d 317 (1986) (court has inherent authority to pass on custody and support issues); *Boyd v. Boyd,* 81 N.C. App. 71, 343 S.E.2d 581 (1986) (citing *Fuchs*) (provisions of a separation agreement relating to custody and support are not binding on the court, which has inherent and statutory authority to protect the interests of children).]

d. See *Spousal Agreements,* Bench Book, Vol. 1, Chapter 1, Section IV.F.4 for more on separation agreements.

2. Separation agreements that are incorporated into a judgment of the court.

a. Parents can request that a court incorporate their separation agreement into a judgment of the court. [*Pataky v. Pataky*, 160 N.C. App. 289, 303–04 n.6, 585 S.E.2d 404, 414 n.6 (2003) (stating in a footnote that parents should be free to evaluate the

relative advantages and disadvantages of incorporation), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004).]

b. Once incorporated, a separation agreement is a court order. As such it is enforceable by the contempt powers of the court, and child support provisions are subject to modification upon a showing of a material change in circumstance. [*Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983); *Duffey v. Duffey,* 113 N.C. App. 382, 438 S.E.2d 445 (1994) (trial court free to modify amount of child support in incorporated agreement in the event of changed circumstances).]

3. Separation agreements that are not incorporated into a judgment of the court.

a. Generally.

i. An unincorporated separation agreement is a contract between the parties. [*Rose v. Rose,* 108 N.C. App. 90, 422 S.E.2d 446 (1992).]

ii. A parent's obligation to pay child support pursuant to an unincorporated separation agreement may be enforced by a court in the same manner as other contracts. [*See Morrow v. Morrow,* 103 N.C. App. 787, 407 S.E.2d 286 (1991) (party alleging other parent obligated by separation agreement to support parties' child who was no longer a minor had to file a civil action rather than motion in the cause; G.S. 1A-1, Rule 3, providing that a civil action is commenced by filing a complaint, does not allow for an action to be commenced by a motion in the cause); *Rosen v. Rosen*, 105 N.C. App. 326, 413 S.E.2d 6 (1992) (defendant's agreement to provide for children's educational training beyond high school not enforceable; no meeting of the minds as to amount of his contribution).]

iii. For more on enforcement of unincorporated separation agreements, see *Enforcement of Child Support Orders*, Part 4 of this Chapter, Section VIII.B and *Spousal Agreements,* Bench Book, Vol. 1, Chapter 1, Section IV.F.4.

b. Parties to an unincorporated separation agreement may seek court-ordered prospective child support.

i. Either party to an unincorporated separation agreement may seek a court order to establish child support pursuant to G.S. 50-13.4 in an amount, scope, or duration different from that provided in the unincorporated agreement. [*See Bottomley v. Bottomley*, 82 N.C. App. 231, 346 S.E.2d 317 (1986) (noncustodial parent sought a decrease in his support payments); *Boyd v. Boyd*, 81 N.C. App. 71, 343 S.E.2d 581 (1986) (custodial parent sought an increase in amount of support).]

ii. In this case, the child support order entered by the court is an **initial** child support order and does not modify the child support provisions contained in the unincorporated separation agreement. [*Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003) (citing *Boyd v. Boyd*, 81 N.C. App. 71, 343 S.E.2d 581 (1986)), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004); *Boyd* (moving party is not required to prove that there has been a substantial change of circumstances since the date the separation agreement was executed; moving party's only burden is to show the amount of support necessary to meet the reasonable needs of the child at the time of the hearing).]

c. Awarding prospective support.

i. To establish prospective child support when there is a prior unincorporated separation agreement:

(a) The court must first apply a rebuttable presumption that the amount set forth in the separation agreement is just and reasonable.

(b) The court then determines the actual needs of the child at the time of the hearing, as compared to the provisions of the separation agreement.

(c) The court next determines whether the presumption of reasonableness has been rebutted by the greater weight of the evidence, taking into account the needs of the children existing at the time of the hearing and considering the factors enumerated in the first sentence of G.S. 50-13.4(c).

(1) The *Pataky* presumption is rebutted by evidence that the amount of support in the agreement does not meet the reasonable needs of the children. The *Pataky* presumption is not rebutted by evidence that that an obligor does not have the ability to pay the amount required by the contract. [*Lasecki v. Lasecki*, 257 N.C. App. 24, 809 S.E.2d 296 (2017).]

(d) If the presumption of reasonableness **is not** rebutted, the court should enter an order in the amount provided in the separation agreement and make a finding that application of the guidelines would be inappropriate.

(e) If the presumption of reasonableness afforded the separation agreement allowance **has been** rebutted, the court then looks to the presumptive guidelines.

(f) Upon motion of either party or on the court's own motion, the court may deviate from the guidelines under the usual standard for deviation, that application of the guidelines would not meet or would exceed the needs of the child or would be otherwise unjust or inappropriate. [*Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004).

ii. When applying the presumption, the trial court must make findings of fact:

(a) Regarding the needs of the child at the time of the hearing and the factors set out in the first sentence of G.S. 50-13.4(c) and

(b) That indicate whether the party has rebutted the presumption of reasonableness. [*Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part*, 359 N.C. 65, 602 S.E.2d 360 (2004).]

iii. In determining whether the amount of support in an unincorporated separation agreement is reasonable, a trial court may not impute income to the supporting parent without finding that the supporting parent "deliberately depressed his income or deliberately acted in disregard of his obligation to provide support." [*Lasecki v. Lasecki*, 246 N.C. App. 518, 523, 786 S.E.2d 286, 292 (2016) (quoting *McKyer v. McKyer,* 179 N.C. App. 132, 146, 632 S.E.2d 828, 836 (2006)).] Similarly, in determining the amount of child support that father had the ability to pay for specific performance purposes, the trial court erred when it imputed

income to father of $150,000/year even though it found that he was not "voluntarily suppressing his income in bad faith to avoid his child support obligation." [*Lasecki*, 246 N.C. App. at 534, 786 S.E.2d at 299 (father was unemployed and had no income at the time of the hearing).]

(a) For more on *Lasecki*, see Cheryl Howell, *And They Said It Again: Never Use Earning Capacity without Bad Faith*, UNC Sch. of Gov't: On the Civil Side Blog (Apr. 22, 2016), http://civil.sog.unc.edu/and-they-said-it-again-never-use-earning-capacity-without-bad-faith.

(b) For more on bad faith generally, see Cheryl Howell *Imputing Income: So What Is Bad Faith?* UNC Sch. of Gov't: On the Civil Side Blog (Oct. 7, 2015), http://civil.sog.unc.edu/imputing-income-so-what-is-bad-faith.

(c) The relevant provision in the 2020 and 2019 Guidelines states that "[t]he amount of potential income imputed to a parent must be based on the parent's *assets, residence*, employment potential and probable earnings level, based on the parent's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the community *and other relevant background factors relating to the parent's actual earning potential." See* Cheryl Howell, *New Child Support Guidelines for 2019*, UNC Sch. of Gov't: On the Civil Side Blog (Jan. 8, 2019) (italicized language added to the 2019 Guidelines to respond to emphasis in new federal regulations, which were the basis for the 2019 Guidelines, that the amount of imputed income reflect the parent's actual present earning capacity), https://civil.sog.unc.edu/new-child-support-guidelines-for-2019.

iv. The *Pataky* presumption and required findings have been found to apply even if the parties' unincorporated agreement provides for calculation of support pursuant to the guidelines upon the occurrence of a certain event or condition. [*See Weisberg v. Griffith,* 171 N.C. App. 517, 615 S.E.2d 738 (2005) (**unpublished**) (when parties agreed in unincorporated agreement to set child support in accordance with the guidelines should one of the parties move fifty miles from the other, trial court ordered guideline support as of date of mother's move with children out of state; order vacated and remanded as not conforming with Pataky when findings did not indicate that trial court applied the presumption that the amount of support in the agreement was reasonable, there were no specific findings regarding the presumption or whether it was rebutted, and no findings as to the reasonable needs of the children at the time of the separation agreement and at the time of trial).]

v. Trial court did not abuse its discretion when it determined that the *Pataky* presumption had been rebutted when it made numerous, in-depth findings as to the children's accustomed standard of living, the needs of the children, and the variance at the time of the hearing between the expenses incurred by the father on behalf of the children and those incurred by the mother on their behalf. [*Brind'Amour v. Brind'Amour,* 196 N.C. App. 322, 674 S.E.2d 448 (2009).]

vi. Where presumption is rebutted, the trial court has discretion to order prospective child support in an amount greater than that in the parties unincorporated separation agreement. [*Carson v. Carson,* 199 N.C. App. 101, 680 S.E.2d 885

(2009).] For a court's discretion to award less than the support provided in the separation agreement, see Section III.C.3.d, immediately below.

d. Setting prospective child support order in an amount less than that provided for in an unincorporated separation agreement.

i. A trial court has discretion to enter an order establishing child support in an amount less than the amount established by a separation or child support agreement. [*Brind'Amour v. Brind'Amour,* 196 N.C. App. 322, 674 S.E.2d 448 (2009) (citing *Bottomley v. Bottomley*, 82 N.C. App. 231, 346 S.E.2d 317 (1986)) (noting, however, that in most cases the custodial parent obtains child support in an amount greater than that in the agreement). *Cf. Lasecki v. Lasecki*, 257 N.C. App. 24, 32, 809 S.E.2d 296, 304 (2017) ("[T]he question for the trial court was limited to . . . whether the amount of child support should be *increased* . . . .").]

ii. No abuse of discretion when the trial court awarded mother $9,147 per month in support when the parties unincorporated agreement provided for $15,000. [*Brind'Amour v. Brind'Amour,* 196 N.C. App. 322, 674 S.E.2d 448 (2009) (finding that mother's expenses related to the three children were excessive).]

iii. If the court enters an order requiring a parent to pay less child support than provided under an unincorporated separation agreement, the court of appeals has indicated that the party receiving support may still be able to seek to enforce her contractual rights to support under the unincorporated separation agreement. [*Bottomley v. Bottomley*, 82 N.C. App. 231, 346 S.E.2d 317 (1986) (order setting child support in lesser sum than that provided for in parties' separation agreement did not deprive obligee wife of her contractual right to recover sums provided for in the agreement but did limit her contempt remedy to sums provided for by court order); *McKaughn v. McKaughn,* 29 N.C. App. 702, 225 S.E.2d 616 (1976) (noting that judgment cutting monthly support payments in half did not change the contractual obligations under the separation agreement). *But see Richardson v. Richardson,* 261 N.C. 521, 135 S.E.2d 532 (1964) (when court ordered less in support than required by separation agreement, mother not entitled to enforce separation agreement to recover the difference).]

e. Awarding retroactive support when there is an unincorporated separation agreement.

i. Two types of retroactive support.

(a) The first type of retroactive support occurs when a court awards support for a period prior to the date a civil action for support was filed. Such an order has required a parent to reimburse a child's custodian for the parent's fair share of actual and reasonable child-related expenses paid by the custodian before the date an action seeking child support was filed. [*Carson v. Carson,* 199 N.C. App. 101, 680 S.E.2d 885 (2009); *Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E.2d 176 (1992).] This type of support is also known as "prior maintenance."

(b) The second type of retroactive support occurs when a court orders a retroactive increase in the amount provided in an existing support order. [*Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000) (in limited

circumstances, the trial court may order an obligor to reimburse the other parent for emergency expenses not covered by the existing support order).]

ii. When a valid, unincorporated separation agreement sets out the obligations of the parent for support and the parent fully complies with this obligation, the trial court is not permitted to award retroactive child support absent an emergency situation. [2020 Guidelines; *Carson v. Carson,* 199 N.C. App. 101, 680 S.E.2d 885 (2009) (citing *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E.2d 487 (1963)) (interpreting the 2006 Guidelines) (time period in *Carson* for which support was sought was three years prior to the filing of the complaint, during which time parties had an unincorporated separation agreement that was not being breached; trial court erred by using guidelines to determine retroactive support when unincorporated separation agreement was in effect and was not being breached).] The 2011, 2015, and 2020 Guidelines provide that "if a child's parents have executed a valid, unincorporated separation agreement that determined a parent's child support obligation for the period of time before the child support action was filed, the court shall not enter an order for retroactive child support or prior maintenance in an amount different than the amount required by the unincorporated separation agreement" without mentioning an exception for an emergency. Case law allows retroactive support in an amount different than the amount in an unincorporated separation agreement in an emergency situation. [See *Fuchs*, *Biggs v. Greer,* 136 N.C. App. 294, 524 S.E.2d 577 (2000), and other cases cited in *Carson*.]

iii. For more on retroactive support when there is an unincorporated separation agreement, see Cheryl Howell, *Retroactive Child Support: What Is It and How Is the Amount Determined?,* UNC Sch. of Gov't: On the Civil Side Blog (Apr. 1, 2016), http://civil.sog.unc.edu/retroactive-child-support-what-is-it-and-how-is-the-amount-determined.

f. For a discussion of the application of the guidelines when there is an unincorporated separation agreement, see *Liability and Amount*, Part 1 of this Chapter, Section III.D.5.

IV. Criminal Nonsupport Proceedings

A. Offenses

1. A parent who willfully neglects or refuses to provide adequate support for his or her child, whether natural or adopted and whether or not the parent abandons the child, shall be guilty of a Class 2 misdemeanor (or a Class 1 misdemeanor for a subsequent offense). [G.S. 14-322(d), (f) (discussed in Section IV.D, below).]

2. Any man or woman who, without just cause or provocation, willfully abandons his or her child or children for six months and who willfully fails or refuses to provide adequate support for his or her child or children during the six-month period, shall be guilty of a Class I felony if the parent also attempts to conceal his or her whereabouts with the intent

of escaping his or her lawful child support obligation. [G.S. 14-322.1 (discussed in Section IV.E, below).]

3. A parent who willfully neglects or refuses to provide adequate support and maintain his or her child born out of wedlock shall be guilty of a Class 2 misdemeanor. [G.S. 49-2, *amended by* S.L. 2013-198, § 17, effective June 26, 2013 (discussed in Section IV.F, below).]

B. Generally

1. A parent may be prosecuted for criminal nonsupport of his child regardless of whether a child support order has been previously entered requiring the parent to pay child support on behalf of the child.
2. Parentage is a necessary element of criminal nonsupport. [*See State ex rel. Lewis v. Lewis,* 311 N.C. 727, 319 S.E.2d 145 (1984) (prosecution under G.S. 14-322); *State v. Coffey,* 3 N.C. App. 133, 164 S.E.2d 39 (1968) (prosecution under G.S. 49-2).]
3. The State must prove all elements of the offense of criminal nonsupport beyond a reasonable doubt. [*See State ex rel. Lewis v. Lewis,* 311 N.C. 727, 319 S.E.2d 145 (1984); *State v. Ellis,* 262 N.C. 446, 137 S.E.2d 840 (1964).]
4. An indigent defendant has a right to court-appointed counsel in a criminal nonsupport proceeding. [G.S. 7A-450 and 7A-451(a).] When a defendant is not indigent, the defendant has a constitutional right to be represented by counsel at trial unless the defendant knowingly and intelligently waives that right. [*State v. Lee*, 40 N.C. App. 165, 252 S.E.2d 225 (1979) (guilty plea of nonindigent defendant charged under G.S. 49-2 stricken because when defendant was called upon to plead, he was neither represented by counsel nor had waived his right to counsel).]
5. Right to trial by jury.
   a. In criminal cases there shall be no jury trial in the district court. [G.S. 7A-196(b).]
   b. Upon appeal to superior court trial shall be de novo, with jury trial as provided by law. [G.S. 7A-196(b); 7A-271(b).]
6. Probation.
   a. The court may (and in some cases must, depending on the defendant's prior record) suspend a sentence of incarceration for criminal nonsupport and place the defendant on probation.
   b. If the court places a defendant on probation, the defendant must satisfy child support and other family obligations as required by the court. [G.S. 15A-1343(b)(4).]

C. Jurisdiction

1. The district court has exclusive original jurisdiction over misdemeanor criminal nonsupport proceedings. [G.S. 7A-272; *State v. Caudill*, 68 N.C. App. 268, 314 S.E.2d 592 (1984) (violation of G.S. 49-2 is a misdemeanor over which the district court has exclusive original jurisdiction).] A defendant who is convicted of criminal nonsupport in district court may appeal to the superior court for trial de novo. [G.S. 7A-196(b); 7A-271(b).]
2. The offense of criminal nonsupport is deemed to have been committed in North Carolina whenever the child lives in North Carolina at the time the nonsupport occurs, regardless

of the parent's residence. [G.S. 14-325.1; 49-3; *State v. Tickle*, 238 N.C. 206, 77 S.E.2d 632 (1953) (father of child conceived in Virginia but born in North Carolina was constructively present with reference to consummation of the crime of willful nonsupport), *cert. denied,* 346 U.S. 938, 74 S. Ct. 378 (1954).]

3. Willful neglect or failure to provide adequate support to a child is a continuing offense. A parent may be prosecuted for criminal nonsupport if, following his acquittal or conviction for criminal nonsupport in a prior criminal proceeding, he subsequently willfully fails to support his child. [G.S. 14-322(d). *See State v. Hinson*, 209 N.C. 187, 183 S.E. 397 (1936) (initial prosecution is not a bar to a subsequent prosecution, for there is a new violation of the law); *Stephens v. Worley*, 51 N.C. App. 553, 277 S.E.2d 81 (1981) (citing *State v. Ellis,* 262 N.C. 446, 137 S.E.2d 840 (1964)) (previous acquittal on a charge of willful nonsupport does not bar a subsequent prosecution because G.S. 49-2 creates a continuing offense); *State v. Coffey*, 3 N.C. App. 133, 164 S.E.2d 39 (1968) (citing *State v. Johnson,* 212 N.C. 566, 194 S.E.2d 319 (1937)) (since offense of nonsupport under G.S. 49-2 is a continuing offense, a new warrant may be filed charging defendant with nonsupport under G.S. 49-2 if nonsupport occurred after issuance of the warrant on which defendant has been tried).]

D. Failure to Support a Legitimate Child [G.S. 14-322.]

1. Generally.
   a. G.S. 14-322 relates only to the offense of failure to support one's legitimate children. A person may be convicted for nonsupport of a child born out of wedlock only under G.S. 49-2. [*State v. Caudill,* 68 N.C. App. 268, 314 S.E.2d 592 (1984).]
   b. A magistrate is required to issue criminal process under G.S. 14-322 if she finds probable cause to believe that a parent has willfully neglected or failed to make court-ordered child support payments for two consecutive months. [G.S. 110-138.1.]
   c. A parent who abandons a child who is less than seven days old pursuant to G.S. 7B-500(b) or (d) may not be prosecuted for criminal nonsupport of the child pursuant to G.S. 14-322. [G.S. 14-322.3.]
2. When action may be brought. A criminal nonsupport proceeding under G.S. 14-322 may be brought at any time before a child's 18th birthday. [G.S. 14-322(d).]
3. Elements. To obtain a conviction, the State must prove three elements:
   a. That defendant is the parent of the child,
   b. That defendant failed or neglected to provide the child with adequate support, and
   c. That such failure or neglect was willful. [G.S. 14-322(d); *State ex rel. Lewis v. Lewis,* 311 N.C. 727, 319 S.E.2d 145 (1984).] S.L. 1981-683, effective July 1, 1981, rewrote G.S. 14-322 to provide for criminal sanctions against both genders for nonsupport.
4. Order for support.
   a. If a defendant is not required to pay child support under an existing order, the court may enter an order requiring a defendant convicted of criminal nonsupport under G.S. 14-322(d) to pay child support. [G.S. 14-322(e).]
   b. The child support guidelines apply. The amount of support is to be determined as provided in G.S. 15-13.4(c). [G.S. 14-322(e).]

c. Child support ordered pursuant to G.S. 14-322(e) generally must be paid through the State Child Support Collection and Disbursement Unit through immediate income withholding. [*See* G.S. 15A-1344.1(a).]

5. Sentence and probation.

a. A first offense is a Class 2 misdemeanor. A second or subsequent offense is a Class 1 misdemeanor. [G.S. 14-322(f).]

b. The maximum sentence for a first offense under G.S. 14-322 is 30, 45, or 60 days (depending of the defendant's prior criminal record) and a fine of up to $1,000. [G.S. 15A-1340.23.]

c. G.S. 15A-1341 and 15A-1343 permit a judge to suspend the activation of a jail sentence and place a defendant on probation subject to the condition that defendant satisfy child support obligations.

i. The terms of the suspended judgment should be specifically stated in the judgment.

ii. Under the terms of the suspended judgment, the judge may also require a defendant to file a bond to secure compliance with the provisions of the suspended judgment. [*See* G.S. 15A-1343(b1)(10) (providing that the court may impose any other conditions reasonably related to defendant's rehabilitation).]

d. The presumptive probationary period for defendants convicted of criminal nonsupport under G.S. 14-322 is 6 to 18 months or 12 to 24 months. The maximum term of probation may not exceed 5 years. [G.S. 15A-1343.2(d)(1) and (2).]

6. Effect of conviction or guilty plea on issue of paternity in a subsequent action.

a. A conviction under G.S. 14-322 for failure to support necessarily required a finding that defendant was the father of the minor children whose support was at issue, so defendant was collaterally estopped from relitigating the issue of paternity in a later civil action by the state for reimbursement of public assistance. [*State ex rel. Lewis v. Lewis,* 311 N.C. 727, 319 S.E.2d 145 (1984) (the State of North Carolina was administering the child support enforcement program for the county that brought the subsequent civil action, so the parties in the civil action were identical or in privity with the parties in the criminal action).] **NOTE:** When Lewis was decided, the standard of proof for a civil paternity action was beyond a reasonable doubt, allowing application of collateral estoppel. Collateral estoppel may not be used when the two actions have different standards of proof. [Fathers and Paternity, at 60–61.]

b. Former husband's guilty plea to criminal charge of nonsupport pursuant to G.S. 14-322 was evidentiary admission of paternity precluding blood test in later custody proceeding. [*Heavner v. Heavner,* 73 N.C. App. 331, 326 S.E.2d 78, *review denied,* 313 N.C. 601, 330 S.E.2d 610 (1985).]

E. Abandonment of Child for Six Months [G.S. 14-322.1.]

1. When action may be brought. A criminal nonsupport proceeding under G.S. 14-322.1 may be brought at any time before a child's 18th birthday.

2. Elements. To obtain a conviction, the State must prove three elements beyond a reasonable doubt:

a. The defendant "willfully fail[ed] or refuse[d] to provide adequate means of support for his or her child" for a period of six months;

b. The defendant, also without just cause or provocation, "willfully abandon[ed]" the child for the same six-month period; and

c. The defendant has "attempt[ed] to conceal his or her whereabouts . . . with the intent of escaping his lawful [child support] obligation." [G.S. 14-322.1.]

3. Sentence and probation.

a. Offense of willful abandonment is punishable as a Class I felony. [G.S. 14-322.1.]

b. The presumptive sentence for criminal nonsupport under G.S. 14-322.1 ranges from 4 to 6 months to 8 to 10 months, depending on the defendant's prior record. [G.S. 15A-1340.17.]

c. The presumptive probationary period for defendants convicted of criminal nonsupport under G.S. 14-322.1 is 12 to 30 months or 18 to 36 months. The maximum term of probation may not exceed 5 years. [G.S. 15A-1343.2(d)(3), (4).]

d. A parent who abandons a child who is less than 7 days old pursuant to G.S. 7B-500(b) or (d) may not be prosecuted for abandonment of the child pursuant to G.S. 14-322.1. [G.S. 14-322.3.]

F. Willful Failure to Support a Child Born Out of Wedlock [G.S. 49-2, *amended by* S.L. 2013-198, § 17, effective June 26, 2013.]

1. When action may be brought.

a. A criminal nonsupport proceeding under G.S. 49-2 against a child's mother may be brought at any time before the child's 18th birthday. [G.S. 49-4.]

b. A criminal nonsupport proceeding against a reputed father under G.S. 49-2 must be brought:

i. Before the child's 3rd birthday,

ii. Any time before the child's 18th birthday if the child's paternity has been determined before the child's 3rd birthday, or

iii. Within three years of the last support payment made by the reputed father and before the child's 18th birthday if the father has acknowledged paternity by making support payments on behalf of the child before the child's 3rd birthday. [G.S. 49-4.]

2. Who may initiate action. Proceedings may be initiated by the mother or her personal representative or, if the child is likely to become a public charge, by the director of social services. [G.S. 49-5.]

3. Where action may be brought.

a. Proceedings may be brought in the county where the mother or putative father resides or is found or in the county where the child is found. [G.S. 49-5.]

b. The fact that the child was born outside of the state is not a bar to proceedings against the putative father in any county where he resides or is found, or in the county where the mother resides or the child is found. [G.S. 49-5.]

4. Elements.
    a. To be found guilty of violating G.S. 49-2, the state must prove that:
        i. The defendant is a parent of the child born out of wedlock and
        ii. The defendant has willfully neglected or refused to support such child. [G.S. 49-7, *amended by* S.L. 2013-198, § 20, effective June 26, 2013; *Sampson Cty. ex rel. McPherson v. Stevens,* 91 N.C. App. 524, 372 S.E.2d 340 (1988) (quoting *State v. Hobson,* 70 N.C. App. 619, 320 S.E.2d 319 (1984)).]
    b. Additionally, a defendant must receive notice and demand for support. [*See State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964) (no conviction under G.S. 49-2 unless demand for the child's support has been made of the parent and the parent refused the demand without just cause or excuse); *State v. Hobson,* 70 N.C. App. 619, 320 S.E.2d 319 (1984) (notice and demand for support should be one of the issues submitted in writing to the jury), *writ denied,* 312 N.C. 497, 322 S.E.2d 562 (1984).]
        i. Demand must be made after the birth of the child and before prosecution for nonsupport has commenced. [*State v. Ellis,* 262 N.C. 446, 137 S.E.2d 840 (1964); *State v. Killian,* 61 N.C. App. 155, 300 S.E.2d 257 (1983) (demand made after warrant issued not sufficient to support prosecution).]
5. Right to counsel.
    a. A defendant charged with willful refusal to support a child born out of wedlock in violation of G.S. 49-2 has a constitutional right to be represented by counsel at his trial unless he knowingly and intelligently waives that right, since a sentence of imprisonment may be imposed for such offense. [*State v. Lee,* 40 N.C. App. 165, 252 S.E.2d 225 (1979) (guilty plea of nonindigent defendant charged under G.S. 49-2 stricken because when defendant was called upon to plead, he was neither represented by counsel nor had waived his right to counsel); 3 Lee's North Carolina Family Law § 16.12a (5th ed. 2002).]
        i. The maximum sentence for criminal nonsupport under G.S. 49-2 is 30, 45, or 60 days (depending on the defendant's prior criminal record) and a fine of up to $1,000. [G.S. 15A-1340.23(b), (c).]
        ii. An indigent defendant is entitled to services of court-appointed counsel in "[a]ny case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged." [G.S. 7A-451(a).]
6. Order for support.
    a. If a defendant is not required to pay child support under an existing order, the court must enter an order requiring a defendant convicted of criminal nonsupport under G.S. 49-2 to pay child support regardless of whether the defendant is sentenced to an active term of incarceration or is placed on probation. [G.S. 49-7.]
    b. The amount of child support ordered under G.S. 49-7 must be determined in accordance with G.S. 50-13.4. [G.S. 49-7.]
    c. Child support ordered pursuant to G.S. 49-7 generally must be paid through the State Child Support Collection and Disbursement Unit through immediate income withholding. [G.S. 15A-1344.1.]

7. Sentence.
   a. Offense of willful nonsupport of a child born out of wedlock is punishable as a Class 2 misdemeanor. [G.S. 49-2, *amended by* S.L. 2013-198, § 17, effective June 26, 2013.]
   b. The maximum sentence for criminal nonsupport under G.S. 49-2 is 30, 45, or 60 days (depending of the defendant's prior criminal record) and a fine of up to $1,000. [G.S. 15A-1340.23.]
8. For a discussion on the use of genetic testing to determine paternity in a criminal nonsupport proceeding, see *Paternity*, Bench Book, Vol. 1, Chapter 10.
9. For the effect in a subsequent action of acquittal, conviction, or guilty plea on issue of paternity in a criminal nonsupport proceeding, see *Paternity*, Bench Book, Vol. 1, Chapter 10.

V. Child Support in Domestic Violence and Juvenile Proceedings

A. Child Support in Domestic Violence Cases

1. Subject to the provisions of the Uniform Interstate Family Support Act (UIFSA) (G.S. Chapter 52C), a district court judge may enter an order requiring a parent to pay temporary child support as part of a domestic violence protective order entered pursuant to G.S. 50B-3. [G.S. 50B-3(a)(6).]
2. The amount of child support payable under a child support order entered pursuant to G.S. 50B-3(a)(6) must be determined by application of the child support guidelines unless there are sufficient grounds for deviating from the guidelines. [2020 Guidelines.]
3. A district court judge may enter a temporary child support order in a domestic violence case pending a party's commencement of a civil child support action pursuant to G.S. 50-13.4 *et seq.* The court may also encourage a child's parent to execute and file a voluntary support agreement pursuant to G.S. 110-132(a3) or 110-133 in lieu of entering a child support order pursuant to G.S. 50B-3(a)(6) or commencing a proceeding to establish a child support order. [See Section III.A, above.]
4. Child support provisions contained in a protective order entered pursuant to G.S. 50B-3(a)(6) are valid and enforceable for the period stated in the order, not to exceed one year, but may be renewed by the court for subsequent periods not to exceed one year. [G.S. 50B-3(b).]
5. Violation of a support provision in a G.S. Chapter 50B protective order is a Class A1 misdemeanor. [G.S. 50B-4.1(a).] Unless covered under some other provision of law providing greater punishment, following two convictions for knowingly violating provisions of a valid protective order, a person who knowingly violates a valid protective order as provided in G.S. 50B-4.1(a) is guilty of a Class H felony. [G.S. 50B-4.1(f).]

B. Child Support in Juvenile Proceedings

1. In a juvenile proceeding involving an abused, neglected, or dependent child, the district court may order, at the dispositional hearing or a subsequent hearing, the child's parent

to pay child support, if the court finds that the parent is able to do so, when legal custody is vested in someone other than the child's parent and there is no existing order requiring the parent to pay child support. [G.S. 7B-904(d); *In re W.V.*, 204 N.C. App. 290, 693 S.E.2d 383 (2010) (G.S. 7B-904(d) authorizes the trial court to order a noncustodial parent to pay child support to the custodial parent upon making the findings required by G.S. 50-13.4(c)).]

2. In a juvenile proceeding involving an undisciplined or delinquent child, the district court may enter an order, at the dispositional hearing or a subsequent hearing, requiring the child's parent to pay child support through the clerk of superior court if the parent is able to do so. [G.S. 7B-2704(1).]
3. Instead of establishing a child support order in juvenile court pursuant to G.S. 7B-904(d) or 7B-2704(1), the district court may encourage a child's parent to execute and file a voluntary support agreement pursuant to G.S. 110-132(a3) or 110-133. [See Section III.A, above.]
4. The amount of child support payable under a child support order entered pursuant to G.S. 7B-904(d) or 7B-2704(1) must be determined by application of the child support guidelines unless there are sufficient grounds for deviating from the guidelines. [G.S. 7B-904(d), 7B-2704(1) (requiring that the amount of child support be determined as provided in G.S. 50-13.4(c)).]
5. Although G.S. 7B-904(d) allows a juvenile court to order a parent to pay child support as discussed in Section V.B.1, above, the statute does not authorize a juvenile court to order a child's parent to contact a child support enforcement agency and to cooperate with the agency in establishing a child support order for the child. [*See In re Cogdill*, 137 N.C. App. 504, 508 n.3, 528 S.E.2d 600, 603 n.3 (2000) (decided under previous statute) (trial court did not have authority to order parent of child adjudicated abused and neglected to contact child support enforcement agency and file paperwork necessary to begin paying child support or to order parent to obtain housing and employment; trial court may not order a parent to undergo any course of conduct not provided for in the statute); *In re A.S.,* 181 N.C. App. 706, 640 S.E.2d 817 (G.S. 7B-904(d) does not authorize the trial court to order respondent father to contact a child support enforcement authority), *aff'd per curiam,* 361 N.C. 686, 651 S.E.2d 883 (2007); *In re W.V.*, 204 N.C. App. 290, 693 S.E.2d 383 (2010) (trial court not authorized by G.S. 7B-904(d) to order a parent to obtain and maintain employment, because nothing in record indicated neglect of child was related to father's lack of employment).] For definition of a IV-D case and a non-IV-D case, see Section I.C.8, above.
6. Juvenile court did not err in an abuse and neglect proceeding when it ordered father to comply with an existing child support order. [*In re E.H., Jr.,* 192 N.C. App. 543, 665 S.E.2d 594 (2008) (**unpublished**).]

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Chapter 3: **Child Support**

Part 3. Modification of Child Support Orders

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Chapter 3: **Child Support**

Part 3. Modification of Child Support Orders

I. General Principles

A. Support Orders Are Modifiable

1. Because a child support order determines the current and continuing rights and obligations of the parties with respect to the support of a minor child, the issue of support remains *in fieri* (that is, open and pending before the court for further action) following the entry of a "final" or "permanent" child support order and remains so until the child for whose benefit the order was entered is emancipated and the parent's legal support obligation has been fully discharged. [*See Brooks v. Brooks*, 107 N.C. App. 44, 418 S.E.2d 534 (1992).]

   a. A "final" or "permanent" child support order is res judicata with respect to the amount, scope, and duration of a parent's child support obligation only as long as the circumstances upon which the order was based remain substantially unchanged. [*Schroader v. Schroader,* 120 N.C. App. 790, 463 S.E.2d 790 (1995). *See also Walker v. Walker*, 63 N.C. App. 644, 306 S.E.2d 485 (1983) (earlier child support action dismissed with prejudice could be res judicata in a later proceeding only if the circumstances existing at the time of the earlier action had remained the same).]

   b. Conversely, the amount, scope, or duration of a parent's child support obligation as adjudicated in a "final" or "permanent" child support order may be modified by a subsequent child support order if the court finds that there has been a significant change of circumstances relevant to the issue of child support. [G.S. 50-13.7(a); *Ebron v. Ebron*, 40 N.C. App. 270, 252 S.E.2d 235 (1979) (requiring a substantial change of circumstances affecting the welfare of the child).]

   c. In compliance with 45 C.F.R. § 303.8(d), the need to provide for the child's health care needs in a support order, through health insurance or other means, is a substantial change in circumstances warranting modification of a child support order, regardless of whether an adjustment in the amount of support is necessary. [N.C. Child Support Guidelines, 2020 Ann. R. N.C. 49 (effective Mar. 1, 2020, applicable to child support actions heard on or after that date) (hereinafter referred to as 2020 Guidelines).] For more on the 2020 Guidelines, see Cheryl Howell, *Amendments to Chapter 50B and to the Child Support Guidelines*, UNC Sch. of Gov't: On the Civil Side Blog (Feb. 12, 2020), https://civil.sog.unc.edu/amendments-to-chapter-50b-and-to-the-child-support-guidelines.

d. In compliance with 45 C.F.R. § 302.56(c)(3), incarceration may not be treated as voluntary unemployment in establishing or modifying support orders. [2020 Guidelines.] For more on the addition of this provision to the 2019 edition of the Guidelines, see Cheryl Howell, *New Child Support Guidelines for 2019*, UNC Sch. of Gov't: On the Civil Side Blog (Jan. 8, 2019), https://civil.sog.unc.edu/new-child-support-guidelines-for-2019.

2. Only a court is authorized to modify a child support order.

a. The parties may not extrajudicially modify the provisions of a child support order through unilateral action or mutual agreement (other than a consent order approved by the court). [*Baker v. Showalter*, 151 N.C. App. 546, 566 S.E.2d 172 (2002) (parties could not modify a child support order by oral agreement; amount of support in an incorporated separation agreement remained in effect); *Chused v. Chused,* 131 N.C. App. 668, 508 S.E.2d 559 (1998) (husband's unilateral reduction in support payments after job loss improper); *Leak v. Leak*, 129 N.C. App. 142, 497 S.E.2d 702 (father improperly terminated his support payments for 18-year-old child who had not graduated from high school), *review denied,* 348 N.C. 498, 510 S.E.2d 385 (1998); *Massey v. Massey*, 121 N.C. App. 263, 465 S.E.2d 313 (1996) (parties cannot, after reconciling, voluntarily dismiss by stipulation a support order previously entered in the action); *Van Nynatten v. Van Nynatten*, 113 N.C. App. 142, 438 S.E.2d 417 (1993) (defendant who unilaterally reduced his child support payments required to apply to the court before altering his payments); *Dillingham v. Ramsey*, 267 N.C. App. 378, 837 S.E.2d 129 (2019) (in high-income case, father had no right to unilaterally reduce amount of child support by 25 percent when first one, and then another, of the parties' four children started college; proper procedure would have been to apply to the trial court for modification); *Craig v. Craig*, 103 N.C. App. 615, 406 S.E.2d 656 (1991) (even though child support normally terminates as a matter of law upon a child reaching age 18, where at least one child for whom support was ordered remains a minor, defendant cannot unilaterally reduce payments by half but must apply to trial court for modification); *Griffin v. Griffin*, 96 N.C. App. 324, 385 S.E.2d 526 (1989) (father had no authority to twice reduce child support payments required by divorce decree when his income was reduced; father obligated to pay full amount of support even though trial court found that wife agreed to accept less than amount ordered).]

b. Remedies for a unilateral reduction.

i. Order for payment of arrears.

(a) A trial court has discretion over how and when a parent must pay arrears, but "that discretion is not without bounds." [*Dillingham v. Ramsey*, 267 N.C. App. 378, 388, 837 S.E.2d 129, 136 (2019).] In a high-income case, the trial court erred when it allowed a father to pay $24,400 in past-due child support at a rate of $100 per month over more than twenty years; his monthly salary was $144,196 at the time of the hearing, and he had the ability to pay the full amount. On remand, the trial court was to have discretion to award interest on the arrears but was not to consider the father's voluntary payment of substantial expenses for two adult children when determining payment of the arrears. [267 N.C. App. at 387–88, 837 S.E.2d at 136.]

(b) *Spencer v. Spencer,* 133 N.C. App. 38, 514 S.E.2d 283 (1999) (when mother reduced her child support payments by half when oldest child moved in with her, case was remanded to determine arrearages accruing between date of unilateral modification and date petition was filed for modification).

(c) *Baker v. Showalter*, 151 N.C. App. 546, 566 S.E.2d 172 (2002) (former wife ordered to pay child support arrears based upon separation agreement sum).

ii. Contempt.

(a) *Chused v. Chused,* 131 N.C. App. 668, 508 S.E.2d 559 (1998) (father who unilaterally reduced payments after job loss while request for modification was pending was in contempt since he had ability to pay full amount from his sizeable estate).

B. What Constitutes a Modification

1. An order modifies a prior child support order if it changes or otherwise affects the amount, scope, or duration of a parent's child support obligation as determined under the prior order. [*See* 28 U.S.C. § 1738B(b)(8), *amended by* Pub. L. 113-183, Title III, §§ 301(f)(2)(B), (3)(B) (Sept. 29, 2014).]

2. A court may modify certain provisions of an order, for example, the amount of support, but leave other provisions, such as the duration of support, in effect.

   a. An order that modified only the amount of support and provided that prior orders remained in full force and effect did not modify the duration of support beyond the age of majority in an earlier order. [*See Martin v. Martin,* 180 N.C. App. 237, 636 S.E.2d 340 (2006) (**unpublished**) (parent's obligation in a 1994 consent order to support a child with Down Syndrome beyond the age of majority remained enforceable after a 1997 modification of the amount of support; the 1997 order, which included language that, except as modified, prior orders remained in full force and effect, modified and controlled only the amount of child support, leaving the durational terms of the 1994 order in full effect), *review denied,* 361 N.C. 220, 642 S.E.2d 444 (2007).]

3. Actions that do not constitute a modification.

   a. An order that required an obligor to pay only a portion of the amount required under an initial child support order so that the obligor might purge himself of contempt did not constitute a modification of the prior order. [*See Bogan v. Bogan*, 134 N.C. App. 176, 516 S.E.2d 641 (1999) (trial court could allow obligor to purge himself of contempt upon a payment of some amount less than that owed without modifying the initial support order).]

   b. An order that entered judgment for child support arrears and declared the judgment a specific lien on the obligor's real estate did not amend the child support order. [*Fitch v. Fitch*, 115 N.C. App. 722, 446 S.E.2d 138 (1994) (past due child support payments may be reduced to judgment pursuant to G.S. 50-13.4(f)(8)).]

   c. *See also* G.S. 50-13.9(a) (the court may at any time order that support payments be made to the State Child Support Collection and Disbursement Unit; change not treated as a modification).

II. Modifying North Carolina Child Support Orders

A. Statutory Authority

1. G.S. 50-13.7(a) authorizes a North Carolina court to modify or vacate an order of a North Carolina court providing for the support of a minor child at any time upon motion in the cause by an interested party and a showing of changed circumstances.
   a. In exercising its authority under G.S. 50-13.7(a), a court may not modify vested past due child support payments that have accrued under a child support order. [G.S. 50-13.10.]
   b. See Section II.H, below, for a discussion on the retroactive modification of child support arrearages, and Section II.I.4, also below, for a discussion on the effective date of a modification.
2. G.S. 50-13.7(a) applies to any "final" or "permanent" order entered by a North Carolina court for the support of a minor child.
   a. G.S. 50-13.7(a) applies to and authorizes modification of:
      i. Child support orders entered in civil child support actions brought pursuant to G.S. 50-13.4,
      ii. Child support terms in a divorce decree, [*In re Register,* 303 N.C. 149, 277 S.E.2d 356 (1981).]
      iii. Child support orders entered in a Uniform Interstate Family Support Act (UIFSA) proceeding pursuant to G.S. 52C-4-401(a),
      iv. Voluntary support agreements approved pursuant to G.S. 110-132(a3) and 110-133, [G.S. 110-132(a3); 110-133.]
      v. The child support provisions of a separation agreement that has been incorporated into a divorce decree or other court order, [*Beamer v. Beamer,* 169 N.C. App. 594, 610 S.E.2d 220 (2005); *Duffey v. Duffey,* 113 N.C. App. 382, 438 S.E.2d 445 (1994). *See also Cavenaugh v. Cavenaugh*, 317 N.C. 652, 347 S.E.2d 19 (1986) (incorporated separation agreement may be modified on the basis of changed circumstances).]
      vi. Confessions of judgment, [*Snipes v. Snipes*, 118 N.C. App. 189, 454 S.E.2d 864 (1995).] and
      vii. Consent orders for child support. [*Mason v. Erwin,* 157 N.C. App. 284, 579 S.E.2d 120 (2003); *O'Neal v. Wynn*, 64 N.C. App. 149, 306 S.E.2d 822 (1983), *aff'd*, 310 N.C. 621, 313 S.E.2d 159 (1984).] Form AOC-CV-615, Consent Agreement and Order to Modify Child Support Order, may be used.
         (a) If the consent order does not contain findings of fact, the trial court must take evidence and make findings about the circumstances existing at the time the initial order was entered for the order to have a "base line" to determine whether there has been a substantial change warranting modification. [*Balawejder v. Balawejder,* 216 N.C. App. 301, 721 S.E.2d 679 (2011) (consent custody order was at issue).]

b. G.S. 50-13.7(a) probably applies to and authorizes modification of child support orders entered in criminal nonsupport proceedings pursuant to G.S. 14-322(e) or 49-7. For criminal nonsupport in the context of enforcement, see *Enforcement of Child Support Orders*, Part 4 of this Chapter.

3. G.S. 50-13.7(a) does not apply to:

a. Interim or temporary child support orders. [*Sikes v. Sikes*, 330 N.C. 595, 411 S.E.2d 588 (1992) (court may order final support without finding a substantial change of circumstances since entry of temporary order); *Cole v. Cole*, 149 N.C. App. 427, 562 S.E.2d 11 (2002).]

b. Child support obligations that are included in an unincorporated separation agreement or property settlement. [*Pataky v. Pataky,* 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part*, 359 N.C. 65, 602 S.E.2d 360 (2004); *Bottomley v. Bottomley*, 82 N.C. App. 231, 346 S.E.2d 317 (1986) (trial court could, notwithstanding unincorporated separation agreement, make its own independent determination of what was fair and reasonable child support and could require a parent to pay child support in an amount different from that provided in the separation agreement; no finding made as to changed circumstances).] In child support cases involving unincorporated agreements or settlements, the court must apply a rebuttable presumption that the support amount agreed upon is reasonable. [*See Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part*, 359 N.C. 65, 602 S.E.2d 360 (2004); see Section V.A, below, for more on modification of child support provisions in an unincorporated separation agreement).]

4. Other modifications.

a. When a court has confirmed an award of child support made under the Family Law Arbitration Act, the court may modify the child support award pursuant to G.S. 50-13.7 or, upon joint motion and agreement of the parties, may remit the matter to arbitrators chosen in accordance with G.S. 50-45 for arbitration and entry of a modified award of child support by the arbitrators pursuant to G.S. 50-13.7. [*See* G.S. 50-56.]

b. Following entry of an equitable distribution order, the court, upon request of either party, must consider whether a child support order should be modified or vacated pursuant to G.S. 50-13.7. [G.S. 50-20(f).]

i. A property settlement reached by agreement is not an equitable distribution triggering G.S. 50-20(f). [*Diehl v. Diehl,* 177 N.C. App. 642, 630 S.E.2d 25 (2006).]

ii. Absent the request of a party, a trial court is not required to reconsider child support after equitable distribution. [*Diehl v. Diehl,* 177 N.C. App. 642, 630 S.E.2d 25 (2006).]

iii. No requirement of finding of substantial change of circumstances if prior order of child support is clearly temporary, pending entry of an equitable distribution order and a final support order. [*Little v. Little,* 74 N.C. App. 12, 327 S.E.2d 283 (1985).]

iv. An earlier order of child support may not be modified in an equitable distribution order but, rather, must be modified in an order entered after the equitable distribution order. [*Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985) (trial court erred when, in an equitable distribution order, it terminated a writ of possession to the marital home granted to mother and child in a child support order).] However, the court may in an equitable distribution order modify a provision of an earlier support order concerning the depository of the child support payment. [*Shoffner v. Shoffner,* 91 N.C. App. 399, 371 S.E.2d 749 (1988) (ED order modified support only to provide that defendant was to pay child support to clerk rather than to plaintiff directly).]

c. A tribunal of another state may modify a child support order issued by a tribunal in North Carolina if the other state's tribunal has jurisdiction to modify the North Carolina child support order under the Uniform Interstate Family Support Act (UIFSA) and the Full Faith and Credit for Child Support Orders Act (FFCCSOA) (28 U.S.C. § 1738B). [See Section III.B, below.]

d. If a tribunal of another state which assumed jurisdiction pursuant to UIFSA modifies a child support order issued by a tribunal in North Carolina, the North Carolina tribunal:

i. May enforce the order that was modified only as to arrearages and interest accruing before the modification; [G.S. 52C-6-612(1), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

ii. May provide other appropriate relief for violations of its order that occurred before the effective date of the modification; [G.S. 52C-6-612(3), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] and

iii. Must recognize the modifying order of the other state, upon registration, for the purpose of enforcement. [G.S. 52C-6-612(4), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] **NOTE:** Before June 25, 2015, G.S. 52C-6-612(2), which was repealed, allowed a North Carolina tribunal to enforce only nonmodifiable aspects of its order.

B. Personal Jurisdiction in Modification Proceedings

1. Personal jurisdiction acquired by a tribunal in North Carolina in a proceeding under G.S. Chapter 52C or other North Carolina law relating to a support order continues as long as the North Carolina tribunal has continuing, exclusive jurisdiction to modify its order or continuing jurisdiction to enforce its order as provided by G.S. 52C-2-205 or 52C-2-206. [G.S. 52C-2-202, *amended by* S.L. 2015-117, § 1, effective June 24, 2015; Official Comment (2015), G.S. 52C-2-202 (the Uniform Interstate Family Support Act establishes that the personal jurisdiction necessary to sustain modification of an order of child support persists as long as the order is in force and effect, even as to arrearages).]

a. A "support order" includes a judgment, decree, order, decision, or directive, issued in a state or a foreign country for the benefit of a child, a spouse, or a former spouse, providing for monetary support, health care, arrearages, retroactive support, or reimbursement for financial assistance provided to an individual obligee in place of child support. It may include related costs and fees, interest, income withholding,

automatic adjustment, reasonable attorney fees, and other relief. [G.S. 52C-1-101(21), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

2. The bases of personal jurisdiction in G.S. 52C-2-201(a) or in any other law of this state may not be used to acquire personal jurisdiction for a tribunal of the state to modify a child support order of another state unless the requirements of G.S. 52C-6-611 are met or, in the case of a foreign support order, unless the requirements of G.S. 52C-6-615 are met. [G.S. 52C-2-201(b), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

C. Subject Matter Jurisdiction of a North Carolina Tribunal to Modify Its Child Support Order

1. A North Carolina tribunal that has issued a valid order for child support has and shall exercise continuing, exclusive jurisdiction to modify the order pursuant to G.S. 50-13.7(a) if the order is the controlling order and:

   a. At the time a request for modification is filed, either the individual obligee, the obligor, **or** the child for whose benefit the support order was issued resides in North Carolina [G.S. 52C-2-205(a)(1), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; *Watkins v. Benjamin*, 267 N.C. App. 122, 833 S.E.2d 22 (2019) (North Carolina had exclusive jurisdiction to modify its existing child support order when father resided in North Carolina, even though mother and children lived in Maryland); *Jurado v. Brashear*, 782 So. 2d 575 (La. 2001) (when both parents and the child move out of the issuing state, the court of the issuing state retains jurisdiction to enforce its order but not to modify the order).] or

      i. As explained in the Official Comment (2015), G.S. 52C-2-205, if all the relevant persons have permanently left the issuing state, the issuing state no longer has jurisdiction to modify but the original order of the issuing state remains valid and enforceable and in effect in the issuing state and in those states in which the order has been registered. The order also may be registered and enforced in additional states even after the issuing state has lost its power to modify its order.

   b. Even if the individual obligee, the obligor, or the child for whose benefit the support order was issued do not reside in North Carolina, the parties consent in a record or in open court for a North Carolina tribunal to continue to exercise jurisdiction to modify its order. [G.S. 52C-2-205(a)(2), *amended by* S.L. 2015-117, § 1, effective June 24, 2015. See G.S. 52C-1-101(13c), *added by* S.L. 2015-117, § 1, effective June 24, 2015, for definition of "record"; for more on modification jurisdiction generally, see Cheryl Howell, *Child Custody and Support: Jurisdiction to Modify*, UNC Sch. of Gov't: On the Civil Side Blog (Apr. 15, 2016), http://civil.sog.unc.edu/child-custody-and-support-jurisdiction-to-modify.]

2. Notwithstanding G.S. 52C-6-611(a)–(d) and 52C-2-201(b), a North Carolina tribunal retains jurisdiction to modify an order issued by a North Carolina tribunal if one party resides in another state and the other party resides outside the United States. [G.S. 52C-6-611(d1), *added by* S.L. 2015-117, § 1, effective June 24, 2015; Official Comment (2015), G.S. 52C-6-611 (subsection (d1) created a necessary exception to the "play away" concept (see Section III.B.2.b.iii.(a), below) when the parties and the child no longer reside in the issuing state and one party resides outside the United States).]

3. A North Carolina tribunal that has issued a valid order for child support may not exercise continuing, exclusive jurisdiction to modify the order pursuant to G.S. 50-13.7(a) if:
   a. All of the individual parties file consent in a record with a North Carolina tribunal stating that a tribunal of another state that has jurisdiction over at least one of the individual parties or that is located in the state of the child's residence may modify the order and assume continuing, exclusive jurisdiction [G.S. 52C-2-205(b)(1), *amended by* S.L. 2015-117, § 1, effective June 24, 2015).] or
   b. Its order is not the controlling order. [G.S. 52C-2-205(b)(2), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; 52C-2-207 (determination of "controlling" child support order).]
4. The trial court's jurisdiction is limited to the specific issues properly raised by a party or interested person.
   a. If the only motion before the court is for modification of child support, the court may not address other issues. [*Van Nynatten v. Van Nynatten*, 113 N.C. App. 142, 438 S.E.2d 417 (1993) (court erred by addressing alimony when only motion before it was for modification of child support).]
   b. Trial court may not modify child support upon a motion to modify child custody; modification of support is not before the court in such instances. [*Royall v. Sawyer*, 120 N.C. App. 880, 463 S.E.2d 578 (1995).]
   c. It was error for trial court to modify support when only question before court was alimony. [*Smith v. Smith*, 15 N.C. App. 180, 189 S.E.2d 525 (1972).]
   d. Similarly, a trial court lacks authority to modify a specific payment provision in a child support order if a party did not seek modification of that provision. *[Moore v. Moore,* 237 N.C. App. 455, 768 S.E.2d 4 (2014) (citing *Henderson v. Henderson,* 165 N.C. App. 477, 598 S.E.2d 433 (2004)) (trial court erred when it modified on its own motion portion of consent child support order addressing payment of uninsured medical expenses when neither party had requested the court to modify that provision; parties had agreed in original order to equally share uninsured medical expenses).]

D. Venue

1. Court of original venue is proper court for subsequent actions. [*Tate v. Tate*, 9 N.C. App. 681, 683, 177 S.E.2d 455, 457 (1970) (emphasis added) (the court first obtaining jurisdiction "is the only proper court . . . [for] an action for the modification of an order *establishing* custody and support"); *Broyhill v. Broyhill*, 81 N.C. App. 147, 343 S.E.2d 605 (1986) (interpreting *Tate* not to preclude a court from transferring venue).]
   a. Subject to the Uniform Interstate Family Support Act and the Full Faith and Credit for Child Support Orders Act, a North Carolina district court that enters a valid child support order generally retains jurisdiction over the subject matter and the parties with respect to modification and enforcement of its order even if the obligor moves from the county or the state. [*See Brooker v. Brooker*, 133 N.C. App. 285, 515 S.E.2d 234 (1999) (district court that issued consent judgment setting forth father's child support obligation was proper forum for later motion to modify, even though mother

and child had moved to second county and father had moved to third county); *Brooks v. Brooks*, 107 N.C. App. 44, 418 S.E.2d 534 (1992) (when modification was sought and parties remained the same, the court of original venue was the proper court, even though none of the parties resided there at time of modification request).]

b. The statute relating to venue of an action for custody and support, G.S. 50-13.5(f), applies only to the institution of an action for custody and support and does not apply to a proceeding for modification of an existing order. [*Tate v. Tate*, 9 N.C. App. 681, 177 S.E.2d 455 (1970) (Forsyth County court was the proper court to modify its child support obligation; modification action filed in Mecklenburg County properly dismissed).]

c. However, an action to modify custody and child support may proceed in a county other than the original county if no objection to venue is raised in a timely manner. [*Brooks v. Brooks*, 107 N.C. App. 44, 418 S.E.2d 534 (1992) (mother waived right to remove custody and support modification case to New Hanover County, where earlier child support order was entered, when she did not seek removal either in a pre-answer motion or answer; mother's oral motion at trial not timely).]

2. Proper way to object to venue.

a. Objection to **improper venue** pursuant to G.S. 1-83(1) in a proceeding to modify a child support order must be raised either in a pre-answer motion pursuant to G.S. 1A-1, Rule 12 or be set forth affirmatively in the answer. [*Stokes v. Stokes*, 371 N.C. 770, 821 S.E.2d 161 (2018); *Brooks v. Brooks*, 107 N.C. App. 44, 418 S.E.2d 534 (1992) (failure to raise the defense in this manner constitutes a waiver of the defense; mother's oral motion at trial, after the pleadings were complete, was not timely and therefore was ineffective to raise the issue of the prior pending support action).] However, if the modification request is made by motion in the cause and no answer is required by the N.C. Rules of Civil Procedure, it is not clear that Rule 12 will apply.

b. Motions for change of venue based on **convenience of witnesses** pursuant to G.S. 1-83(2) are addressed to the discretion of the judge. A party may file a motion to change venue for the convenience of the witnesses at any time before trial if the party can make the required showing. [*Stokes v. Stokes*, 371 N.C. 770, 821 S.E.2d 161, *aff'g as modified* 258 N.C. App. 165, 811 S.E.2d 693 (2018).]

i. For earlier cases *contra*, see *Thompson v. Horrell,* 272 N.C. 503, 158 S.E.2d 633 (1968); *Zetino-Cruz v. Benitez-Zetino*, 249 N.C. App. 218, 791 S.E.2d 100 (2016) (motion for change of venue for convenience of the witnesses must be filed after the answer is filed); *Smith v. Barbour,* 154 N.C. App. 402, 571 S.E.2d 872 (2002) (citing *McCullough v. Branch Banking & Tr. Co.,* 136 N.C. App. 340, 524 S.E.2d 569 (2000)) (motion pursuant to G.S. 1-83(2) must be filed **after** an answer has been filed; in custody and paternity action, trial court did not abuse its discretion by denying mother's motion to change venue based on G.S. 1-83(2), which was filed before she answered), *cert. denied,* 599 S.E.2d 408 (N.C. 2004).

ii. In *Stokes*, the supreme court noted that the earlier cases were decided based on case law decided under code pleading. The court held that neither the Rules of Civil Procedure nor G.S. 1-83 prohibits a party from filing a motion to change venue before the filing of an answer.

3. Transfer of venue.
    a. The most common reasons for a change of venue in custody and support cases are found in G.S. 1-83, which provides that a court may change the place of trial when:
        i. The county in which the action is brought is not the proper one [G.S. 1-83(1) (venue is improper).] or
            (a) "May change" venue as used in G.S. 1-83(1) has been interpreted to mean "*must* change" venue. [*Zetino-Cruz v. Benitez-Zetino*, 249 N.C. App. 218, 225, 791 S.E.2d 100, 105 (2016) (quoting *Kiker v. Winfield*, 234 N.C. App. 363, 364, 759 S.E.2d 372, 373 (2014)) (custody action).]
        ii. The convenience of witnesses and the ends of justice would be promoted by the change. [G.S. 1-83(2) (venue is proper but may be changed for reasons in the statute); *Zetino-Cruz v. Benitez-Zetino*, 249 N.C. App. 218, 791 S.E.2d 100 (2016) (change of venue under G.S. 1-83(2) is discretionary with the court); *Broyhill v. Broyhill*, 81 N.C. App. 147, 343 S.E.2d 605 (1986) (court of original venue may, in its discretion, transfer the venue of an ongoing action for custody or support to a more appropriate county based on convenience of witnesses and parties and the best interest of the child).]
            (a) G.S. 1-83(2) does not authorize a change of venue for the "convenience of the court." [*Zetino-Cruz v. Benitez-Zetino*, 249 N.C. App. 218, 231, 791 S.E.2d 100, 108 (2016).]
    b. A court may not change venue *sua sponte* under G.S. 1-83, whether under 1-83(1) or 1-83(2), when no defendant had answered or objected to venue. [*Zetino-Cruz v. Benitez-Zetino*, 249 N.C. App. 218, 791 S.E.2d 100 (2016) (trial court's authority to change venue under G.S. 1-83(1) **or** (2) is triggered by a defendant's objection to venue).] For more on this case, see Cheryl Howell, *No Sua Sponte Change of Venue Allowed*, UNC Sch. of Gov't: On the Civil Side Blog (Aug. 26, 2016), http://civil.sog.unc.edu/no-sua-sponte-change-of-venue-allowed.
4. Orders entered in IV-D cases must require the clerk of superior court to transfer the case to another jurisdiction in the state if the IV-D agency requests the transfer on the basis that the obligor, the child's custodian, and the child no longer reside in the jurisdiction in which the order was issued. [G.S. 50-13.4(e1).] A "IV-D case" is a case in which services have been applied for or are being provided by a child support enforcement agency established pursuant to Title IV-D of the Social Security Act, as amended, and Article 9 of G.S. Chapter 110. [G.S. 110-129(7).] A "non-IV-D case" is any case, other than a IV-D case, in which child support is legally obligated to be paid. [G.S. 110-129(7).]
5. One case has found no abuse of discretion when a request to transfer venue was denied.
    a. Trial court did not abuse its discretion by denying defendant's motion pursuant to G.S. 1-83(2) to transfer venue from Iredell County to Forsyth County. [*Brooker v. Brooker,* 133 N.C. App. 285, 515 S.E.2d 234 (1999) (Iredell remained the most convenient forum for modification, even though defendant had relocated to Forsyth County and plaintiff and child had relocated to Wilkes County).]
6. Parties can waive objection to improper venue by failing to file a timely objection to improper venue.

a. Mother waived right to remove custody and support modification case to county where original proceedings were held by failing to demand removal either in pre-answer motion or in answer; mother's oral motion made at trial not timely. [*Brooks v. Brooks,* 107 N.C. App. 44, 418 S.E.2d 534 (1992) (New Hanover County was court of original venue; mother failed to timely object to venue in Buncombe County).]

E. Standing

1. A motion to modify a child support order may be filed by either party or by an "interested" person. [G.S. 50-13.7(a).]
   a. A county social services department to which child support rights have been assigned as a condition of a child's receipt of public assistance has standing as an "interested person" to seek modification of an order providing support for that child. [*Cox v. Cox*, 44 N.C. App. 339, 260 S.E.2d 812 (1979).]
   b. An interested person who seeks modification of a child support order but is not a party to the pending child support action may move to intervene in the action pursuant to G.S. 1A-1, Rule 24.
2. A party or an interested person must request modification; the court lacks authority to modify a child support order on its own motion *sua sponte*. A trial court can modify only if requested to do so by motion of a party. [*Summerville v. Summerville*, 259 N.C. App. 228, 241, 814 S.E.2d 887, 897 (2018) (the court of appeals has interpreted *Catawba Cty. ex rel. Rackley v. Loggins*. 370 N.C. 83, 804 S.E.2d 474 (2017), as not expressly disapproving of cases of the court of appeals establishing a "longstanding prohibition of the *sua sponte* modification of child support obligations"); *Henderson v. Henderson,* 165 N.C. App. 477, 598 S.E.2d 433 (trial court erred by modifying mother's child support obligation when neither party had requested modification), *aff'd per curiam,* 359 N.C. 184, 605 S.E.2d 637 (2004); *Miller* (*Sikes*) *v. Miller,* 153 N.C. App. 40, 568 S.E.2d 914 (2002); *Bogan v. Bogan,* 134 N.C. App. 176, 516 S.E.2d 641 (1999); *Fink v. Fink,* 120 N.C. App. 412, 462 S.E.2d 844 (1995) (this is true whether the previous order utilized guideline amounts or deviated therefrom), *review denied,* 342 N.C. 654, 467 S.E.2d 710 (1996).]

F. Procedure

1. Request for modification is made by motion in the cause.
   a. A request for modification of a child support order should be made by filing a motion in the pending child support action. [G.S. 50-13.7(a) (allows a child support order to be modified "upon motion in the cause and a showing of changed circumstances"); *Baker v. Showalter,* 151 N.C. App. 546, 566 S.E.2d 172 (2002) (order setting child support may be modified only upon motion in the cause and a showing of changed circumstances).]
   b. G.S. 50-13.7(a) requires "a motion in the cause and a showing of changed circumstances" before a trial court can modify an existing order for child support or child custody. The failure of a party to file a motion to modify does not divest the trial court of jurisdiction and, accordingly, does not render a modification order void. The failure to file a motion to modify, however, is a legal error that can be challenged on appeal if not waived. [*Catawba Cty. ex rel. Rackley v. Loggins*, 370 N.C. 83, 804 S.E.2d

474 (2017) (majority opinion found that the trial court maintained continuous jurisdiction to modify a consent voluntary support agreement and order, even though no motion to modify had been filed), *rev'g* 246 N.C. App. 387, 784 S.E.2d 620 (2016).] For more on the North Carolina Supreme Court decision in *Rackley*, see Cheryl Howell, *Child Support Modification: Yes, We're Still Supposed to File a Motion to Modify*, UNC Sch. of Gov't: On the Civil Side Blog (Oct. 6, 2017), https://civil.sog.unc.edu/child-support-modification-yes-a-motion-to-modify-still-is-required.

c. Even though *Catawba Cty. ex rel. Rackley v. Loggins*, 370 N.C. 83, 804 S.E.2d 474 (2017), discussed above, held that failure to file the motion required by G.S. 50-13.7(a) to modify an order for child support did not in that case render an order modifying child support void, pursuant to *Loggins,* failure to file the required motion is a legal error that can be challenged on appeal if not waived. The court of appeals has interpreted *Loggins* as not expressly disapproving of cases of the court of appeals establishing a "longstanding prohibition of the *sua sponte* modification of child support obligations". [*See Summerville v. Summerville*, 259 N.C. App. 228, 241, 814 S.E.2d 887, 897 (2018) (reading *Loggins* "as continuing to require *some* action by the parties in order to satisfy the underlying purpose" of G.S. 50-13.7(a) and vacating an order modifying father's child support obligation when neither party had filed a motion in the cause for modification or an adequate substitute).]

2. Requirements of the motion.

a. Except as otherwise allowed under G.S. 1A-1, Rule 7, a motion seeking modification of a child support order must be made in writing, state the facts upon which the motion is based, and indicate the specific relief sought. [*Cf. Elmore v. Elmore*, 4 N.C. App. 192, 166 S.E.2d 506 (1969) (noting a lack of authority on requiring that change of circumstances be alleged, either specifically or in general terms, in the motion in the cause; decided before N.C. Rules of Civil Procedure became effective).]

b. Although a motion to modify based on a change in circumstances need not include detailed factual allegations, to survive a motion to dismiss, a motion to modify must contain allegations that, if true, would entitle the moving party to relief. [*Devaney v. Miller,* 191 N.C. App. 208, 216, 662 S.E.2d 672, 677–78 (2008) (when only factual allegation supporting motion to modify was that "on information and belief, the parties' incomes have changed significantly since the entry of the order," dismissal was proper; even if allegation was true, this fact alone not sufficient to survive a motion to dismiss).]

c. The scope of the modification procedure should be limited to the issues raised by the motion filed and noticed for hearing. [*See Guilford Cty. ex rel. St. Peter v. Lyon*, 247 N.C. App. 74, 81, 785 S.E.2d 131, 136 (2016) (father filed a motion to modify his permanent child support obligation based on a change in his financial circumstances; the trial court, *sua sponte* and over mother's objection, (1) amended father's motion, considered the amended motion as a G.S. 1A-1, Rule 60(b)(3) motion for relief based on mother's alleged fraud, and as a motion for temporary support and (2) set aside the order for permanent support for fraud and entered a new temporary order, without a showing of a change in circumstances; the trial court's *sua sponte* action placed mother in an "an entirely different procedural posture with substantively different

issues to defend than were raised by the motion to modify child support," which resulted in a "judgment by ambush").]

d. Similarly, a trial court lacks authority to modify a specific payment provision in a child support order if a party did not seek modification of that provision. [*Moore v. Moore,* 237 N.C. App. 455, 768 S.E.2d 4 (2014) (citing *Henderson v. Henderson,* 165 N.C. App. 477, 598 S.E.2d 433 (2004)) (trial court erred when it modified on its own motion portion of consent child support order addressing payment of uninsured medical expenses when neither party had requested the court to modify that provision; parties had agreed in original order to equally share uninsured medical expenses).]

3. Notice of the motion.

   a. The party seeking modification of a child support order must serve the motion on all other parties, pursuant to G.S. 1A-1, Rule 5, at least ten days before the date of the hearing on the motion. [G.S. 50-13.5(d)(1). *See also Osborne v. Osborne*, 129 N.C. App. 34, 497 S.E.2d 113 (1998) (party given less than ten days' notice of hearing to establish child support but no prejudice to party).]

   b. A party's failure to give timely notice of a motion to modify a child support order is waived if the opposing party does not object in a timely manner or attends and participates in the hearing. [*See Brandon v. Brandon*, 10 N.C. App. 457, 179 S.E.2d 177 (1971) (in child custody proceeding, mother's motion for postponement due to insufficient notice denied where mother participated in hearing by testifying, calling witnesses, and cross-examining father's witnesses; no prejudice shown when mother suggested no additional testimony that would have been available to her at a later hearing and when she failed to show how she might have benefited from a later hearing).]

4. A party to a North Carolina child support action who is a nonresident of North Carolina may file a Uniform Interstate Family Support Act (UIFSA) proceeding seeking modification of a North Carolina child support order when North Carolina has jurisdiction to modify the order. [G.S. 52C-3-301(c) (individual can file a request that North Carolina act as a responding tribunal); 52C-3-305 (North Carolina court must act as a responding tribunal when requested by petitioner); 52C-3-315(a) (petitioner's personal appearance is not required).]

   a. Special rules governing discovery, admissibility of evidence, and communication between courts apply to UIFSA proceedings in which a nonresident requests a responding tribunal to modify a child support order issued by that court. [*See* G.S. 52C-3-315, 52C-3-316, and 52C-3-317.]

5. No jury. Motions seeking modification of child support orders are heard and decided by a district court judge without a jury. [G.S. 50-13.5(h).]

6. No appointment of counsel for a *pro se* indigent obligor. A *pro se* indigent obligor is not entitled to court-appointed counsel in connection with a motion to modify child support. [*King v. King*, 144 N.C. App. 391, 547 S.E.2d 846 (2001) (motion to reduce child support does not place physical liberty interest at stake).]

7. Burden of proof.
    a. The party seeking modification of a child support order has the burden of proving, by a preponderance of the evidence, that a substantial change in circumstances has occurred since the date the order was entered. [*Devaney v. Miller,* 191 N.C. App. 208, 662 S.E.2d 672 (2008) (citing *Wolf v. Wolf*, 151 N.C. App. 523, 566 S.E.2d 516 (2002)); *Armstrong v. Droessler,* 177 N.C. App. 673, 630 S.E.2d 19 (2006); *Trevillian v. Trevillian,* 164 N.C. App. 223, 595 S.E.2d 206 (2004); *Thomas v. Thomas*, 134 N.C. App. 591, 518 S.E.2d 513 (1999); *Hamill v. Cusack*, 118 N.C. App. 82, 453 S.E.2d 539, *review denied,* 340 N.C. 359, 458 S.E.2d 187 (1995).]
8. Modification of a child support order is a two-step process. [*Hart v. Hart*, 268 N.C. App. 172, 836 S.E.2d 244 (2019) (citing *Head v. Mosier,* 197 N.C. App. 328, 677 S.E.2d 191 (2009)); *Young v. Young,* 224 N.C. App. 388, 736 S.E.2d 538 (2012) (citing *Head*); *Armstrong v. Droessler,* 177 N.C. App. 673, 630 S.E.2d 19 (2006) (citing *McGee v. McGee*, 118 N.C. App. 19, 453 S.E.2d 531, *review denied,* 340 N.C. 359, 458 S.E.2d 189 (1995)).]
    a. The first step in the modification process is to determine whether there has been a substantial change of circumstances since the existing child support order was entered.
        i. See Section II.G, below, for more on changed circumstances.
        ii. If the court determines there has **not** been a substantial change of circumstances, the court must enter an order denying the motion and may not modify the order. [*Lewis v. Lewis,* 181 N.C. App. 114, 638 S.E.2d 628 (2007) (trial court erred when it modified an existing consent order as to support when it concluded, at the same time, that there had not been any substantial change in circumstances).]
        iii. The court's determination of whether changed circumstances exist is a conclusion of law. [*Head v. Mosier,* 197 N.C. App. 328, 677 S.E.2d 191 (2009) (citing *Brooker v. Brooker,* 133 N.C. App. 285, 515 S.E.2d 234 (1999)); *Armstrong v. Droessler,* 177 N.C. App. 673, 630 S.E.2d 19 (2006).]
    b. If the court determines that there has been a substantial change of circumstances, the second step is the entry of a new child support order that modifies and supersedes the existing child support order.
        i. The trial court is to determine the modified amount of ongoing child support after entry of the order and, if the court made the modification effective from the date the motion to modify was filed, the amount of support due between the filing of the motion to modify and entry of the modification order. For both purposes, the amount of support is generally determined by the party's actual income at the time the existing order is modified. [*Hart v. Hart*, 268 N.C. App. 172, 836 S.E.2d 244 (2019) (citing *Frey v. Best,* 189 N.C. App. 622, 659 S.E.2d 60 (2008)) (in high-income case, trial court determined father's child support obligation based on parties' incomes in late 2017 and made modification effective as of February 2016, when father filed motion to modify).]
        ii. While the trial court is to use a party's actual income at the time the existing order is modified, it may consider past or historical income to determine the party's current income if the trial court explains in findings its reason for doing

so. [*Simms v. Bolger*, 264 N.C. App. 442, 826 S.E.2d 522 (2019).] When determining the amount father owed for the period between the filing of a motion to modify in 2011 and the entry of the modification order in 2017, the trial court erred when it considered father's income for each of those years without providing a rationale for using historical income. The court of appeals remanded the matter for (1) recalculation of father's income using his gross income at the time the modification order was entered or (2) findings to support the use of father's historical income. [*Simms*, 264 N.C. App. 442, 826 S.E.2d 522.]

iii. For more on whether the modification is effective as of the filing of the motion to modify, the entry of the modification order, or at some other point in time, see Section II.I.4, below.

iv. In modifying a parent's child support obligation in a high-income case where father did not challenge on appeal the trial court's determination that the child's needs had increased, the trial court did not err when it ordered father to pay a monthly amount of support that was "almost 110% of the child's total reasonable needs" when the amount ordered was supported by unchallenged findings as to the significant disparity in the parties' estates, lifestyles, and accustomed standards of living. [*Bishop v. Bishop*, 275 N.C. App. 457, 465, 459, 853 S.E.2d 815, 820, 817 (2020) (father's share of the child's reasonable monthly needs, $5,421, combined with father's monthly court-ordered child support, $3,289, exceeded the child's total monthly reasonable needs of $7,926, which was the basis for father's argument that "the trial court's math is wrong").]

v. In determining the amount, scope, and duration of the obligor's modified child support obligation, the court must apply North Carolina's child support guidelines (unless there are sufficient grounds for deviating from the guidelines) and other applicable law. [*Head v. Mosier,* 197 N.C. App. 328, 677 S.E.2d 191 (2009) (citing *Beamer v. Beamer,* 169 N.C. App. 594, 610 S.E.2d 220 (2005)); *Trevillian v. Trevillian,* 164 N.C. App. 223, 595 S.E.2d 206 (2004); *Hamill v. Cusack*, 118 N.C. App. 82, 453 S.E.2d 539, *review denied,* 340 N.C. 359, 458 S.E.2d 187 (1995).]

vi. When a party requests a recalculation of child support, the court is to apply the entirety of the North Carolina Child Support Guidelines, including not only the worksheets but also the commentary. [*Ticconi v. Ticconi,* 161 N.C. App. 730, 589 S.E.2d 371 (2003) (court authorized to modify provision on allocation of tax dependency deduction even though deduction is not utilized in the worksheet calculations of child support; application of the guidelines is not limited solely to the numbers applied to the worksheet).]

G. Changed Circumstances

1. Relevant date for a change in circumstances is the date the existing order was entered. In other words, the substantial change must have occurred since entry of the last order.

   a. A court may not modify a child support order unless there has been a **substantial** change of circumstances occurring **after** the date the order was entered. [*Woodring v. Woodring,* 227 N.C. App. 638, 745 S.E.2d 13 (2013) (in determining substantial

change of circumstances, a court may consider only events that occurred after entry of the most recent permanent order, unless the events were previously undisclosed to the court); *Newman v. Newman*, 64 N.C. App. 125, 306 S.E.2d 540, *review denied,* 309 N.C. 822, 310 S.E.2d 351 (1983); *Wachacha v. Wachacha*, 38 N.C. App. 504, 248 S.E.2d 375 (1978).]

b. The relevant starting point from which a change in circumstances should be determined is the date of the last modification. [*Devaney v. Miller,* 191 N.C. App. 208, 662 S.E.2d 672 (2008) (determinations on the merits on the issue of child support included the original order entered in 1993 and modifications in 1996, 2000, and 2005; date of 2005 modification order was the relevant starting point).]

2. Relevant date for a change in circumstances when a separation agreement has been incorporated into a divorce judgment is the date of incorporation.

a. When a separation agreement has been incorporated into a divorce judgment, the date to use to determine whether a party has had a substantial and involuntary reduction in income is the date of incorporation. [*Smart v. State ex rel. Smart,* 198 N.C. App. 161, 678 S.E.2d 720 (2009).]

b. Where's husband's military discharge, and corresponding reduction in income, occurred prior to incorporation of separation agreement into divorce decree, trial court properly entered summary judgment denying husband's motion for modification of child support. [*Smart v. State ex rel. Smart,* 198 N.C. App. 161, 678 S.E.2d 720 (2009) (change of circumstances between execution of separation agreement and entry of divorce decree incorporating agreement irrelevant to father's motion to modify child support).]

3. Each of the following situations, the first four of which are discussed separately below, may amount to a substantial change in circumstances. (Other matters that have been found to constitute substantial change of circumstances are discussed in Section II.G.8, below.) A substantial change of circumstances may be based on a single dispositive factor. [*Hart v. Hart*, 268 N.C. App. 172, 836 S.E.2d 244 (2019) (citing *Kowalick v. Kowalick*, 129 N.C. App. 781, 501 S.E.2d 671 (1998)) (significant change in the parties' custodial arrangement, to give father substantially more time with the children, was by itself sufficient to warrant modification of the existing child support order).]

a. When a child support order was entered at least three years before the pending motion to modify was filed, proof of a disparity of 15 percent or more between the amount of support payable under the existing order and the amount of support resulting from application of the guidelines establishes a rebuttable presumption of a substantial change of circumstances. [2020 Guidelines). See Section II.G.4, below, for exact language of the provision in the 2020 Guidelines; 2015 Ann. R. N.C. 49 (effective Jan. 1, 2015, and hereinafter referred to as 2015 Guidelines), 2011 Ann. R. N.C. 49 (effective Jan. 1, 2011, and hereinafter referred to as 2011 Guidelines).]

b. A significant increase or decrease in the needs of the child. [*McGee v. McGee,* 118 N.C. App. 19, 453 S.E.2d 531, *review denied,* 340 N.C. 359, 458 S.E.2d 189 (1995).]

c. A significant involuntary decrease in the income of the noncustodial parent, even though the child's needs are unchanged. [*Hammill v. Cusack*, 118 N.C. App. 82, 453 S.E.2d 539, *review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995).]

d. A voluntary decrease in the income of either parent, absent bad faith, upon a showing of changed circumstances relating to child-oriented expenses. [*Schroader v. Schroader*, 120 N.C. App. 790, 463 S.E.2d 790 (1995); *Young v. Young,* 224 N.C. App. 388, 736 S.E.2d 538 (2012) (citing *Frey v. Best,* 189 N.C. App. 622, 659 S.E.2d 60 (2008)) (substantial change may be shown when either parent, in good faith, suffered a voluntary decrease in income and the child's financial needs changed); *Johnston Cty. ex rel. Bugge v. Bugge,* 218 N.C. App. 438, 722 S.E.2d 512 (2012) (citing *Wolf v. Wolf*, 151 N.C. App. 523, 566 S.E.2d 516 (2002)) (if a party has acted in bad faith, a trial court may refuse to modify a support award).]

e. A significant involuntary decrease in the income of the custodial parent. [*Bishop v. Bishop*, 245 N.C. 573, 96 S.E.2d 721 (1957) (temporary change in mother's financial circumstances, arising from mother's involuntary termination from teaching position and the need to return to college for recertification, justified an inference that the welfare of the minor children had been affected thereby).]

4. Support orders more than three years old with a 15 percent disparity.

a. North Carolina's child support guidelines provide that "[i]n a proceeding to modify the amount of child support payable under a child support order that was entered at least three years before the pending motion to modify was filed, a difference of 15% or more between the amount of child support payable under the existing order and the amount of child support resulting from application of the guidelines based on the parents' current incomes and circumstances shall be presumed to constitute a substantial change of circumstances warranting modification of the existing child support order." [2020 Guidelines.]

i. Based on the Guideline language quoted above, it appears that the three-year period begins to run at the time the existing order was entered.

ii. Intervening motions to modify that do not result in a new child support order do not interrupt the time period. [2020 Guidelines, stating that "[i]n a proceeding to modify the amount of child support payable under a child support order that was entered at least three years before the pending motion to modify was filed."]

b. The 15 percent presumption created by the guidelines applies:

i. Whether the moving party seeks an increase or decrease in her child support obligation, [*Willard v. Willard,* 130 N.C. App. 144, 502 S.E.2d 395 (1998).]

ii. When the existing child support order was not based on the child support guidelines, [*Lewis v. Lewis,* 181 N.C. App. 114, 638 S.E.2d 628 (2007) (citing *Willard v. Willard,* 130 N.C. App. 144, 502 S.E.2d 395 (1998)); *Hess v. Hermann-Hess,* 228 N.C. App. 281, 748 S.E.2d 773 (2013) (**unpublished**) (citing *Lewis*).] and

iii. To consent orders for support. [*Hess v. Hermann-Hess,* 228 N.C. App. 281, 748 S.E.2d 773 (2013) (**unpublished**).]

c. When the moving party has presented evidence that satisfies the requirements of the 15 percent presumption, the party does not need to show a change of circumstances by other means. [*Johnston Cty. ex rel. Bugge v. Bugge,* 218 N.C. App. 438, 722

S.E.2d 512 (2012) (citing *Head v. Mosier,* 197 N.C. App. 328, 677 S.E.2d 191 (2009)); *Head* (citing *Garrison ex rel. Williams v. Connor*, 122 N.C. App. 702, 471 S.E.2d 644, *review denied,* 344 N.C. 436, 476 S.E.2d 116 (1996)); *Garrison* (15 percent presumption eliminates the necessity that the moving party show change of circumstances by other means when he has presented evidence that satisfies the requirements of the presumption; where plaintiff presented evidence satisfying the requirements of the 15 percent presumption and defendant presented no evidence, court found a change of circumstances warranting an increase in defendant's child support); *Hess v. Hermann-Hess,* 228 N.C. App. 281, 748 S.E.2d 773 (2013) (**unpublished**) (citing *Head*) (reduction in plaintiff's child support obligation based on 15 percent presumption affirmed when trial court found three years had passed since entry of consent order and difference of 15 percent or more in amount of child support determined by application of the guidelines to the parties' current income and circumstances); *Parrott v. Kriss,* 204 N.C. App. 210, 694 S.E.2d 522 (2010) (**unpublished**) (when 15 percent presumption was applicable, defendant was not required to offer evidence of a substantial change in the children's needs), *cert. denied*, 365 N.C. 212, 710 S.E.2d 40 (2011).]

d. A party who satisfies the requirements of the 15 percent presumption may not be entitled to modification if a trial court determines that the party reduced her income in disregard of her child support obligation. Under those circumstances, the court may refuse to modify the support obligation based on the party's actual income and may instead use the party's earning capacity to determine if modification is warranted. [*See Johnston Cty. ex rel. Bugge v. Bugge,* 218 N.C. App. 438, 722 S.E.2d 512 (2012) (citing *Wolf v. Wolf*, 151 N.C. App. 523, 566 S.E.2d 516 (2002)) (presumption of a substantial change in circumstances arising from the 15 percent disparity rebutted by a finding that defendant intentionally left his job to pursue other careers out of state, without any concern for the welfare of the children, thus voluntarily depressing his income; defendant's argument that the trial court could not consider his income when the 15 percent presumption applied was rejected); *Andrews v. Andrews,* 217 N.C. App. 154, 159, 719 S.E.2d 128, 131 (2011) (reversing an order that concluded that plaintiff had acted "in good faith, without a disregard for his child support obligation" and ordered modification based on the 15 percent presumption; facts showed that plaintiff voluntarily resigned his position as an engineer earning $172,000 per year plus benefits to start a church at an annual salary of $52,800 without benefits; evidence did not support the finding that there was "no evidence" of plaintiff's bad faith or an intentional disregard of his child support obligation and in fact, only evidence on the point, father's testimony that he acted without considering his ability to meet his child support obligation, was to the contrary), *review denied,* 365 N.C. 561, 722 S.E.2d 595 (2012).]

e. When 15 percent change was shown and there was no request for deviation, there was no abuse of discretion when the trial court made no findings regarding changes in the children's needs or failed to consider the children's needs against the obligor's ability to pay the amount of support. [*Head v. Mosier,* 197 N.C. App. 328, 677 S.E.2d 191 (2009).]

f. The order must include a finding or conclusion that the court applied the 15 percent presumption. [*Badstein v. Badstein,* 197 N.C. App. 628, 680 S.E.2d 271 (2009) (**unpublished**) (order devoid of any findings regarding the 15 percent presumption reversed; court rejected mother's contention that court's reliance on the 15 percent presumption to modify child support was "self-evident" from the findings and the attached worksheet).]

g. A conclusion that there had been a "substantial change in circumstances in that it has been more than three years since the calculation of [obligor's] child support obligation and the current obligation is greater than fifteen percent (15%) of the prior obligation" satisfies the requirement of an ultimate finding on this point. [*Head v. Mosier,* 197 N.C. App. 328, 332, 677 S.E.2d 191, 194–95 (2009) (citing *Brooker v. Brooker,* 133 N.C. App. 285, 515 S.E.2d 234 (1999)).]

5. A significant increase or decrease in the needs of the child.

a. Cases following rule.

i. *Wiggs v. Wiggs,* 128 N.C. App. 512, 495 S.E.2d 401 (1998) (recognizing that a substantial increase or decrease in the child's needs can constitute changed circumstances), *disapproved of on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998).

ii. *McGee v. McGee,* 118 N.C. App. 19, 453 S.E.2d 531 (court pointed out that its decision did not affect established law that a change of circumstances sufficient to modify a child support order may be shown by a substantial increase or decrease in the children's needs), *review denied,* 340 N.C. 359, 458 S.E.2d 189 (1995).

iii. *Meehan v. Lawrance,* 166 N.C. App. 369, 602 S.E.2d 21 (2004) (increase in educational expenses, significant amount of money in travel expenses for visitation as a result of relocation to Georgia, and the fact that the minor children had become involved "in a lot of extracurricular activities" sufficient evidence of increase in needs of the children; increase in children's needs, substantial increase in both parents' incomes, and increased cost of living for both parents supported conclusion of substantial change in parents' financial condition).

iv. *Lawrence v. Nantz,* 115 N.C. App. 478, 445 S.E.2d 87 (1994) (minor child's hospitalization and its resulting costs constituted a substantial change in circumstances).

v. *Brooker v. Brooker*, 133 N.C. App. 285, 515 S.E.2d 234 (1999) (increase in needs shown by increase in daycare expenses, recreation expenses, and amount spent on rent and groceries).

vi. *Craig v. Kelly*, 89 N.C. App. 458, 366 S.E.2d 249 (1988) (substantial increase in needs of child who had recently started school; child's expenses for shelter, food, clothing, and dental costs also increased).

vii. *Koufman v. Koufman*, 330 N.C. 93, 408 S.E.2d 729 (1991) (changed circumstances based on substantial decrease in monthly expenses of child who enrolled in boarding school).

b. Procedure.

i. When an increase or decrease in a child's needs is the basis of a motion to modify, the moving party has the burden of proving the amount of the child's needs at the time the existing order was entered and at the time the motion for modification is filed or heard. [*See Brooker v. Brooker*, 133 N.C. App. 285, 515 S.E.2d 234 (1999) (citing *Davis v. Risley*, 104 N.C. App. 798, 411 S.E.2d 171 (1991)).]

ii. An order modifying child support based on either an increase or decrease in the child's needs must contain findings of fact sufficient to support the judgment. [*English v. Nixon*, 188 N.C. App. 164, 654 S.E.2d 833 (2008) (**unpublished**) (citing *Brooker v. Brooker*, 133 N.C. App. 285, 515 S.E.2d 234 (1999)) (when party seeking modification did not present evidence regarding the children's expenses at the time the parties entered the original consent order and trial court's only finding to support modification was that the children had grown older and taller, appellate court vacated the portion of the order modifying child support).]

6. A significant **involuntary** decrease in the income of the noncustodial parent even though the child's needs are unchanged.

a. Cases following rule.

i. *Devaney v. Miller,* 191 N.C. App. 208, 662 S.E.2d 672 (2008) (citing *Wiggs v. Wiggs,* 128 N.C. App. 512, 495 S.E.2d 401 (1998), *disapproved of on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998)) (recognizing the rule that absent a showing of a change in the needs of the child, only a substantial and involuntary decrease in the noncustodial parent's income can justify a decrease in the child support obligation; dismissing father's motion to modify because it failed to allege facts that would support a finding of a substantial change in circumstances).

ii. *Armstrong v. Droessler,* 177 N.C. App. 673, 630 S.E.2d 19 (2006) (citing *Askew v. Askew*, 119 N.C. App. 242, 458 S.E.2d 217 (1995)) (in cases where the needs of the children have not changed, a substantial change of circumstances can be found based on the noncustodial parent's ability to pay; case remanded for findings on the issue of whether father's income had been involuntarily decreased).

iii. *Padilla v. Lusth*, 118 N.C. App. 709, 457 S.E.2d 319 (1995) (stating that it is well settled that a significant involuntary decrease in a obligor's income can satisfy the changed circumstances requirement even in the absence of any evidence showing a change in the child's needs).

iv. *Chused v. Chused*, 131 N.C. App. 668, 508 S.E.2d 559 (1998) (obligor's involuntary termination from his employment constituted a "changed circumstance" under G.S. 50-13.7). *Cf. Young v. Young,* 224 N.C. App. 388, 736 S.E.2d 538 (2012) (father failed to prove that his sustained unemployment after losing his job was involuntary, given the lack of proof of a job search and self-imposed restrictions on his search; no substantial change of circumstances).

v. *Pittman v. Pittman*, 114 N.C. App. 808, 443 S.E.2d 96 (1994) (trial court erred in holding that obligor's job loss could not, as a matter of law, constitute a substantial change of circumstances authorizing reduction in his child support payments).

vi. *McGee v. McGee*, 118 N.C. App. 19, 453 S.E.2d 531 (involuntary decrease in obligor's income from job loss satisfied change in circumstances requirement of G.S. 50-13.7 without consideration of actual past expenditures on the minor children), *review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995).

vii. *Hammill v. Cusack*, 118 N.C. App. 82, 453 S.E.2d 539 (significant decrease in obligor's income from relocation of podiatry practice from one state to another satisfied necessary showing of changed circumstances, even in absence of any change affecting child's needs; without discussion, the court considered the move to have been an involuntary occurrence), *review denied,* 340 N.C. 359, 458 S.E.2d 187 (1995).

b. Unemployment caused by incarceration may not be treated as voluntary unemployment in establishing or modifying a child support order. [2020 Guidelines; 45 C.F.R. § 302.56(c)(3).]

c. What constitutes a significant decrease in income.

i. The court of appeals has held that a 16 percent decrease in an obligor's disposable earnings, in addition to a decrease in his monthly veterans benefit, was a sufficient showing of changed circumstances to justify modification of a consent judgment. [*Springs v. Springs*, 25 N.C. App. 615, 214 S.E.2d 311 (1975).]

ii. But in a high income case, a 25 percent involuntary reduction in income was found not to constitute a substantial change in circumstances warranting a modification of child support. [*Trevillian v. Trevillian,* 164 N.C. App. 223, 595 S.E.2d 206 (2004) (reduction was from $300,000 to $227,400 per year).]

iii. The court of appeals has held that a $500 per year decrease in an obligor's income was not a significant decrease in income. [*See Wiggs v. Wiggs*, 128 N.C. App. 512, 495 S.E.2d 401 (1998), *disapproved of on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998).]

7. A voluntary decrease in income of either parent, in good faith, and a change in the child's financial needs.

a. Even if the court assumed that father suffered a voluntary decrease in income, father failed to prove that it was in good faith. [*Young v. Young,* 224 N.C. App. 388, 736 S.E.2d 538 (2012) (father failed to show a good faith effort to find employment when the evidence showed that he submitted only five job applications over the previous year and no applications for seasonal work or in fields outside his area of expertise, that he voluntary moved to a rural area with fewer job opportunities, and that he failed to report Navy income and purchased additional insurance for the children even though they were insured through mother's employment; moreover, trial court found that father's testimony about employment matters was contradictory and not completely honest).]

8. Other matters found to constitute a substantial change of circumstances.

a. Findings that since entry of the child support order (1) the obligor had settled his workers' compensation disability claim and his claim against a third party, resulting in two large monetary distributions and the elimination of obligor's weekly workers' compensation benefits; (2) the social-security benefit received by mother for the

child as a result of the obligor's disability had increased; and (3) the child's day-care and health insurance expenses had increased, as had the total reasonable needs of the child, supported the conclusion of a substantial change of circumstances sufficient to support a modification of the obligor's monthly child support obligation. [*Simms v. Bolger*, 264 N.C. App. 442, 826 S.E.2d 522 (2019).]

b. The fact that the child for whom support is owed has begun receiving public assistance constitutes a substantial change of circumstances under G.S. 50-13.7. [*Cartrette v. Cartrette*, 73 N.C. App. 169, 325 S.E.2d 671 (1985) (modifying a previous consent judgment).]

c. A change in the physical custody of the child constitutes a substantial change of circumstances warranting modification of an existing child support order. [*Kowalick v. Kowalick*, 129 N.C. App. 781, 501 S.E.2d 671 (1998); *Gray v. Peele*, 235 N.C. App. 554, 761 S.E.2d 739 (2014) (citing *Kowalick*); *Hart v. Hart*, 268 N.C. App. 172, 836 S.E.2d 244 (2019) (entry of a child custody consent order that gave father significantly more custodial time after father moved from Washington to North Carolina was by itself a substantial change of circumstances sufficient to warrant modification of the existing child support order).]

d. The fact that a parent's legal obligation to support a child, or to support one of several children, has terminated (for example, because the child has reached the age of 18 and is no longer in elementary or secondary school, has been emancipated, etc.) may constitute a substantial change of circumstances warranting modification of an existing order providing for the child's support. [*See Craig v. Craig*, 103 N.C. App. 615, 406 S.E.2d 656 (1991) (supporting parent must apply to trial court for modification when one of two or more minor children for whom support is ordered reaches age 18 and support is not allocated by child); *Massey v. Massey*, 71 N.C. App. 753, 323 S.E.2d 451 (1984) (stating that defendant could easily have taken the question of payments due after his child reached majority to the court for a modification of the child support order rather than withholding payments contrary to the court order).] See Section I.A.2, above, for more on attempts to unilaterally modify a child support order.

e. The fact that mother could no longer claim child 1, who had reached majority since entry of the order being modified, as a dependent for tax purposes was a substantial change of circumstances, justifying modification of the existing order to award mother the right to claim child 2 as a dependent for tax purposes. [*Laws v. Laws*, 235 N.C. App. 656, 764 S.E.2d 698 (2014) (**unpublished**) (order being modified had awarded father the right to claim child 2 as a dependent).] Note that the change to the 2015 Guidelines to delete the sentence "[i]f the parent who receives child support has minimal or no income tax liability, the court may consider requiring the custodial parent to assign the [tax] exemption to the supporting spouse and deviate from the guidelines", should not change the result in *Laws*.

9. What does **not** constitute a substantial change of circumstances.

a. A substantial **voluntary** decrease in income of either parent, standing alone, does not constitute a substantial change of circumstances under G.S. 50-13.7.

i. Where defendant obligor willfully and intentionally depressed his income by voluntarily leaving an insurance company to become an independent agent,

defendant failed to meet his burden to prove changed circumstances. [*Askew v. Askew*, 119 N.C. App. 242, 458 S.E.2d 217 (1995).]

ii. Voluntary decrease in obligor's income did not constitute a changed circumstance since there was no showing that the needs of the children had changed. [*King v. King*, 144 N.C. App. 391, 547 S.E.2d 846 (2001).]

iii. A substantial voluntary decrease in an obligor's income can constitute a changed circumstance only if accompanied by a substantial decrease in the needs of the child; where mother admitted no change in son's financial needs, modification was denied. [*Mittendorff v. Mittendorff,* 133 N.C. App. 343, 515 S.E.2d 464 (1999) (citing *Schroader v. Schroader*, 120 N.C. App. 790, 463 S.E.2d 790 (1995)).]

iv. Where obligee/custodial parent voluntarily left her employment to enroll as a full-time college student, the resulting voluntary decrease in her income, absent a finding of bad faith, could be considered to support a finding of changed circumstances only if movant also showed a change in child-oriented expenses. [*Schroader v. Schroader*, 120 N.C. App. 790, 463 S.E.2d 790 (1995).]

v. In compliance with 45 C.F.R. § 302.56(c)(3), incarceration may not be treated as voluntary unemployment in establishing or modifying a child support order. [2020 Guidelines.]

b. A substantial increase in the obligor's income, standing alone, does not constitute a sufficient change of circumstances under G.S. 50-13.7. [*Simms v. Bolger*, 264 N.C. App. 442, 826 S.E.2d 522 (2019) (citing *Thomas v. Thomas*, 134 N.C. App. 591, 518 S.E.2d 513 (1999)) (noting, however, that an increase in an obligor's income may be a factor in determining whether circumstances have changed when considered in the context of changes in the child's needs); *Thomas* (increase in obligor's income in a high-income case); *Wilson v. Wilson,* 214 N.C. App. 541, 714 S.E.2d 793 (2011) (noting that under *Thomas*, an increase in income alone is not enough to prove a change of circumstances and reversing an order that implemented provisions in an incorporated separation agreement providing for automatic yearly increases in child support, based on a percentage of bonuses and salary increases received by defendant, as impermissibly modifying child support without finding a substantial change of circumstances)

c. Court orders providing for automatic increases or decreases in the amount of support without a showing of changed circumstances are void as against public policy. [*Snipes v. Snipes*, 118 N.C. App. 189, 454 S.E.2d 864 (1995) (holding that a provision in incorporated agreement linking the amount of support to the Consumer Price Index was void and unenforceable but noting that an unincorporated agreement between the parties requiring automatic increases in support is enforceable. (citing *Frykberg v. Frykberg*, 76 N.C. App. 401, 333 S.E.2d 76 (1985)))]

d. A supporting spouse's decision to cease voluntary payments in excess of the amounts required by a consent order was not a substantial change of circumstances without a showing of a change in the child's reasonable needs. [*Shirey v. Shirey*, 267 N.C. App. 554, 833 S.E.2d 820 (2019), *review denied*, 376 N.C. 675, 853 S.E.2d 159 (2021).]

e. The adoption or revision of the child support guidelines is not a sufficient change of circumstances, in and of itself, to justify modification of a child support order. [*See Davis v. Risley*, 104 N.C. App. 798, 411 S.E.2d 171 (1991).]

f. Evidence that the child is older or that the general cost of living has increased is not, standing alone, sufficient to prove a substantial change of circumstances. [*Holder v. Holder*, 87 N.C. App. 578, 361 S.E.2d 891 (1987) (sole finding of fact regarding change of circumstances was that child was older and that inflation had occurred); *Waller v. Waller*, 20 N.C. App. 710, 202 S.E.2d 791 (1974) (fact that children were eight years older and that father's income had increased did not warrant increase in child support).]

g. The voluntary filing of a Chapter 11 petition in bankruptcy did not constitute a "substantial change of circumstances" that would warrant a reduction in father's child support payments. [*Harris v. Harris,* 91 N.C. App. 699, 373 S.E.2d 312 (1988).] For a discussion of bankruptcy and child support enforcement, see *Enforcement of Child Support Orders*, Part 4 of this Chapter, Section XI.

h. The voluntary assumption of support obligations greater in amount or scope than those imposed by G.S. Chapter 50 is not a factor to be considered in determining a change of circumstances.

   i. Husband's voluntary support of emancipated son was not a factor to be considered in determining a change of circumstances sufficient to support a reduction for remaining minor children. [*Dishmon v. Dishmon,* 57 N.C. App. 657, 292 S.E.2d 293 (1982).]

   ii. The fact that defendant voluntarily assumed the financial burden to send his eldest child to a high tuition, out-of-state university does not justify a reduction in child support for his other children. [*Gilmore v. Gilmore*, 42 N.C. App. 560, 257 S.E.2d 116 (1979) (defendant also had voluntarily entered into another marital and family relationship).]

i. A parent's financial responsibility for children other than the child for whom support is being determined.

   i. A parent's assumption of new or increased family support obligations could arise from marriage or remarriage, the birth or adoption of a child other than the child involved in the pending child support action, or the payment of spousal or child support under an arrangement, agreement, or order entered after the existing child support order.

      (a) The single fact that defendant had a newborn child in his home did not constitute a significant and material change of circumstances. [*State ex rel. Cross v. Saunders,* 168 N.C. App. 235, 607 S.E.2d 309 (2005).]

      (b) Fact that husband remarried and had a child with his new spouse cannot be the sole basis for a finding of a substantial change in circumstances regarding the amount of child support. [*Frey v. Best,* 189 N.C. App. 622, 659 S.E.2d 60 (2008) (noting provision in 2002 Guidelines stating that deduction from a parent's gross income for other children who reside with the parent could not be sole basis for modifying an existing support order); 2020 Guidelines contain the same language.]

(c) Fact that husband voluntarily entered into another marital and family relationship did not constitute a change of circumstances. [*Gilmore v. Gilmore*, 42 N.C. App. 560, 257 S.E.2d 116 (1979) (increase in husband's needs and obligations resulted from his voluntary assumption of additional obligations arising from his remarriage and from college expenses of his eldest son).]

ii. Current child support payments actually made by a parent under any existing court order, separation agreement, or voluntary support arrangement for a child other than the child for whom support is being determined are deducted from the parent's gross income, regardless of whether the child or children for whom support is being paid was/were born before or after the child or children for whom support is being determined. Amounts paid towards arrears are not deducted from income. [2020 Guidelines.]

10. Findings of fact.

a. Findings to support a modification of child support must be specific enough to indicate to the appellate court that the judge took due regard of the particular estates, earnings, conditions, and accustomed standard of living of both the child and the parents. [*Frey v. Best,* 189 N.C. App. 622, 659 S.E.2d 60 (2008) (citing *Coble v. Coble,* 300 N.C. App. 708, 268 S.E.2d 185 (1980)).]

b. Where the trial judge sits as the trier of fact on a motion to modify child support, she must find the facts specially, state separately her conclusions of law, and direct entry of the appropriate judgment. [*Smart v. State ex rel. Smart,* 198 N.C. App. 161, 678 S.E.2d 720 (2009) (citing *Koufman v. Koufman,* 330 N.C. 93, 408 S.E.2d 729 (1991); G.S. 1A-1, Rule 52(a)).]

c. Findings are not necessary when a case is disposed of by summary judgment or by judgment on the pleadings. [*Smart v. State ex rel. Smart,* 198 N.C. App. 161, 678 S.E.2d 720 (2009).]

H. Modification of Child Support Arrearages

1. Federal requirement regarding vesting of child support.

a. A 1986 federal law known as the Bradley Amendment [42 U.S.C. § 666(a)(9)(C).] required North Carolina and other states, as a condition of receiving federal funding for child support enforcement programs, to enact legislation providing that child support owed under court orders is vested as a judgment when it becomes due and prohibiting the retroactive modification of vested child support arrearages owed under court orders.

b. North Carolina's General Assembly enacted G.S. 50-13.10 in order to comply with the Bradley Amendment. [*New Hanover Cty. ex rel. Mannthey v. Kilbourne,* 157 N.C. App. 239, 578 S.E.2d 610 (2003).]

c. A child support payment is vested once it becomes due and payable. [*See Craig v. Craig*, 103 N.C. App. 615, 406 S.E.2d 656 (1991); G.S. 50-13.10.]

d. Under G.S. 50-13.10, a child support payment does not accrue and is not vested if:

i. It became due after the date of the death of the child for whom support was owed;

ii. It became due after the date of the death of the obligor;

iii. It became due during the period of time that the child for whom support is owed lived with the obligor pursuant to a valid court order or an express or implied written or oral agreement transferring primary custody of the child to the obligor; or

iv. It became due during the period of time that the obligor was incarcerated, was not on work release, and did not have income or resources sufficient to make the payment. [G.S. 50-13.10(d).]

2. General rule: Vested arrearages cannot be modified.

a. G.S. 50-13.10 generally prohibits a North Carolina court from modifying, reducing, or vacating vested child support arrearages that have accrued under a valid child support order issued by a North Carolina court in a civil child support proceeding pursuant to G.S. 49-14, G.S. Chapter 50, or G.S. 110-132 or 110-133. [*See New Hanover Cty. ex rel. Mannthey v. Kilbourne,* 157 N.C. App. 239, 578 S.E.2d 610 (2003) (under G.S. 50-13.10, past due child support is vested, is not subject to retroactive modification, and is entitled to full faith and credit by sister states).]

i. The North Carolina Supreme Court has held that the general rule prohibits a retroactive modification; that is, any modification that affects payments due before the motion for modification was filed. [*Hill v. Hill,* 335 N.C. 140, 435 S.E.2d 766 (1993) (in context of modification of an alimony award, court noted that a trial court cannot, without evidence of an emergency situation, order modification of child support to take place before a motion for modification is filed).]

ii. Thus, the prohibition against retroactive modification of vested child support arrearages generally precludes a court from **increasing or decreasing** an obligor's court-ordered child support obligation with respect to a period prior to the date a motion was filed seeking modification of the child support order.

iii. *See Craig v. Craig*, 103 N.C. App. 615, 406 S.E.2d 656 (1991) (enactment of G.S. 50-13.10, effective Oct. 1, 1987, divested court of the ability to modify vested arrears for equitable considerations).

b. The Full Faith and Credit Clause of the U.S. Constitution prohibits a North Carolina court from retroactively modifying child support arrearages that have accrued under a child support order issued by the court or tribunal in another state and that are vested under a state law similar to G.S. 50-13.10(a). [*See Fleming v. Fleming*, 49 N.C. App. 345, 271 S.E.2d 584 (1980).]

3. Modifications or other court actions that do not violate the general rule.

a. Making the modification effective as of the date the petition for modification was filed, or a subsequent date, does not violate the general rule.

i. Under G.S. 50-13.10, an order modifying child support does not retroactively modify vested arrearages if it modifies only payments that have not yet accrued or that accrued after the date a motion seeking modification was filed. [*See Hill*

v. Hill, 335 N.C. 140, 435 S.E.2d 766 (1993) (order modifying alimony from the date the matter was first noticed for hearing was not a retroactive modification); *Mackins v. Mackins*, 114 N.C. App. 538, 442 S.E.2d 352 (applying holding in *Hill* on alimony to child support modifications and concluding that trial court has discretion to modify a child support order, effective from the date a petition to modify is filed, as to support obligations that accrue after that date), *review denied,* 337 N.C. 694, 448 S.E.2d 527 (1994).] For more on awards of prior maintenance, see *Liability and Amount,* Part 1 of this Chapter, Section VII.D.

b. G.S. 50-13.10(a)(2) permits, but does not require, a court to retroactively modify child support payments that accrued before the date a motion seeking modification was filed if the court finds that the moving party was precluded by physical disability, mental incapacity, indigency, misrepresentation of another party, or other compelling reason from filing the motion prior to the date the payment accrued and if the moving party filed the motion seeking modification promptly after he was no longer precluded from filing it.

c. G.S. 50-13.10 does not prohibit retroactive "modification" of a child support award under a temporary or interim order. [*See Sikes v. Sikes*, 330 N.C. 595, 411 S.E.2d 588 (1992) (until a final child support order is entered, G.S. 50-13.10 does not come into play).]

d. G.S. 50-13.10 does not prohibit a court from giving an obligor credit against vested child support arrearages for timely child support payments that were made directly to the obligee rather than through the State Child Support Collection and Disbursement Unit. [*See* G.S. 50-13.10(e).]

e. Pursuant to an amendment to G.S. 110-135 effective Dec. 13, 2005, a past due public assistance debt is subject to reduction as set forth therein. [G.S. 110-135, *amended by* S.L. 2005-389; for more on the amendment to G.S. 110-135, see *Liability and Amount,* Part 1 of this Chapter, Section VII.E.11.]

4. Modifications that have been found to violate the general rule.

a. Modification of an order that provided for reimbursement of past paid public assistance.

i. Error for trial court to forgive portion of arrearages that represented past public assistance paid before defendant knew of the existence of his child; no legal basis to retroactively modify defendant's vested child support arrearages. [*Orange Cty. ex rel. Harris v. Keyes,* 158 N.C. App. 530, 581 S.E.2d 142 (2003) (1998 voluntary support agreement ordered defendant to reimburse the state $1,272 for past paid public assistance; trial court erred when, pursuant to a 2002 motion to modify, it forgave the public assistance arrearage of $1,272 because that sum represented public assistance paid before defendant knew of the existence of his child).]

b. Retroactive increase in the amount of child support in an existing order.

i. A court is not precluded from retroactively increasing the obligor's child support obligation in emergency situations based on an unanticipated increase in the custodial parent's expenses with respect to the child. [*Biggs v. Greer*, 136

N.C. App. 294, 524 S.E.2d 577 (2000) (citing *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963)).]

ii. A retroactive increase in the amount provided in an existing support order should be allowed only sparingly and only under the limited circumstance constituting a true sudden emergency situation that required the expenditure of sums in excess of the existing child support order. [*Biggs v. Greer,* 136 N.C. App. 294, 524 S.E.2d 577 (2000) (citing *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963)).]

iii. Findings and conclusions.

(a) The order must contain a conclusion of law that there was a substantial and material change in circumstances since entry of the existing order affecting the welfare of the child that was the result of a sudden emergency sufficient to warrant an increase. [*Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000).]

(b) A trial court must set out specific findings of fact to sustain the above conclusion and to support the award of retroactive support. [*Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000); *Savani v. Savani*, 102 N.C. App. 496, 403 S.E.2d 900 (1991).]

(c) The findings must reflect the actual amount disbursed by a party within three years or less of the date of the filing of the motion to modify, the reasonably necessary expenditures made on behalf of the child, and the extraordinary "sudden emergency" situation that required expenditures in excess of the existing amount of ordered support. [*Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000).]

(d) The findings also must set out the parent's ability to pay during the period for which increased support is sought. [*Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000).]

(e) When father's only evidence of a substantial change of circumstances was mother's receipt of $249,000 from sale of the marital home after entry of a custody and support order, and father presented no evidence of an emergency situation after entry of the order and before he filed a motion to modify, trial court correctly refused to award retroactive child support. [*McKyer v. McKyer,* 179 N.C. App. 132, 632 S.E.2d 828 (2006) (emergency situation is required to justify an award of retroactive child support), *review denied,* 361 N.C. 356, 646 S.E.2d 115 (2007).]

(f) A permanent support order may not be retroactively modified without a showing of an emergency, while a temporary support order may be retroactively modified without a showing of such emergency. [*McKyer v. McKyer,* 179 N.C. App. 132, 632 S.E.2d 828 (2006) (citing *Miller* (*Sikes*) *v. Miller,* 153 N.C. App. 40, 568 S.E.2d 914 (2002)), *review denied,* 361 N.C. 356, 646 S.E.2d 115 (2007).]

I. Orders

1. The court's determination with respect to changed circumstances is a conclusion of law. [*Brooker v. Brooker*, 133 N.C. App. 285, 515 S.E.2d 234 (1999).] The order should include a conclusion that there has or has not been a substantial change in circumstances. However, the lack of an express conclusion that there was a substantial change in circumstances did not require remand in *Watkins v. Benjamin*, 267 N.C. App. 122, 833 S.E.2d 22 (2019) (absence of express conclusion did not render order deficient when order contained findings reflecting that a substantial change had occurred).
2. Findings required.
    a. Although the court is not required to make specific or evidentiary findings, the court must make "ultimate" findings of fact that indicate the factual basis for its conclusion that there has been a substantial change of circumstances and that are necessary to resolve material disputes in the evidence. [*Brooker v. Brooker,* 133 N.C. App. 285, 515 S.E.2d 234 (1999).]
        i. In *Brooker v. Brooker,* 133 N.C. App. 285, 515 S.E.2d 234 (1999), when the moving party relied on an increase in the child's needs to establish changed circumstances, the trial court made an ultimate finding that the needs of the child had increased, which was supported by evidence of increased daycare expenses and recreation expenses, as well as increased rent and grocery costs for the minor child.
        ii. Other examples of ultimate findings in a child support case would be: "the court finds that there has been a significant increase in the child's needs since the existing order was entered" or "the court finds that the obligor has experienced a significant, involuntary decrease in income since the existing order was entered."
        iii. For examples of ultimate findings in other contexts, see *Madison v. International Paper,* 165 N.C. App. 144, 598 S.E.2d 196 (2004) (workers' compensation case where the N.C. Industrial Commission's ultimate finding, that the heat to which the worker had been exposed was a contributing factor to his heart attack, was upheld); *In re O.W.*, 164 N.C. App. 699, 703, 596 S.E.2d 851, 854 (2004) (where, in an abuse and neglect case, the court gave examples of ultimate findings that the court could have made if it found that certain facts were true: that the natural father "has a history of cocaine and crack use" or that he "has a bad temper, he is impatient, he hollers at the baby and slaps her on her hands").
    b. For findings required to deviate from the guidelines, see *Liability and Amount,* Part 1 of this Chapter, Section IV.
    c. For findings required to award attorney fees, see *Liability and Amount,* Part 1 of this Chapter, Section VIII.
3. When the court grants a request for modification, it must:
    a. Determine the amount, scope, and duration of the obligor's child support obligation based on North Carolina's child support guidelines (unless there are sufficient grounds to deviate from the guidelines) and other applicable law [2020 Guidelines: "guidelines apply as a rebuttable presumption in all legal proceedings involving the child support obligation of a parent".] and

b. Enter a new order establishing the obligor's modified child support obligation.

4. Effective date of modification.

a. A court modifying a child support order under G.S. 50-13.7 may make the modification (increase or decrease in child support payments) effective as of the date the motion for modification was filed, or as of any ensuing date, as to support obligations that accrue after that date. [*Mackins v. Mackins*, 114 N.C. App. 538, 442 S.E.2d 352 (first case to so hold; modified support by increasing it), *review denied*, 337 N.C. 694, 448 S.E.2d 527 (1994); *Hart v. Hart*, 268 N.C. App. 172, 836 S.E.2d 244 (2019) (setting out *Mackins* rule and affirming order decreasing child support that made modification effective on date the motion to modify was filed); *Spencer v. Spencer,* 133 N.C. App. 38, 514 S.E.2d 283 (1999) (applying the *Mackins* ruling to decreases as well as increases in support payments).

b. Although a trial court has the discretion to modify a child support order as of the date the petition to modify is filed, it is not required to do so. [*Barham v. Barham*, 127 N.C. App. 20, 487 S.E.2d 774 (1997) (trial court did not abuse its discretion by making the obligor's modified child support payments effective as of the date the order was entered, rather than retroactive to the date the motion was filed), *aff'd,* 347 N.C. 570, 494 S.E.2d 763 (1998).]

c. *But cf. Mason v. Erwin,* 157 N.C. App. 284, 579 S.E.2d 120 (2003) (citing *Mackins*) (noting that the law is well settled that modification of a child support order takes effect on the date the petition for modification was filed); *and State ex rel. Miller v. Hinton,* 147 N.C. App 700, 556 S.E.2d 634 (2001) (there is an implied presumption that prospective support begins at the time of filing; beginning support at a date other than the date of filing is a deviation from the Guidelines and requires findings to support deviation). For more on the effective date of a modification, see Cheryl Howell, *Retroactive Child Support: What Is It and How Is the Amount Determined?,* UNC Sch. of Gov't: On the Civil Side Blog (Apr. 1, 2016), http://civil.sog.unc.edu/retroactive-child-support-what-is-it-and-how-is-the-amount-determined and Cheryl Howell, *Prospective Child Support: What Is It and How Is the Amount Determined?,* UNC Sch. of Gov't: On the Civil Side Blog (Feb. 10, 2021), https://civil.sog.unc.edu/prospective-child-support-what-is-it-and-how-is-the-amount-determined/.

d. The general rule is that a modification cannot be made effective prior to the date the motion was filed because vested child support arrearages cannot be modified. [See Section II.H, above.]

e. Making the modification effective as of the date the petition for modification was filed, or a subsequent date, does not violate the general rule prohibiting the retroactive modification of vested child support arrearages (i.e., court-ordered child support payments coming due before the date a motion for modification was filed). [*Mackins v. Mackins*, 114 N.C. App. 538, 442 S.E.2d 352, *review denied*, 337 N.C. 694, 448 S.E.2d 527 (1994). See Section II.H, above.]

5. When the court denies a request for modification:

a. The existing order remains in effect and unchanged.

b. Specific findings of fact generally are not required if the court denies a motion based on its conclusion that there has not been a substantial change of circumstances. [*See Davis v. Risley*, 104 N.C. App. 798, 801, 411 S.E.2d 171, 173 (1991) (quoting *Searl v. Searl,* 34 N.C. App. 583, 587, 239 S.E.2d 305, 308–09 (1977), *disapproved of on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998)) (court's conclusion that there was no substantial change of circumstances indicated that father did not meet his burden of proof, in which case, "[A] trial court is not required to make negative findings of fact to justify a holding that a party has not met his or her burden of proof on an issue"); *Searl*, 34 N.C. App. at 587, 239 S.E.2d at 308 (citing *In re Custody of Mason*, 13 N.C. App. 334, 185 S.E.2d 433 (1971)) (in custody context, when there is no change in circumstances warranting modification, district court not required to make negative findings of fact justifying a holding that a party has not met the burden of proof on an issue; trial court's conclusion that there were "no material changes of circumstances with respect to the custody and welfare of the minor children" since entry of the prior order was sufficient).]

6. Attorney fees.

   a. Where the action is solely to modify an award of support, the court may award attorney fees to an obligee pursuant to G.S. 50-13.6 if the court finds that the obligee was acting in good faith, that the obligee had insufficient means to defray the cost of the proceeding, and that the obligor refused to provide adequate support under the circumstances existing at the time of the institution of the action or proceeding. [*See* G.S. 50-13.6; *Mason v. Erwin,* 157 N.C. App. 284, 579 S.E.2d 120 (2003) (trial court's three findings, that plaintiff was acting in good faith to obtain reasonable support for her daughter, that she lacked sufficient means to pay her attorney fees, and that defendant had refused to provide support at time modification was sought, supported award of fees).]

   b. Addressing entitlement to an attorney fee award in connection with husband's filing of a motion to modify child support and considering for the first time the phrase "refused to provide adequate support under the circumstances existing at the time of the institution of the action or proceeding," the appellate court held that the action was instituted on the date that husband filed the motion to modify. [*Hill v. Hill,* 261 N.C. App. 600, 629, 821 S.E.2d 210, 230 (2018) (recognizing that wife had a claim for attorney fees related to her motion for contempt but dismissing her assertion that the date wife filed that motion should be used).]

   c. A court may award attorney fees to an interested party under G.S. 50-13.6 in connection with a supporting party's motion to modify a child support order if the court finds that the supporting party's motion to modify was "frivolous." [G.S. 50-13.6.]

   d. For more on attorney fees, see *Liability and Amount*, Part 1 of this Chapter, Section VIII.

7. Relief from a judgment or order pursuant to G.S. 1A-1, Rule 60.

   a. Relief pursuant to G.S. 1A-1, Rule 60(a) to correct a clerical mistake.

      i. G.S. 1A-1, Rule 60(a) allows a trial court to amend clerical mistakes or errors in judgments arising from oversight or omission.

ii. Rule 60(a) does not authorize a court to make substantive modifications to a judgment. [*Spencer v. Spencer,* 156 N.C. App. 1, 575 S.E.2d 780 (2003) (trial court made impermissible substantive change when it modified existing consent judgment by adding to decretal portion language that husband "shall" share equally in cost of child's college education when original judgment provided only in finding of fact section that parties "should" equally divide cost of child's college education); *S.C. Dep't of Soc. Servs. ex rel. Ratteree v. Hamlett*, 142 N.C. App. 501, 543 S.E.2d 189 (2001) (trial court substantially altered its 1991 order when, some nine years later, it added to the decretal portion of the order language nullifying a South Carolina judgment; the change prejudiced mother's rights to receive the child support ordered in that judgment by effectively reducing arrearages to zero and was not a mere correction of clerical error).]

b. Relief pursuant to G.S. 1A-1, Rule 60(b)(3) for fraud.

i. Fraud as a basis for relief from a judgment cannot be based on a statement that is true or represents the speaker's future intention. [*See Guilford Cty. ex rel. St. Peter v. Lyon*, 247 N.C. App. 74, 785 S.E.2d 131 (2016) (father sought relief from a permanent child support order based on mother's alleged fraud in obtaining father's agreement to deviate from the guideline support amount; fraud allegation was based on a statement, which mother did not admit making, that if father did not agree to pay child support greater than required by the guidelines, he would not be allowed to see their son; because representation was not false and evidenced a future act by mother, even if mother followed through on her statement, it would not be sufficient to grant relief from the judgment for fraud).]

ii. A motion for relief from an order pursuant to G.S. 1A-1, Rule 60(b)(3) for fraud must be brought within one year of the order's entry. [*Unger v. Unger*, 268 N.C. App. 142, 834 S.E.2d 649 (2019), *appeal dismissed*, 837 S.E.2d 721 (N.C.), *cert denied*, 851 S.E.2d 610 (N.C. 2020).]

J. Appeal

1. Dismissal of a motion to modify support based on the insufficiency of the allegations as a matter of law without the weighing of facts is subject to de novo review. [*Devaney v. Miller,* 191 N.C. App. 208, 662 S.E.2d 672 (2008) (citing *State ex rel. Lively v. Berry,* 187 N.C. App. 459, 653 S.E.2d 192 (2007)).]
2. Appeal of a modification order was dismissed as interlocutory when order required parents to submit affidavits of actual expenses each parent incurred for child's golf-related activities, which the court would then use to allocate the expenses between the parents. [*Plomaritis v. Plomaritis,* 200 N.C. App. 426, 684 S.E.2d 702 (2009) (order was not certified for immediate appeal and did not affect a substantial right).]
3. For appeal of a support order generally, including the effect of G.S. 50-19.1, see *Procedure for Initial Child Support Orders,* Part 2 of this Chapter, Section I.I.

III. Modifying Child Support Orders of Another State

A. Introduction

1. The Preventing Sex Trafficking and Strengthening Families Act of 2014: Improving Child Support Recovery, Pub. L. No. 113-183, required North Carolina to adopt the most recent amendments to the 2008 version of the Uniform Interstate Family Support Act (UIFSA) (G.S. Chapter 52C), to bring it into compliance with the Hague Convention on International Recovery of Child Support and Other Forms of Family Maintenance (the Convention). S.L. 2015-117, § 1, effective June 24, 2015, made the necessary amendments to G.S. Chapter 52C. For background of the 2015 amendments to UIFSA, see *Liability and Amount,* Part 1 of this Chapter, Section VII.A
2. Before June 24, 2015, the effective date of amendments to the Uniform Interstate Family Support Act (UIFSA):
   a. The terms "child support order", "home state", "initiating tribunal", "issuing tribunal", "responding tribunal", and "support order" were defined in terms of, or as being applicable to, a "state". [G.S. 52C-1-101(2); 52C-1-101(4); 52C-1-101(8); 52C-1-101(10); 52C-1-101(17); 52C-1-101(21).]
   b. The definition of "state" included each state in the United States, various territories and possessions, Indian tribes, and a foreign jurisdiction that has enacted a law or established procedures for issuance and enforcement of support orders which are substantially similar to the procedures under UIFSA, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act. [52C-1-101(19).]
   c. The term "foreign support order" was not defined in G.S. Chapter 52C and, based on the definition of "state" in G.S. 52C-1-101(19), was generally used to refer to an order for child support entered by a court in a state other than North Carolina or a foreign jurisdiction with a law or procedure substantially similar to UIFSA.
   d. Part 3, Article 6 of G.S. Chapter 52C, which included G.S. 52C-6-609 through 52C-6-614, addressed "Registration and Modification of Child Support Order[s]," with little differentiation between modification of an order of another state or of a foreign country, given that both were included in the definition of "state".
3. After June 24, 2015, the effective date of amendments to the Uniform Interstate Family Support Act (UIFSA):
   a. The six terms set out in Section III.A.2.a, above, were amended to specifically apply to a "state or a foreign country."
   b. Definitions were added for "foreign country", "foreign support order", "foreign tribunal", "issuing foreign country", and "outside this State". [G.S. 52C-1-101(3a); 52C-1-101(3b); 52C-1-101(3c); 52C-1-101(8a); 52C-1-101(13a).]
   c. "State" is now defined as a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession under the jurisdiction of the United States, including an Indian nation or tribe.

i. The definition of "state" in G.S. 52C-1-101(19) was amended to do away with the "legal fiction" that a foreign country can be a state of the United States. [Official Comment (2015), G.S. 52C-1-101.]

ii. In the current version of UIFSA, "state" is clearly intended to refer only to a state of the United States or to other designated political entities subject to federal law. [Official Comment (2015), G.S. 52C-1-101.] According to Official Comment (2015), G.S. 52C-1-101, the new definitions in UIFSA "are fine-tuned to avoid ambiguity in order to ensure that 'foreign' is used strictly to identify international proceedings and orders."

d. Part 3, Article 6 of G.S. Chapter 52C, which includes G.S. 52C-6-609 through 52C-6-614, as amended, now addresses registration and modification of child support orders of another state.

e. Part 4, Article 6 of G.S. Chapter 52C, which includes G.S. 52C-6-615 and 52C-6-616, was added by S.L. 2015-117, § 1, effective June 24, 2015, and addresses registration and modification of foreign child support orders.

4. Application and scope of Uniform Interstate Family Support Act (UIFSA) and Full Faith and Credit for Child Support Orders Act (FFCCSOA).

a. The rules regarding modification of support orders contained in UIFSA (G.S. Chapter 52C) apply to temporary, as well as final or permanent, child support orders issued by a state or a foreign country. [G.S. 52C-1-101(21), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (definition of "support order" includes a judgment, order, decision, or directive, whether temporary, final, or subject to modification, issued in a state or foreign country for the benefit of a child).]

b. The rules regarding modification of support orders contained in the federal FFCCSOA (28 U.S.C. § 1738B) apply to temporary, as well as final or permanent, child support orders issued by a state. [28 U.S.C. § 1738B(b)(5), *amended by* Pub. L. 113-183, Title III, § 301(f)(2)(B), (3)(B) (Sept. 29, 2014) (definition of "child support order" includes a permanent or temporary order); FFCCSOA is applicable to a child support order issued by a "state" as defined in 28 U.S.C. § 1738B(b)(9), but not to a foreign support order).]

c. Under UIFSA, a child support order means a support order for a child, which includes a child who has attained the age of majority under the law of the issuing state or foreign country. [G.S. 52C-1-101(2), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (definition of "child support order").]

5. An order of another state means an order of a tribunal in the other forty-nine U.S. states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, a U.S. Indian nation or tribe, or any territory or insular possession under the jurisdiction of the United States. [G.S. 52C-1-101(19), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (definition of "state"); 52C-1-101(22), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (definition of "tribunal").]

B. Statutory Authority to Modify Support Order of Another State

1. G.S. 50-13.7(b) authorizes a North Carolina court, upon gaining jurisdiction and upon a showing of changed circumstances, to enter a new child support order that modifies or supersedes a child support order previously entered by a court of another state.
    a. The Uniform Interstate Family Support Act (UIFSA) and Full Faith and Credit for Child Support Orders Act (FFCCSOA) significantly limit a North Carolina court's authority under G.S. 50-13.7(b) to modify a child support order entered by a court of another state. [*See* G.S. 52C-2-207(d) (tribunal that issued the controlling order has continuing jurisdiction to the extent provided in G.S. 52C-2-205), 52C-6-611 (setting out the criteria that must be satisfied before a North Carolina tribunal can modify a child support order of another state); 28 U.S.C. § 1738B(a)(2) (modification only in accordance with §§ 1738B(e), (f), and (i)); *Lacarrubba v. Lacarrubba,* 202 N.C. App. 532, 534, 688 S.E.2d 769, 771 (2010) (stating that UIFSA and FFCCSOA have "severely limited the circumstances under which a state may modify a child support order issued by another state"); *New Hanover Cty. ex rel. Mannthey v. Kilbourne,* 157 N.C. App. 239, 578 S.E.2d 610 (2003) (noting that after the 1996 amendment to FFCCSOA, it was identical to UIFSA, with both acts strictly prohibiting modification of a sister state's prior, valid order).]
    b. FFCCSOA requires that state courts afford "full faith and credit" to child support orders issued in other states and refrain from modifying or issuing contrary orders except in limited circumstances. [*State ex rel. Harnes v. Lawrence,* 140 N.C. App. 707, 538 S.E.2d 223 (2000).]
    c. FFCCSOA is binding on all states and supersedes any inconsistent provisions of state law. [*Uhrig v. Madaras,* 174 N.C. App. 357, 620 S.E.2d 730 (2005), *review denied,* 360 N.C. 367, 630 S.E.2d 455 (2006).]
    d. The restrictions on the authority of a court to modify apply to ongoing child support payments and to arrearages due under a child support order of another state. [*Lacarrubba v. Lacarrubba,* 202 N.C. App. 532, 688 S.E.2d 769 (2010) (order entered in New York, registered in Florida, and then registered in North Carolina); *New Hanover Cty. ex rel. Mannthey v. Kilbourne,* 157 N.C. App. 239, 578 S.E.2d 610 (2003) (a North Carolina court **cannot** modify child support arrearages that have accrued under a child support order issued by another state and are vested under a law similar to G.S. 50-13.10(a)).]
    e. Only an order entitled to recognition as the controlling order under UIFSA can be modified. [G.S. 52C-2-207.]
2. Under the Uniform Interstate Family Support Act (UIFSA) and Full Faith and Credit for Child Support Orders Act, a North Carolina court may modify a child support order issued by a court or tribunal of another state and registered in North Carolina in the following situations only:
    a. If all individual parties reside in North Carolina and the child does not reside in the issuing state; [G.S. 52C-6-613(a); *Hart v. Hart*, 268 N.C. App. 172, 836 S.E.2d 244 (2019) (noting that parties and their children were North Carolina residents when motion to modify was filed and holding that, under G.S. 52C-6-613(a), trial court had jurisdiction to enforce and modify out-of-state order).]

b. If G.S. 52C-6-613 does not apply, provided the following criteria under G.S. 52C-6-611(a)(1) are satisfied:

i. Neither the individual obligee, the obligor, nor the child resides in the issuing state;

ii. The North Carolina tribunal has personal jurisdiction over the respondent or nonmoving party; **and**

iii. The petitioner or party moving for modification is not a resident of North Carolina (the "play away" rule). [G.S. 52C-6-611(a)(1), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

(a) The result of the "play away" rule is that the nonresident movant for modification (usually the obligee) must play an away game on the home field of the other party (usually the obligor). [Official Comment (2015), G.S. 52C-6-611. *See Crenshaw v. Williams,* 211 N.C. App. 136, 710 S.E.2d 227 (2011) (obligee/custodial father filed for modification of a Michigan child support order in North Carolina, where father lived; G.S. 52C-6-611(a)(1) required father to register and seek modification of Michigan order in Georgia, where obligor mother lived).]

(b) New Jersey, the issuing tribunal, lost its continuing, exclusive jurisdiction to modify its support order as (1) neither the parties nor the child still resided in the issuing state; (2) the party seeking modification was a nonresident of North Carolina; and (3) the respondent was subject to the personal jurisdiction of the North Carolina court. [*Lombardi v. Lombardi,* 157 N.C. App. 540, 579 S.E.2d 419 (2003).]

(c) When a child support order issued in New York and registered in Florida was registered in North Carolina for enforcement only and North Carolina did not have personal jurisdiction over the nonmoving party, a Florida resident, the trial court lacked authority to modify the order. [*Lacarrubba v. Lacarrubba,* 202 N.C. App. 532, 688 S.E.2d 769 (2010).]

(d) Defendant's challenge to registration and enforcement of a support order of another state did not confer subject matter jurisdiction upon the trial court to modify the order. [*Lacarrubba v. Lacarrubba,* 202 N.C. App. 532, 688 S.E.2d 769 (2010).]

(e) A jurisdictional statement in an order confirming registration of an order for enforcement only does not give the court jurisdiction to modify the registered order. [*Lacarrubba v. Lacarrubba*, 202 N.C. App. 532, 538, 688 S.E.2d 769, 773 (2010) (rejecting argument that language in the order that the trial court had "personal and subject matter jurisdiction over the parties" gave North Carolina full and unfettered jurisdiction).]

(f) Even though issuing state (New York) had lost jurisdiction because parties and child had moved, registration in North Carolina of a child support order that had been registered in another state (Florida) did not give North Carolina jurisdiction to modify the order. [*Lacarrubba v. Lacarrubba,* 202 N.C. App. 532, 688 S.E.2d 769 (2010).]

(g) Trial court lacked jurisdiction under G.S. 52C-6-611 to modify a child support order issued in Russia pursuant to a motion filed in North Carolina by mother residing with child in North Carolina against father who resided in Canada. Mother was required to seek modification of the Russian order in Canada. [*Barclay v. Makarov,* 237 N.C. App. 398, 767 S.E.2d 152 (2014) (**unpublished**) (applying UIFSA provisions in effect before 2015 amendments) (Russia did not have continuing, exclusive jurisdiction to modify its order because neither party resided in Russia when modification was sought; if both parents had resided in North Carolina, North Carolina would have had jurisdiction to modify pursuant to G.S. 52C-6-613; because the parties here resided in different states and there was no state or country with continuing, exclusive jurisdiction, mother seeking modification had to register the Russian order in Canada, where father resided, as Canada was the only state, as that term was defined in G.S. C 52C-1-101(19)(b), with jurisdiction to modify).] Note that the outcome in *Barclay* would be the same after the 2015 amendments to UIFSA except that Canada would be considered a foreign country as defined in G.S. 52C-1-101(3a), *added by* S.L. 2015-117, § 1, effective June 24, 2015, instead of being considered a state.

c. If G.S. 52C-6-613 does not apply, provided the following criteria under G.S. 52C-6-611(a)(2) are satisfied:

i. North Carolina is the residence of the child, or a party who is an individual is subject to personal jurisdiction in North Carolina, and all individual parties have filed consents in a record with the issuing tribunal authorizing a North Carolina tribunal to modify the support order and assume continuing, exclusive jurisdiction. [G.S. 52C-6-611(a)(2), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; Official Comment (2015), 52C-6-611 (for another tribunal to assume modification jurisdiction by agreement under G.S. 52C-6-611(a)(2), the individual parties first must agree in a record to modification in the responding tribunal and file the record with the issuing tribunal; for the definition of a "record", see G.S. 52C-1-101(13c), *added by* S.L. 2015-117, § 1, effective June 24, 2015).]

(a) When the foreign child support order was registered in North Carolina for enforcement only and the parties had not consented to North Carolina's jurisdiction to modify the foreign order, the trial court lacked authority to modify the order or reduce arrearages. [*Lacarrubba v. Lacarrubba,* 202 N.C. App. 532, 688 S.E.2d 769 (2010).]

3. Conversely, a North Carolina tribunal may not modify a child support order issued by a tribunal of another state or foreign country if the issuing or other tribunal has continuing, exclusive jurisdiction under the Uniform Interstate Family Support Act (UIFSA) over its order. [*See* G.S. 52C-2-205, *amended by* S.L. 2015-117, § 1, effective June 24, 2015; Official Comment (2015) to G.S. 52C-2-205 considers 52C-2-205 as "perhaps the most crucial provision in UIFSA"); 28 U.S.C. § 1738B(e)(2), *amended by* Pub. L. 113-183, Title III, §§ 301(f)(2)(B), (3)(B) (Sept. 29, 2014) (under the Full Faith and Credit for Child Support Orders Act , a child support order may be modified by another state only if the rendering state no longer has continuing, exclusive jurisdiction over the child support order or

each individual contestant has filed written consent with the state of continuing, exclusive jurisdiction for a court of another state to modify the order and assume continuing, exclusive jurisdiction; Official Comment (2015), G.S. 52C-6-611 (citing G.S. 52C-2-205 through 52C-2-207, if an issuing tribunal has continuing, exclusive jurisdiction over its child support order, a responding tribunal is precluded from modifying the controlling order).]

a. A North Carolina tribunal that has issued a valid child support order has and shall exercise continuing, exclusive jurisdiction to modify the order if the order is the controlling order and (1) at the time a request for modification is filed, either the individual obligee, the obligor, or the child for whose benefit the support order was issued resides in North Carolina or (2) even if the individual obligee, the obligor, or the child for whose benefit the support order was issued do not reside in North Carolina, the parties consent in a record or in open court for a tribunal in North Carolina to continue to exercise jurisdiction to modify its order. [G.S. 52C-2-205(a)(1), (2), *amended by* S.L. 2015-117, § 1, effective June 24, 2015, and the Official Comment (2015), which states that the issuing tribunal retains continuing, exclusive jurisdiction over a child support order, except in very narrowly defined circumstances; 28 U.S.C. § 1738B(e)(2), *amended by* Pub. L. No. 113-183, Title III, §§ 301(f)(2)(B), (3)(B) (Sept. 29, 2014).]

   i. Modification of a valid order by a responding state is allowable only if the court has jurisdiction to enter the order and all parties have consented to the jurisdiction of the responding state to modify the order or if neither the child nor any of the parties remain in the issuing state. [*State ex rel. Lively v. Berry,* 187 N.C. App. 459, 653 S.E.2d 192 (2007) (where mother still resided in Florida and had not consented to North Carolina's exercise of jurisdiction, North Carolina did not have jurisdiction to modify the child support order; Florida retained jurisdiction).]

b. Cases where modification not allowed because issuing court had continuing, exclusive jurisdiction.

   i. *State ex rel. Harnes v. Lawrence,* 140 N.C. App. 707, 538 S.E.2d 223 (2000) (New Jersey retained continuing, exclusive jurisdiction when mother and child continued to live in that state and mother had not consented to a modification of the New Jersey child support order).

   ii. *State ex rel. George v. Bray,* 130 N.C. App. 552, 503 S.E.2d 686 (1998) (mother remained in the issuing state, Indiana, and she had not consented to jurisdiction in North Carolina for modification of the order; Indiana retained continuing, exclusive jurisdiction over the action).

   iii. *Hinton v. Hinton*, 128 N.C. App. 637, 496 S.E.2d 409 (1998) (when Texas court had continuing, exclusive jurisdiction over order under UIFSA and there was no showing of consent of all parties to allow North Carolina to assume jurisdiction, North Carolina court could not modify order).

   iv. *Welsher v. Rager,* 127 N.C. App. 521, 491 S.E.2d 661 (1997) (noting that without evidence in the record that the issuing state has lost jurisdiction or that the parties consented to jurisdiction in North Carolina, no North Carolina court could vacate or modify the foreign order).

4. If a North Carolina court lacks the authority under the Uniform Interstate Family Support Act and Full Faith and Credit for Child Support Orders Act to modify a child support order of another state, the North Carolina court may serve as an initiating tribunal to forward proceedings to a tribunal of another state. [G.S. 52C-2-203, *added by* S.L. 2015-117, § 1, effective June 24, 2015; Official Comment (2015), G.S. 52C-2-203 (G.S. 52C-2-203 does not deal with whether an initiating tribunal may forward a proceeding to a tribunal in a foreign country, which may be left to the individual support enforcement agency. See also *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section II.B.2.]

C. Procedure

1. Registration and modification of a support order before June 24, 2015.
    a. Former definition of "state". If a foreign jurisdiction is not a "state" under UIFSA, then the district courts of North Carolina do not have statutory authority under UIFSA to register an alimony or child support order from that foreign jurisdiction. [*Haker-Volkening v. Haker*, 143 N.C. App. 688, 547 S.E.2d 127, *review denied,* 354 N.C. 217, 554 S.E.2d 338 (2001).]
        i. With respect to a foreign jurisdiction, "state" means a foreign jurisdiction that has enacted a law or established procedures for issuance and enforcement of support orders that are substantially similar to the procedure under UIFSA, URESA, or RURESA (Revised Uniform Reciprocal Enforcement of Support Act, which, like URESA, was superseded by UIFSA). [G.S. 52C-1-101(19b).]
        ii. England is a "state" for purposes of registering a child support order under UIFSA. [*Ugochukwu v. Ugochukwu,* 176 N.C. App. 741, 627 S.E.2d 625 (2006); *Foreman v. Foreman*, 144 N.C. App. 582, 550 S.E.2d 792 (holding that England has reciprocity with North Carolina in issues of support, in this case, spousal support), *review denied,* 354 N.C. 68, 553 S.E.2d 38 (2001).]
        iii. Switzerland does not constitute a "state" as that term is defined by UIFSA. [*Haker-Volkening v. Haker*, 143 N.C. App. 688, 547 S.E.2d 127 (trial court's registration of the Swiss order vacated), *review denied,* 354 N.C. 217, 554 S.E.2d 338 (2001).]
2. Registration and modification of a support order after June 24, 2015.
    a. Generally.
        i. A party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another state shall register that order in this state if it has not already been registered. [G.S. 52C-6-609, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]
            (a) A "support order" is defined as a judgment, decree, order, decision, or directive, whether temporary, final, or subject to modification, issued in a state or a foreign country for the benefit of a child, which provides for monetary support, health care, arrearages, retroactive support, or reimbursement for financial assistance provided to an individual obligee in place of child support. A support order may include related costs and fees, interest, income withholding, automatic adjustment, reasonable attorney fees, and other relief. [G.S. 52C-1-101(21), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

ii. Registration is a procedural requirement rather than a jurisdictional requirement. [*Hart v. Hart*, 268 N.C. App. 172, 836 S.E.2d 244 (2019) (registration was accomplished, and trial court had subject matter jurisdiction to modify an out-of-state child support order, when registering party substantially complied with statutory registration requirements by filing two of the three parts of the controlling child support order; neither parent was prejudiced by the inadvertent failure to file missing part).]

iii. Registration is in the same manner provided in G.S. 52C-6-601 through 52C-6-608. [G.S. 52C-6-609, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

iv. Modification of a registered child support order is subject to the same requirements, procedures, and defenses that apply to the modification of an order issued by a North Carolina court. [G.S. 52C-6-611(b).]

b. Registration is subdivided into distinct categories:

i. Registration for enforcement; [G.S. 52C-6-601 through 52C-6-608, *all amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

ii. Registration for modification; [G.S. 52C-6-609, *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (a child support order issued in another state is registered in this state in the same manner provided in G.S. 52C-6-601 through 52C-6-608).] or

iii. Registration for both enforcement and modification. [Official Comment (2015), G.S. 52C-6-609 (if the tribunal has the requisite personal jurisdiction over the parties and may assume subject matter jurisdiction as provided in G.S. 52C-6-611 or 52C-6-613, modification may be sought in connection with registration and enforcement); Official Comment (2015), G.S. 52C-6-610 (an order issued in another state registered for purposes of modification may be enforced in the same manner as an order registered for purposes of enforcement).]

c. Filing with the clerk. A party or support enforcement agency seeking modification of a child support order issued in another state must register that order with the clerk of superior court in the same manner provided in G.S. 52C-6-602 through 52C-6-608. [G.S. 52C-6-609, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

i. A petition to register a Florida order for custody and support pursuant to G.S. 50A-305 of the Uniform Child Custody Jurisdiction and Enforcement Act did not substantially comply with the UIFSA registration requirements in G.S. 52C-6-602 when the petition did not request modification or enforcement and failed to set out the amount of any child support arrearage. The trial court's dismissal of the petition pursuant to G.S. 1A-1, Rule 12(b)(6) was affirmed, with the appellate court describing the petition as "both in substance and in form a petition to register a foreign custody order" under G.S. 50A-305, not a petition to register a foreign support order under UIFSA. [*Halterman v. Halterman*, 276 N.C. App. 66, 73, 855 S.E.2d 812, 817 (2021).]

d. Effect of filing a support order issued in another state or a foreign support order.

i. A support order issued in another state or a foreign support order is registered when the order is filed in the registering tribunal of this state. [G.S. 52C-6-603(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

ii. Upon filing, a support order becomes registered in North Carolina, and unless successfully contested, it must be recognized and enforced. [*Martin Cty. ex rel. Hampton v. Dallas,* 140 N.C. App. 267, 535 S.E.2d 903 (2000) (citing *Welsher v. Rager,* 127 N.C. App. 521, 491 S.E.2d 661 (1997)); *Hart v. Hart*, 268 N.C. App. 172, 836 S.E.2d 244 (2019) (a support order of another state is registered and enforceable upon filing in North Carolina).]

e. Effect of registration for purposes of modification.

i. A North Carolina tribunal may enforce an order of another state registered for modification in the same manner as if the order had been issued by a tribunal of this state. [G.S. 52C-6-610, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

ii. A North Carolina tribunal may modify an order registered for modification only if the requirements of G.S. 52C-6-611 or G.S. 52C-6-613 have been met. [G.S. 52C-6-610, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] See Section III.B.2.b, above.]

iii. Registration of an out-of-state child support order for enforcement in North Carolina pursuant to UIFSA does not, in and of itself, give a North Carolina court jurisdiction to modify the registered child support order. [G.S. 52C-6-603(c), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; *Hart v. Hart*, 268 N.C. App. 172, 836 S.E.2d 244 (2019) (citing G.S. 52C-6-603(c)). *See Hinton v. Hinton*, 128 N.C. App. 637, 496 S.E.2d 409 (1998).]

f. Documents required for registration.

i. Two copies (including one certified copy) of the order to be registered and any order modifying the order. [G.S. 52C-6-602(a)(2), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

ii. The other documents and information set out in G.S. 52C-6-602(a) also must be submitted for filing.

iii. If two or more orders are in effect, the person requesting registration must:

(a) Furnish to the tribunal a copy of every support order asserted to be in effect in addition to the documents specified in G.S. 52C-6-605.

(b) Specify the order alleged to be the controlling order, if any.

(c) Specify the amount of consolidated arrearages, if any. [G.S. 52C-6-602(d), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

(d) Notwithstanding G.S. 52C-3-310 and 52C-6-602(a), a request for registration of a Hague Convention on International Recovery of Child Support and Other Forms of Family Maintenance (Convention) support order must be accompanied by the documents and information set out in G.S. 52C-7-706(b), *added by* S.L. 2015-117, § 1, effective June 24, 2015.

iv. The registering party must **substantially** comply with the requirements in G.S. 52C-6-602 for registering a child support order for modification. [*See Twaddell v. Anderson*, 136 N.C. App. 56, 523 S.E.2d 710 (1999) (required information found upon a close reading of the submitted material), *review denied,* 351 N.C. 480, 543 S.E.2d 510 (2000); *Hart v. Hart*, 268 N.C. App. 172, 836 S.E.2d

244 (2019) (citing *Twaddell*) (father sought to modify a child support order registered for enforcement in North Carolina by mother, but mother had registered only two of the three parts of the order; mother found to have substantially complied with statutory registration requirements, giving the trial court subject matter jurisdiction in the modification proceeding; neither parent was prejudiced by the inadvertent failure to file missing part of the order).]

g. If two or more orders are in effect, a request for a determination of which is the controlling order may be filed separately or with a request for registration and modification. [G.S. 52C-6-602(e), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

i. The person requesting registration must give notice of the request for determination of controlling order to each party whose rights may be affected by the determination. [G.S. 52C-6-602(e), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

h. Motion to modify may be filed with a request for registration.

i. A petition or motion seeking modification of the registered order may be filed at the same time as the request for registration or at a later time. [G.S. 52C-6-609, *amended by* S.L. 2015-117, § 1, effective June 24, 2015; 52C-6-602(c).]

ii. A petition or motion seeking modification of the registered order, as a motion for modification pursuant to G.S. 50-13.7, must be made in writing, state the facts upon which the motion is based, indicate the relief sought, and be served on the respondent. [See Section II.F.2, above.]

i. Appeal.

i. A trial court's compliance with UIFSA registration procedures is a question of law reviewed de novo on appeal. [*Hart v. Hart*, 268 N.C. App. 172, 836 S.E.2d 244 (2019) (citing *Crenshaw v. Williams,* 211 N.C. App. 136, 710 S.E.2d 227 (2011)).]

3. Contesting the validity or enforcement of a registered support order. [G.S. 52C-6-606.]

a. The respondent may contest the validity or enforcement of a registered order in this state by filing a request for a hearing before a district court judge within the time required by G.S. 52C-6-605(b), which is twenty days after notice of registration, unless the registered order is under G.S. 52C-7-707 (time is extended for cases subject to the Convention). [G.S. 52C-6-606(a); 52C-6-605(b); 52C-6-609, *all amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

b. If a respondent requests a hearing, the registering tribunal must schedule the matter for hearing before a district court judge and give notice of the hearing to the parties. [G.S. 52C-6-606(c); 52C-6-609, *both amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

c. The respondent may contest the validity of a registered support order or seek to vacate the registration by asserting one or more of the following defenses:

i. The issuing tribunal lacked personal jurisdiction over the nonregistering party in the original proceeding; [G.S. 52C-6-607(a)(1); Official Comment (2015), G.S. 52C-6-607.]

ii. The order was obtained by fraud; [G.S. 52C-6-607(a)(2).]

iii. The order has been vacated, suspended, or modified by a later order; [G.S. 52C-6-607(a)(3).]

iv. The issuing tribunal has stayed the order pending appeal; [G.S. 52C-6-607(a)(4).] or

v. The alleged controlling order is not the controlling order. [G.S. 52C-6-607(a)(8), *added by* S.L. 2015-117, § 1, effective June 24, 2015.] For a complete list of the defenses set out in the statute, see G.S. 52C-6-607(a) or *Enforcement of Child Support Orders,* Part 4 of this Chapter, Section II.A.3.

d. The respondent has the burden of proving any of the defenses listed immediately above. [G.S. 52C-6-607(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; *Martin Cty. ex rel. Hampton v. Dallas,* 140 N.C. App. 267, 535 S.E.2d 903 (2000) (trial court erred in placing the burden on the registering party to prove that a Virginia order should be registered in North Carolina; dispute as to amount of arrearages did not shift burden of proof to registering party).]

e. If the respondent does not establish a defense under G.S. 52C-6-607(a), the registering tribunal must issue an order confirming the registered support order. [G.S. 52C-6-607(c), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

f. The respondent also may contest the validity of a registered support order or seek to vacate the registration by asserting that the registering tribunal lacks jurisdiction to modify the registered order under G.S. 52C-6-611 and 52C-6-613.

g. The respondent's failure to contest the validity or enforcement of the registered support order in a timely manner constitutes a waiver of the defense, resulting in the order being confirmed by operation of law. [G.S. 52C-6-606(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

h. Confirmation of a registered support order, whether by operation or law or after notice and hearing, precludes further contest of the order as to any matter that could have been asserted at the time of registration. [G.S. 52C-6-608, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

i. The district court judge must consider and rule on the validity of any of the above-listed defenses that are asserted by the respondent (including defenses based on the issuing court's lack of jurisdiction, unless the issue of jurisdiction has been conclusively determined by a prior decision that is res judicata). [*See Martin Cty. ex rel. Hampton v. Dallas,* 140 N.C. App. 267, 535 S.E.2d 903 (2000) (conflicts in the evidence presented by defendant and by plaintiff are for the trial court to resolve; their mere presence does not justify or permit vacation of the prior registration).]

j. Defendant's challenge to registration and enforcement of a support order of another state did not confer subject matter jurisdiction upon the trial court to modify the order. [*Lacarrubba v. Lacarrubba,* 202 N.C. App. 532, 688 S.E.2d 769 (2010) (moreover, when matter heard, defendant consented to registration).]

k. A jurisdictional statement in an order confirming registration of an order for enforcement only does not give the court jurisdiction to modify the registered order. [*Lacarrubba v. Lacarrubba,* 202 N.C. App. 532, 538, 688 S.E.2d 769, 773 (2010) (rejecting argument that language in the order that the trial court had "personal and

subject matter jurisdiction over the parties" gave North Carolina full and unfettered jurisdiction).]

4. Confirmation of a support order issued in another state.
    a. Confirmation can only occur in two ways:
        i. Where a respondent contests a registered order within twenty days after notice of registration, unless the registered order is under G.S. 52C-7-707 (registered Convention support order), a hearing is held, and respondent's contest is unsuccessful. [G.S. 52C-6-605, 52C-6-606(a), 52C-6-608, *all amended by* S.L. 2015-117, § 1, effective June 24, 2015.]
        ii. By operation of law where a respondent fails to contest a registered order within a timely manner. [G.S. 52C-6-606(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; *Tepper v. Hoch*, 140 N.C. App. 354, 536 S.E.2d 654 (2000).]
    b. Setting aside a confirmation for excusable neglect.
        i. If a respondent fails to contest registration of a foreign support order within twenty days after notice of registration, the court may, on the court's own initiative or upon motion and a showing of excusable neglect and a meritorious defense, set aside confirmation of the registered order to allow the respondent to contest registration of the order. [*Tepper v. Hoch*, 140 N.C. App. 354, 536 S.E.2d 654 (2000) (confirmation set aside under G.S. 1A-1, Rule 60(b)(1) due to former husband's inadvertent failure to request a hearing).]
    c. Effect of confirmation.
        i. Confirmation of a support order, whether by action or as the result of inaction, validates both the terms of the order and the asserted arrearages. [Official Comment (2015), G.S. 52C-6-608.]

D. Choice of Law

1. G.S. 52C-6-604, *amended by* S.L. 2015-117, § 1, effective June 24, 2015, establishes choice of law rules based on the principle in the Uniform Interstate Family Support Act that throughout the process, the controlling order remains the order of the tribunal of the issuing state or foreign country until a valid modification. [Official Comment (2015), G.S. 52C-6-604.]
2. A North Carolina tribunal with jurisdiction under G.S. 52C-6-613 (all individual parties reside in this state and the child does not reside in the issuing state) must apply Chapter 52C, Articles 1 (General Provisions) and 2 (Jurisdiction) and the procedural and substantive law of North Carolina to the modification proceeding. Articles 3, 4, 5, 7, and 8 of Chapter 52C do not apply. [G.S. 52C-6-613(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]
3. Modification of a registered child support order is subject to the same requirements, procedures, and defenses that apply to the modification of an order issued by a North Carolina tribunal. [G.S. 52C-6-611(b); Official Comment (2015), G.S. 52C-6-611 (under subsection (b), when a responding tribunal assumes modification jurisdiction because the issuing tribunal has lost continuing, exclusive jurisdiction, the proceedings will follow

local law with regard to modification of a child support order, except as provided in G.S. 52C-6-611(c) and (c1)).]

4. General rule.
    a. Once North Carolina has obtained modification jurisdiction under G.S. 52C-6-611 or 52C-6-613, the North Carolina court must apply the law of the forum. [*Lombardi v. Lombardi,* 157 N.C. App. 540, 579 S.E.2d 419 (2003) (noting one of the exceptions to this rule, discussed below).]
    b. In other words, a North Carolina court may modify the registered child support order if, applying the procedural and substantive law of North Carolina as set forth in G.S. 50-13.7, 50-13.10, 52C-6-611, and applicable case law, it determines that there has been a substantial change of circumstances warranting modification of the order. [See Section II, above.]
5. The general rule is subject to the following exceptions.
    a. Pursuant to G.S. 52C-6-604(d), *added by* S.L. 2015-117, § 1, effective June 24, 2015, after a tribunal in North Carolina or another state determines which is the controlling order and issues an order consolidating arrearages, if any, a North Carolina tribunal must prospectively apply the law of the state or foreign country issuing the controlling order, including its law on interest on arrearages, on current and future support, and on consolidated arrearages.
    b. Pursuant to G.S. 52C-6-611(c), *amended by* S.L. 2015-117, § 1, effective June 24, 2015, when North Carolina is acting as a responding state with respect to a child support order registered in North Carolina, it may not modify any aspect of a child support order that may not be modified under the law of the issuing state, including the duration of the obligation of support.
        i. In a modification proceeding, the law of the state that issued the initial controlling order governs the duration of the support obligation. The obligor's fulfillment of the duty of support established by that order precludes imposition of a further obligation of support by a tribunal in North Carolina. [G.S. 52C-6-611(c1), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]
        ii. Subsection 611(c1) as modified makes clear that "the original time frame for support is not modifiable unless the law of the issuing state provides for its modification." [Official Comment (2015), G.S. 52C-6-611(c).] For example, if a child support order was entered by a New York court and New York law requires that child support be paid until a child's 21st birthday, a North Carolina court may not modify the order to require that child support be paid only until the child's 18th birthday.
    c. When a term is not final and is modifiable, the order may be modified. [*Lombardi v. Lombardi,* 157 N.C. App. 540, 579 S.E.2d 419 (2003) (New Jersey court's determination that mentally retarded child was unemancipated was not a final, nonmodifiable term of the order so father's support obligation was modifiable; North Carolina court could modify order under North Carolina law so that father was no longer required to pay support).]

6. When a tribunal in North Carolina modifies, consistent with the Uniform Interstate Family Support Act (UIFSA), a child support order issued in another state, the North Carolina tribunal becomes, from that point forward, the tribunal of continuing, exclusive jurisdiction. [G.S. 52C-6-611(d), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; Official Comment (2015), G.S. 52C-6-611 (pursuant to 52C-6-611(d), on modification the new child support order becomes the controlling order to be recognized by all UIFSA states); *Lombardi v. Lombardi,* 157 N.C. App. 540, 579 S.E.2d 419 (2003) (after North Carolina court modified a New Jersey order, North Carolina court became court with continuing, exclusive jurisdiction).] Good practice mandates that the responding tribunal should explicitly state in its order that it is assuming responsibility for the controlling child support order. [Official Comment (2015), G.S. 52C-6-611(c).]

IV. Registration and Modification of a Foreign Child Support Order (other than a Hague Convention on International Recovery of Child Support and Other Forms of Family Maintenance (Convention) Order)

A. Introduction

1. Part 4, Article 6 of G.S. Chapter 52C, which includes G.S. 52C-6-615 and 52C-6-616, was added by S.L. 2015-117, § 1, effective June 24, 2015, and addresses registration and modification of foreign child support orders.
2. "Foreign country" is defined as a country, including a political subdivision thereof, other than the United States, that authorizes the issuance of support orders and:
   a. Which has been declared under the law of the United States to be a foreign reciprocating country,
   b. Which has established a reciprocal arrangement for child support with North Carolina as provided in G.S. 52C-3-308,
   c. Which has enacted a law or established procedures for the issuance and enforcement of support orders which are substantially similar to the procedures under the Uniform Interstate Family Support Act, or
   d. In which the Convention is in force with respect to the United States. [G.S. 52C-1-101(3a), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

B. Statutory Authority

1. Jurisdiction for a North Carolina tribunal to modify a child support order of a foreign country is addressed in G.S. 52C-6-615.
   a. Except as provided in G.S. 52C-7-711 (modification of a Convention child support order), if a foreign country lacks or refuses to exercise jurisdiction to modify its child support order, a North Carolina tribunal may assume jurisdiction to modify the child support order and bind all individuals subject to personal jurisdiction in North Carolina, whether the consent to modification of a child support order otherwise required of the individual pursuant to G.S. 52C-2-6-611 has been given or whether

the individual seeking modification is a resident of North Carolina or of the foreign country. [G.S. 52C-6-615(a), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

b. An order issued by a North Carolina tribunal modifying a foreign child support order pursuant to G.S. 52C-6-615(a) is the controlling order. [G.S. 52C-6-615(b), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

2. The procedure to register a child support order of a foreign country for modification is addressed in G.S. 52C-6-616.

a. A party or support enforcement agency seeking to modify, or to modify and enforce, a foreign child support order not under the Convention may register the order in North Carolina under G.S. 52C-6-601 through 52C-6-608 if the order has not been registered. [G.S. 52C-6-616, *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

b. A petition for modification may be filed at the same time as a request for registration, or at another time, and must specify the grounds for modification. [G.S. 52C-6-616, *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

V. Other Issues

A. Modification of Child Support Provisions in an Unincorporated Separation Agreement

1. An unincorporated separation agreement is a contract and can be modified only with consent of the parties. [*Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983); *Ticconi v. Ticconi,* 161 N.C. App. 730, 589 S.E.2d 371 (2003); *Torres v. McClain*, 140 N.C. App. 238, 535 S.E.2d 623 (2000); *Rose v. Rose,* 108 N.C. App. 90, 422 S.E.2d 446 (1992) (trial court erred by modifying child support provision in an unincorporated agreement without the consent of both parties). *See also Danai v. Danai*, 166 N.C. App. 279, 603 S.E.2d 168 (2004) (**unpublished**) (in alimony case, district court's lack of jurisdiction to modify an unincorporated separation agreement not cured by provision in the agreement authorizing modification by a court of competent jurisdiction); *Shaffner v. Shaffner,* 36 N.C. App. 586, 588, 244 S.E.2d 444, 446 (1978) (emphasis added) (citing *Church v. Hancock,* 261 N.C. 764, 136 S.E.2d 81 (1964)) ("[t]o the extent an [unincorporated] agreement makes provision for the maintenance and support of a child *past his majority,* it is beyond the inherent power of the court to modify absent the consent of the parties and [agreement] is enforceable at law as any other contract").]

2. Support obligations established by unincorporated separation agreements can be modified only by written agreement executed in accordance with G.S. 52-10.1. [*See Greene v. Greene,* 77 N.C. App. 821, 336 S.E.2d 430 (1985) (attempted oral modification of alimony provisions in unincorporated separation agreement did not meet formalities and requirements of G.S. 52-10.1; husband obligated for payments as set out in the agreement); *Jones v. Jones,* 162 N.C. App. 134, 590 S.E.2d 308 (2004) (citing *Greene*) (conversations between husband and wife in which they purportedly agreed to modify the alimony provisions in their separation agreement, even if true, could not modify that agreement).]

3. G.S. 50-13.7, on modification of an order for child support, does not apply to child support obligations that are included in an **unincorporated** separation agreement or

property settlement. [*Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part*, 359 N.C. 65, 602 S.E.2d 360 (2004); *Bottomley v. Bottomley*, 82 N.C. App. 231, 346 S.E.2d 317 (1986).]

4. For a discussion on establishing child support when there is a prior unincorporated separation agreement, including the application of *Carson v. Carson,* 199 N.C. App. 101, 680 S.E.2d 885 (2009), and *Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part*, 359 N.C. 65, 602 S.E.2d 360 (2004), see *Procedure for Initial Child Support Orders,* Part 2 of this Chapter, Section III.C.3. For discussion of establishment of court-ordered support following execution of an unincorporated separation agreement regarding support, see *Procedure for Initial Child Support Orders,* Part 2 of this Chapter, Chapter 3, Section I.G.6.
5. For more on the modification of child support provisions in an unincorporated separation agreement generally, see *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

B. Modification of Child Support Provisions in an Incorporated Separation Agreement

1. Child support provisions in an incorporated separation agreement are modifiable in the same manner as any other child support order. [*Walters v. Walters,* 307 N.C. 381, 298 S.E.2d 338 (1983); *Beamer v. Beamer,* 169 N.C. App. 594, 610 S.E.2d 220 (2005); *Tyndall v. Tyndall*, 80 N.C. App. 722, 343 S.E.2d 284 (citing *Walters*), *review denied*, 318 N.C. 420, 349 S.E.2d 606 (1986); *Holthusen v. Holthusen,* 79 N.C. App. 618, 339 S.E.2d 823 (1986).]
2. When a separation agreement has been incorporated into a divorce judgment, the relevant date for a change of circumstances is the date of incorporation and not the date the agreement was executed. [*Smart v. State ex rel. Smart,* 198 N.C. App. 161, 678 S.E.2d 720 (2009) (when a separation agreement has been incorporated into a divorce judgment, the court must compare present circumstances to those existing on the date of incorporation to determine whether there has been a substantial change in circumstances; a change of circumstances between execution of the separation agreement and entry of the divorce decree incorporating that agreement is irrelevant to a motion to modify).]
3. The parties may not extrajudicially modify the provisions of a child support order through unilateral action or mutual agreement (other than a consent order approved by the court). [*Baker v. Showalter*, 151 N.C. App. 546, 566 S.E.2d 172 (2002) (parties could not modify a child support order by oral agreement; amount of support in incorporated separation agreement remained in effect).]
4. For more about child support provisions in an incorporated separation agreement, see *Procedure for Initial Child Support Orders,* Part 2 of this Chapter, Section III.C.2.
5. For more on the modification of child support provisions in an incorporated separation agreement generally, see *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

C. Modification of Child Support Orders Entered under URESA

1. Although North Carolina's Uniform Reciprocal Enforcement of Support Act (URESA) was repealed effective Jan. 1, 1996, URESA's provisions regarding modification of child support orders of another state will determine whether a child support order entered under URESA before Jan. 1, 1996, modified or superseded a prior child support order. [*See New Hanover Cty. ex rel. Mannthey v. Kilbourne*, 157 N.C. App. 239, 578 S.E.2d 610 (2003)

(citing *Twaddell v. Anderson,* 136 N.C. App. 56, 523 S.E.2d 710 (1999), *review denied*, 351 N.C. 480, 543 S.E.2d 510 (2000)) (although superseded by the Uniform Interstate Family Support Act (UIFSA), URESA is still applicable to determine the validity of an order originally entered when URESA was in effect).]

a. If the URESA order did not modify or supersede a prior order, **both** orders remain valid. [*See Twaddell v. Anderson*, 136 N.C. App. 56, 523 S.E.2d 710 (1999) (1986 North Carolina order entered under URESA did not nullify, supersede, or void a California order entered in 1981), *review denied,* 351 N.C. 480, 543 S.E.2d 510 (2000); *New Hanover Cty. ex rel. Mannthey v. Kilbourne*, 157 N.C. App. 239, 578 S.E.2d 610 (2003); *cf. Wilson Cty. ex rel. Egbert v. Egbert*, 153 N.C. App. 283, 569 S.E.2d 727 (2002) (1989 North Carolina support order not modified by subsequent Florida orders reducing and then terminating father's support obligation; North Carolina order entered in 2001 for arrearages based on 1989 order affirmed).]

b. If the URESA order did modify or supersede the prior order, the prior order is not a "valid" order to be considered when applying UIFSA's rules to determine the controlling child support order pursuant to G.S. 52C-2-207.

c. In North Carolina, the "one order" rules of the Uniform Interstate Family Support Act (UIFSA) (G.S. Chapter 52C) and the Full Faith and Credit for Child Support Orders Act (FFCCSOA) (28 U.S.C. § 1738B) took effect on Jan. 1, 1996. In other states, UIFSA's and FFCCSOA's "one order" rules took effect on Aug. 22, 1996, or the effective date of the issuing state's UIFSA statute, whichever was earlier. [28 U.S.C. § 1738B, *amended by* Pub. L. No. 104-193, § 322.]

2. Under North Carolina's former URESA statute, a "de novo" child support order entered by a North Carolina court under URESA (former G.S. 52A-13) before Jan. 1, 1996, did not nullify, supersede, or modify a prior child support order entered by a North Carolina court or by a court of a sister state under URESA or any other law, unless the URESA order expressly and specifically stated that it nullified, superseded, or modified the prior child support order and the modification was ordered in accordance with G.S. 50-13.7 and 50-13.10. [*See* former G.S. 52A-21; *S.C. Dep't of Soc. Servs. ex rel. Ratteree v. Hamlett*, 142 N.C. App. 501, 543 S.E.2d 189 (2001); *Stephens v. Hamrick*, 86 N.C. App. 556, 358 S.E.2d 547 (1987).]

a. Thus, a case may involve more than one valid order even if the orders are inconsistent in their terms. [*New Hanover Cty. ex rel. Mannthey v. Kilbourne*, 157 N.C. App. 239, 578 S.E.2d 610 (2003).]

b. The URESA statutes of most other states included an "anti-nullification" provision similar to former G.S. 52A-21.

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Chapter 3: **Child Support**

Part 4. Enforcement of Child Support Orders

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Part 4. Enforcement of Child Support Orders

I. Judicial Proceedings to Enforce Child Support Orders

A. Subject Matter Jurisdiction

1. Jurisdiction to enforce current or future support obligations.
    a. Subject to Section I.A.1.b, immediately below, any state with appropriate personal jurisdiction [See Section I.B, below.] has subject matter jurisdiction to enforce a registered child support order. [*See* G.S. 52C-6-603(c), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (state shall recognize and enforce a registered support order issued in another state or a foreign country).]
    b. A court may **not** enforce a child support order **prospectively** (that is, enforce the order with respect to an obligor's **current** or **future** child support obligations as opposed to enforcing the obligor's obligation to pay vested, past due child support arrearages that have accrued under the order) unless the order is determined to be the "controlling" order under the Uniform Interstate Family Support Act (UIFSA) (G.S. Chapter 52C) (applicable to a child support order issued by a state tribunal and to a foreign support order) or the federal Full Faith and Credit for Child Support Orders Act (FFCCSOA) (28 U.S.C. § 1738B) (applicable to a child support order issued by a state tribunal but not to a foreign support order).
        i. While the problem of multiple orders is "fast disappearing," at least on the appellate level, G.S. 52C-2-207 sets out a "relatively simple procedure to identify a single viable order that will be entitled to prospective enforcement in every state." [Official Comment (2015), G.S. 52C-2-207.]
        ii. If only one tribunal has issued a child support order, that order controls. [G.S. 52C-2-207(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] This order controls regardless of when and where it was issued and whether any of the individual parties or the child continue to reside in the issuing state. [Official Comment (2015), G.S. 52C-2-207.]
        iii. If two or more child support orders have been issued by tribunals in North Carolina, another state, or a foreign country for the same obligor and same child, a North Carolina tribunal having personal jurisdiction over both the obligor and individual obligee shall determine which order controls by applying the rules in G.S. 52C-2-207(b).

(a) If only one of the tribunals would have continuing, exclusive jurisdiction under UIFSA, the order of that tribunal controls. [G.S. 52C-2-207(b)(1), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

(b) If more than one tribunal would have continuing, exclusive jurisdiction under UIFSA, an order issued by a tribunal in the child's current home state controls. [G.S. 52C-2-207(b)(2)a., *amended by* S.L. 2015-117, § 1, effective June 24, 2015; see definition of "home state" in G.S. 52C-1-101(4), *amended by* S.L. 2015-117, § 1, effective June 24, 2015, to include a foreign country.]

(c) If more than one tribunal would have continuing, exclusive jurisdiction under UIFSA and no order has been issued in the child's current home state, the order most recently issued controls. [G.S. 52C-2-207(b)(2)b., *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

(d) If none of the tribunals would have continuing, exclusive jurisdiction under UIFSA, a North Carolina tribunal must issue a child support order, which controls. [G.S. 52C-2-207(b)(3), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

2. Jurisdiction to enforce payment of arrearages.

a. A court has subject matter jurisdiction to enforce a valid child support order of another state (regardless of whether the order is entitled to recognition as the "controlling" order under the Uniform Interstate Family Support Act (UIFSA)) with respect to vested, past due arrearages that are entitled to recognition and enforcement under the Full Faith and Credit Clause of the U.S. Constitution. [*See New Hanover Cty. ex rel. Mannthey v. Kilbourne*, 157 N.C. App. 239, 578 S.E.2d 610 (2003) (North Carolina required to enforce arrearages arising out of sister state's order).]

b. A court retains subject matter jurisdiction following termination of an obligor's court-ordered child support obligation (for example, following the child's death, emancipation, completion of high school, adoption, etc.) to enforce vested, past due child support arrearages that accrued before the obligor's child support obligation terminated. [*See Griffith v. Griffith*, 38 N.C. App. 25, 247 S.E.2d 30 (legal obligation to provide child support and the failure to meet that obligation both arose while the court had jurisdiction; court had jurisdiction to enforce arrearages after child's majority), *review denied,* 296 N.C. 106, 249 S.E.2d 804 (1978).]

c. If a child support order issued by a North Carolina tribunal is modified by a tribunal of another state which assumed jurisdiction pursuant to UIFSA, the North Carolina tribunal:

i. May enforce the order that was modified only as to arrearages and interest accruing before the modification; [G.S. 52C-6-612(1), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

ii. May provide other appropriate relief for violations of its order that occurred before the effective date of modification; [G.S. 52C-6-612(3), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] and

iii. Must recognize the modifying order of the other state, upon registration, for purposes of enforcement. [G.S. 52C-6-612(4), *amended by* S.L. 2015-117, § 1,

effective June 24, 2015.] **NOTE**: Before June 25, 2015, G.S. 52C-6-612(2), which was repealed, allowed a North Carolina tribunal to enforce only nonmodifiable aspects of its order.

3. Jurisdiction to enforce a child support order when child and/or parties are reservation Indians.
   a. A state court lacks jurisdiction to enforce a child support order against a Native American obligor who resides within the boundaries of a federally recognized Indian reservation and is subject to the jurisdiction of a tribal court or against the property of such an obligor located on an Indian reservation. [*See Wildcatt v. Smith*, 69 N.C. App. 1, 316 S.E.2d 870 (1984).]
   b. A state court does not have jurisdiction to determine the paternity of a child born out of wedlock when the child, mother, and putative father are all Native Americans living within a federally recognized Indian reservation. [*See Jackson Cty. ex rel. Jackson v. Swayney*, 319 N.C. 52, 352 S.E.2d 413 (exercise of state court jurisdiction to determine paternity would unduly infringe on tribal self-governance; exclusive tribal court jurisdiction over the determination of paternity especially important to tribal self-governance), *cert. denied*, 484 U.S. 826, 108 S. Ct. 93 (1987).]
   c. If the matter at issue does not unduly infringe upon the tribe's right of self-governance, the tribal court and district court have concurrent jurisdiction, except in cases where the tribal court has first exercised jurisdiction and retains jurisdiction.
      i. District court had concurrent jurisdiction with the tribal court for action to recover Aid to Families with Dependent Children (AFDC) payments. [*Jackson Cty. ex rel. Jackson v. Swayney*, 319 N.C. 52, 352 S.E.2d 413 (tribe's interest in self-government not significantly affected; no prior action for the same claim filed in tribal court), *cert. denied*, 484 U.S. 826, 108 S. Ct. 93 (1987).]
      ii. When a claim for child support had been filed in tribal court and that court had retained jurisdiction, the district court did not have jurisdiction of an action to recover AFDC payments. [*Jackson Cty. ex rel. Smoker v. Smoker*, 341 N.C. 182, 459 S.E.2d 789 (1995) (claim for AFDC payments was based on defendant's duty to support his children, jurisdiction over which had been retained by tribal court). *See also State ex rel. West v. West*, 341 N.C. 188, 459 S.E.2d 791 (1995) (per curiam) (action to establish current and future child support payable by non-Indian mother for child in custody of Indian father properly dismissed; tribal court exercised jurisdiction first and continued to exercise jurisdiction).]

B. Personal Jurisdiction and Jurisdiction over Property

1. To enforce a child support order, a court must have:
   a. Personal jurisdiction over the obligor if the remedy is directed against the obligor's person (for example, contempt) **or**
   b. Jurisdiction over the obligor's property if the remedy is directed against the obligor's property (for example, execution of judgment for child support against the obligor's real property). [*See Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E.2d 633 (1977) (to enforce an order, the court must determine whether jurisdiction exists over the person or property of the obligor).]

2. A court that acquires personal jurisdiction over an obligor and enters a valid child support order against the obligor generally retains personal jurisdiction for purposes of enforcing the order against the obligor, even if the obligor no longer resides in the issuing state. [*See, e.g.*, G.S. 52C-2-202, *amended by* S.L. 2015-117, § 1, effective June 24, 2015; *Griffith v. Griffith*, 38 N.C. App. 25, 247 S.E.2d 30 (service on attorney of record pursuant to G.S. 1A-1, Rule 5 was sufficient notice of enforcement proceedings against out-of-state defendant), *review denied*, 296 N.C. 106, 249 S.E.2d 804 (1978).] **NOTE**: This is not the same as retaining "continuing, exclusive jurisdiction" under the Uniform Interstate Family Support Act or Full Faith and Credit for Child Support Orders Act.
3. A North Carolina court generally lacks jurisdiction over real or personal property that is located outside of North Carolina. [*See Cole v. Hughes*, 114 N.C. App. 424, 442 S.E.2d 86 (North Carolina court did not have jurisdiction to decide ownership of a lottery ticket in possession of Virginia lottery authorities; no in rem jurisdiction over personal property located outside North Carolina), *review denied*, 336 N.C. 778, 447 S.E.2d 418 (1994).]

C. Standing

1. Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction. [*Eakes v. Eakes*, 194 N.C. App. 303, 669 S.E.2d 891 (2008) (citing *Aubin v. Susi*, 149 N.C. App. 320, 560 S.E.2d 875 (2002)).]
2. To establish standing, a party must have a substantial stake or interest in a justiciable controversy. [*Eakes v. Eakes*, 194 N.C. App. 303, 669 S.E.2d 891 (2008) (citing *Street v. Smart Corp.*, 157 N.C. App. 303, 578 S.E.2d 695 (2003)) (father had standing to bring an action for an accounting by mother, as father had a substantial interest in her use of monies in a fund established as a supplemental source for payment of father's child support obligations, which interest was affected by her failure to account; additionally, provision in parties' consent order required mother to provide periodic accountings, which provision father could seek to enforce).]
3. An obligee (that is, a party to whom court-ordered child support is owed) has standing to seek judicial remedies to enforce the obligor's child support obligation. [*See Griffith v. Griffith*, 38 N.C. App. 25, 247 S.E.2d 30 (obligee is the real party in interest in action to recover arrearages that accrued while child was a minor), *review denied*, 296 N.C. 106, 249 S.E.2d 804 (1978).]
4. An obligor has standing to enforce obligations of the obligee set out in a support order. [*See Eakes v. Eakes*, 194 N.C. App. 303, 669 S.E.2d 891 (2008) (father had standing to seek enforcement of provisions in a 2004 consent order that required mother to provide periodic accountings of her use of monies in a special account).]
5. A public agency or other person to whom an obligee's child support rights have been assigned has standing to intervene and seek judicial remedies to enforce the obligee's child support rights. [*Tate v. Tate*, 95 N.C. App. 774, 384 S.E.2d 48 (1989) (department of social services, as assignee of mother's right to child support payments, had standing to contest elimination of arrearages).] For more on the state or county as the real party in interest in a claim for reimbursement of public assistance under G.S. 110-135, see *Liability and Amount*, Part 1 of this Chapter, Section VII.E.

6. When an obligee is receiving child support enforcement services from a child support enforcement (IV-D) agency, the state or county (through the IV-D agency) may seek judicial enforcement of a child support order on behalf of the obligee, regardless of whether the obligee's child support rights have been assigned to the state or county. [*See* G.S. 110-130 and 110-130.1(c).]

D. Procedure in Child Support Enforcement Proceedings

1. Generally.
    a. A party seeking one of the judicial child support remedies discussed in the following sections of this Part must comply with the procedural requirements that apply to the particular remedy sought.
    b. Unless otherwise noted, the procedures in judicial proceedings to enforce child support orders are the same in IV-D and non-IV-D cases.
        i. A "IV-D case" is a case in which services have been applied for or are being provided by a child support enforcement agency established pursuant to Title IV-D of the federal Social Security Act, as amended, and Article 9 of G.S. Chapter 110. [G.S. 110-129(7).] "IV-D" references the program's legal authorization under Title IV-D of the Social Security Act.
        ii. A "non-IV-D case" is any case, other than a IV-D case, in which child support is legally obligated to be paid. [G.S. 110-129(7).]
    c. The North Carolina Department of Health and Human Services' Child Support Services (CSS) Manual (1) informs child support enforcement workers that the federal office of child support enforcement has said that "[c]ivil contempt that leads to incarceration is not, nor should it be, standard or routine child support practice" and (2) instructs that "[p]rior to considering the use of contempt proceedings in a delinquent case, CSS caseworkers should consider the use of administrative enforcement remedies." [N.C. Dep't of Health & Human Servs., *DHHS On-Line Manuals*, *Child Support Services Enforcement*, "Enforcement: General Information," https://policies.ncdhhs.gov/divisional/social-services/child-support/policy-manual/csecp.pdf.] *See* Cheryl Howell, *New Regulations Regarding Contempt in IV-D Child Support Cases*, UNC Sch. of Gov't: On the Civil Side Blog (June 30, 2017), https://civil.sog.unc.edu/new-regulations-regarding-contempt-in-iv-d-child-support-cases.
2. Procedure.
    a. Initiated by a motion in the cause.
        i. Unless otherwise provided by law, judicial remedies to enforce a child support order may be sought by filing a motion in the cause in the pending child support action. [*See* G.S. 50-13.4(f)(4) (continuing wage garnishment instituted by motion in the original child support proceeding); 50-13.4(f)(8) (past due periodic payments may by motion in the cause be reduced to judgment); *see also Lang v. Lang*, 157 N.C. App. 703, 579 S.E.2d 919 (2003) (mother and daughter filed separate motions in the cause to enforce a German support judgment under the Uniform Reciprocal Enforcement of Support Act).]

ii. A motion or other pleading seeking a judicial remedy to enforce a child support order generally must be made in writing, state the facts upon which the motion is based, and indicate the specific relief sought. [*See generally* G.S. 1A-1, Rule 7(b).]

b. Notice. Unless waived, an obligor is entitled to timely and adequate notice of a motion or other pleading seeking a judicial remedy to enforce a child support order. [*See Sampson Cty. ex rel. Bolton v. Bolton*, 93 N.C. App. 134, 377 S.E.2d 88 (1989) (contesting wage garnishment).]

c. Burden of proof. Unless otherwise provided by law, the party seeking enforcement of a child support order has the burden of proving that she is entitled to the relief sought. [*See Castle McCulloch v. Freedman*, 169 N.C. App. 497, 610 S.E.2d 416 (burden of proving damages is on the party seeking them), *aff'd per curiam*, 360 N.C. 57, 620 S.E.2d 674 (2005); *see also Trevillian v. Trevillian*, 164 N.C. App. 223, 595 S.E.2d 206 (2004) (burden of demonstrating changed circumstances to modify child support rests upon the moving party).]

d. Right to counsel. Except as otherwise provided (for example, in contempt proceedings to enforce child support orders), an indigent obligor is not entitled to court-appointed counsel in child support enforcement proceedings. [*King v. King*, 144 N.C. App. 391, 547 S.E.2d 846 (2001) (defendant not entitled to appointed counsel in hearing on motion to modify her child support obligation because her liberty interest was not threatened).] See Section VII.B.11, below.

3. Enforcement of a North Carolina order by a nonresident.

a. An obligee who is not a resident of North Carolina may file a Uniform Interstate Family Support Act (UIFSA) petition for enforcement of a North Carolina order. [See G.S. 52C-2-206(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015, to provide that a tribunal of this state having continuing jurisdiction over a support order may act as a responding tribunal to enforce the order; Official Comment (2015), G.S. 52C-2-206 (subsection (b)) makes clear that the issuing tribunal has jurisdiction to serve as a responding tribunal to enforce its own order if requested to do so by another tribunal).].

b. A petitioner's personal appearance is not required. [G.S. 52C-3-315(a).]

c. Special rules governing discovery, admissibility of evidence, and communication between courts apply to UIFSA proceedings in which a nonresident requests a responding tribunal to enforce a child support order issued by that court. [*See* G.S. 52C-3-315, 52C-3-316, and 52C-3-317.]

E. Availability and Election of Remedies

1. North Carolina law provides more than a dozen legal remedies to enforce a child support order that has been entered by a North Carolina court or that has been registered for enforcement in North Carolina. Unless otherwise noted, all of the judicial remedies discussed in the following sections of this Part are available in both IV-D and non-IV-D cases. For definition of a IV-D case and a non-IV-D case, see Section I.D.1, above.

2. Remedies for enforcing child support orders are not mutually exclusive. [*See Griffin v. Griffin*, 103 N.C. App. 65, 404 S.E.2d 478 (1991) (reducing arrearage to judgment and

collecting the arrearage by income withholding are not inconsistent enforcement remedies); *Duplin Cty. DSS ex rel. Pulley v. Frazier*, 230 N.C. App. 480, 751 S.E.2d 621 (2013) (citing *Griffin*) (party seeking to collect arrearages that have been reduced to judgment is not limited solely to execution pursuant to G.S. 1-302).] Unless otherwise provided by law, a party may pursue multiple child support enforcement remedies concurrently.

3. A court may award attorney fees pursuant to G.S. 50-13.6 to either party in connection with a proceeding to enforce a child support order if fees could have been awarded when the obligation was established. [*See Smith v. Smith*, 121 N.C. App. 334, 465 S.E.2d 52 (1996) (obligor ordered to pay obligee's attorney fees in case enforcing consent judgment). See *Liability and Amount*, Part 1 of this Chapter, Section VIII, on attorney fees.]
4. Specific performance is not available as a remedy to enforce a court order. [*Powers v. Powers*, 103 N.C. App. 697, 407 S.E.2d 269 (1991) (specific performance is a remedy that applies to enforcement of a contract, not to enforcement of a court order).]

F. Defenses in Child Support Enforcement Proceedings

1. Defenses that are or may be valid.
   a. *Bankruptcy*. The automatic stay resulting from the obligor's filing of a bankruptcy proceeding under the federal Bankruptcy Code may prevent a state court from taking certain actions against the obligor or the obligor's property to enforce a child support order. [See Section XI, below.]
   b. *Lack of jurisdiction*.
      i. Unless precluded by the doctrines of res judicata or collateral estoppel, the issuing court's lack of subject matter or personal jurisdiction to enter the child support order for which enforcement is sought is a valid defense in a subsequent judicial proceeding seeking enforcement of that order. [*See* G.S. 1A-1, Rule 12(b).]
      ii. A court's lack of personal jurisdiction over the obligor may be asserted as an affirmative defense in a child support enforcement proceeding against the obligor or the obligor's property, but this defense is waived if not asserted in a timely manner. [*See* G.S. 1A-1, Rule 12(b).]
   c. *Status of the order*. The suspension, vacation, or modification of a child support order may be raised as a defense in a proceeding to enforce a registered order. [*See* G.S. 52C-6-607(a)(3).]
   d. *Appeal is pending*. The appeal of a child support order precludes judicial proceedings to enforce the order while the appeal is pending, except that a child support order may be enforced by civil contempt pending appeal. [*See* G.S. 50-13.4(f)(9); 1-294.] For a discussion on the use of contempt to enforce a child support order pending an appeal of the order, see Section VII.B.19, below. For more on the appeal of a child support order generally, including the effect of G.S. 50-19.1 and the effect of an appeal on a trial court's jurisdiction, see *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Sections I.I and I.I.6.
   e. *Order not the controlling order*. If the child support order for which enforcement is sought is not the one "controlling" order under the Uniform Interstate Family

Support Act (UIFSA) and Full Faith and Credit for Child Support Orders Act (FFCCSOA), there can be no prospective enforcement of the order, but the obligee can proceed with enforcement of vested, past due child support arrearages. [*See New Hanover Cty. ex rel. Mannthey v. Kilbourne*, 157 N.C. App. 239, 578 S.E.2d 610 (2003) (parent had continuing obligation to pay vested child support arrearages).] For more on determining when an order is the controlling order, see *Modification of Child Support Orders*, Part 3 of this Chapter, Section III.B.3.

f. *Direct payment to obligee*. Payments made by, or on behalf of, the obligor directly to the obligee (rather than through the court or the State Child Support Collection and Disbursement Unit) or on behalf of the child **may** constitute a valid defense with respect to a proceeding seeking enforcement of vested, past due child support arrearages that would otherwise be owed by the obligor. [*See* G.S. 50-13.10(e) (authorizing credit for timely and adequately documented payments made directly to obligee); see Section I.F.3, below, for a discussion of credits for expenditures by a delinquent parent.]

g. *Payment made under an order other than the order being enforced*. In determining whether an obligor owes past due child support, child support payments that are made by an obligor for a child under one child support order (Order A) must be credited against the obligor's child support obligation under the child support order that is being enforced (Order B) if the payments under the other order (Order A) are for the same child or children and are for the same period of time as the payments allegedly owed under the order in the pending enforcement proceeding (Order B). [*See* G.S. 52C-2-209.]

2. Defenses that are not valid.

a. *Equitable estoppel*. North Carolina's court of appeals has not recognized equitable estoppel as a valid defense against the enforcement of an obligor's legal obligation to pay court-ordered child support. [*See Meehan v. Lawrance*, 166 N.C. App. 369, 602 S.E.2d 21 (2004) (wife not estopped from enforcing child support order when husband failed to show detrimental reliance on alleged oral agreement that changed his obligation to provide health insurance); *Baker v. Showalter*, 151 N.C. App. 546, 566 S.E.2d 172 (2002) (when obligor/wife unable to demonstrate that she relied to her detriment on the written and oral agreement of the parties for reduced child support, trial court did not err by declining to apply the doctrine of equitable estoppel; wife's reduced payments were to wife's benefit, as they allowed her to buy a townhome); *Griffin v. Griffin*, 96 N.C. App. 324, 385 S.E.2d 526 (1989) (indicating that equitable estoppel is never appropriate in an action to enforce arrears; holding that the obligor could not show detrimental reliance in this particular case); *Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E.2d 220 (1986) (obligor did not reasonably rely on representations by obligee).]

b. *Agreements between the parties*.

i. Court orders for support can be modified only by court order. Therefore, oral or written agreements between parties to reduce or waive child support established by court order are ineffective. [*Baker v. Showalter*, 151 N.C. App. 546, 566 S.E.2d 172 (2002) (parties could not modify a child support order by oral agreement; amount of support in incorporated separation agreement remained in effect);

Griffin v. Griffin, 96 N.C. App. 324, 385 S.E.2d 526 (1989) (father obligated to pay full amount of support even though trial court found wife agreed to accept less than amount ordered).]

ii. Established child support rights generally cannot be bargained or traded off in exchange for other legal rights or property as between the child's parents. [*See Brinkley v. Brinkley*, 135 N.C. App. 608, 522 S.E.2d 90 (1999) (defendant not entitled to a credit for the amount his former wife owed him under the parties' equitable distribution judgment); *Nisbet v. Nisbet*, 102 N.C. App. 232, 402 S.E.2d 151 (parent's obligation to pay child support pursuant to an unincorporated separation agreement was not dependent on the other spouse's compliance with visitation, nonharassment, or noncohabitation provisions in the same agreement), *review denied*, 329 N.C. 499, 407 S.E.2d 538 (1991).]

iii. An agreement to release an obligor from his past, current, or future child support obligations in consideration of the obligor's giving consent for the child's adoption by a third party is void as a violation of public policy as expressed in the state's adoption law. [*See Stanly Cty. Dep't of Soc. Servs. ex rel. Dennis v. Reeder*, 127 N.C. App. 723, 493 S.E.2d 70 (1997) (father's consent to adoption, in return for mother's waiver of past and future support, void); *State ex rel. Raines v. Gilbert*, 117 N.C. App. 129, 450 S.E.2d 1 (1994) (mother's agreement to drop child support arrearage action and accept less than amount due, in exchange for father's consent to adoption of child, void).] See *Adoption*, Bench Book, Vol. 1, Chapter 8.

c. *One party's intent or understanding of the provisions in an agreement.*

i. Defendant believed that he did not have to comply with an incorporated separation agreement requiring him to continue child support while his adult child was in good academic standing at a college or trade/technical school. His belief was based on his interpretation of "good academic standing" to mean "enrolled as a full-time student and earning at least a "C" average." Defendant was ordered to pay child support for the months his son was enrolled in college when, by the time of the hearing, the son had completed his degree requirements. [*Wilson v. Wilson*, 214 N.C. App. 541, 545, 714 S.E.2d 793, 796 (2011) (court noted that "[t]he effect of the agreement is not controlled by what one of the parties intended or understood"); *Barker v. Barker*, 228 N.C. App. 362, 745 S.E.2d 910 (2013) (defendant's belief that his daughter's poor academic performance, a 1.658 GPA after three semesters, relieved him of his obligation in a consent order to pay 90 percent of her college expenses as long as she "diligently applied" herself, was rejected; because conclusion that daughter diligently applied herself was supported by findings, defendant found in civil contempt for willful refusal to pay expenses for her second year).]

d. *Reconciliation.*

i. Reconciliation or resumption of a sexual relationship by a child's parents does not terminate a parent's court-ordered child support obligation. [*See Walker v. Walker*, 59 N.C. App. 485, 297 S.E.2d 125 (1982) (parties' periodic sexual relations and temporary reconciliation did not void judgment for child support); *see also Latham v. Latham*, 74 N.C. App. 722, 329 S.E.2d 721 (1985) (once a court

has acquired jurisdiction over the custody or support of a minor child, remarriage of the parties to each other does not divest a court of its continuing jurisdiction over a child for purposes of determining custody or child support).]

ii. An obligor is not liable for child support arrearages that accrued while the child was living with the obligor pursuant to a valid court order or an express or implied agreement transferring primary custody to the obligor. [*See* G.S. 50-13.10(d); *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561 (1977) (father's child support reduced for period children lived with him).]

e. *One child reaching majority without express provision in order for reduction in support.* When a child support order requires an obligor to pay child support for more than one child and the child support award is not stated separately with respect to each child and the obligor has not sought modification of the order, the fact that the obligor no longer owes child support for one of the children (for example, because the older child has reached the age of 18 and is no longer in high school) does not constitute a defense against enforcement of the full amount of the order. [*See Craig v. Craig*, 103 N.C. App. 615, 406 S.E.2d 656 (1991) (father had no authority to unilaterally modify the amount of child support upon older child turning 18 when support order did not allocate amount for each individual child and was silent as to any reduction in support upon one child reaching age 18); see *Liability and Amount*, Part 1 of this Chapter, Section II.B.3 for further discussion.]

f. *Termination of support obligation not a valid defense against existing arrearages.*

i. Effective July 1, 2003, if an arrearage for child support or fees exists at the time that a child support obligation terminates, payments shall continue in the same total amount that was due under the terms of the previous court order or income withholding in effect at the time of the support obligation. [G.S. 50-13.4(c).]

ii. The total amount of these payments is to be applied to the arrearage until all arrearages and fees are satisfied or until further order of the court. [G.S. 50-13.4(c).]

iii. The fact that a child for whom support was owed has reached the age of 18 and is no longer in elementary and secondary school does not constitute a valid defense against the enforcement of vested, past due child support arrearages that accrued before the date the obligor's child support obligation for the child terminated. [*See Griffith v. Griffith*, 38 N.C. App. 25, 247 S.E.2d 30, *review denied*, 296 N.C. 106, 249 S.E.2d 804 (1978); *see also Cumberland Cty. ex rel. Mitchell v. Manning*, 262 N.C. App. 383, 822 S.E.2d 305 (2018) (enforcing by civil contempt an order for child support arrears after child reached age of majority).]

g. *Inability to pay.*

i. Although an obligor's financial inability to pay child support may preclude imposition of some child support enforcement remedies (for example, civil contempt), it does not discharge the obligor's liability for vested, past due child support arrearages. [*See Brower v. Brower*, 75 N.C. App. 425, 331 S.E.2d 170 (1985) (failing to find the obligor in contempt does not affect the underlying debt).]

ii. An obligor, however, is not liable for child support payments that accrue while the obligor is incarcerated if the obligor is not on work release and has no resources from which child support could be paid. [*See* G.S. 50-13.10(d)(4).]

h. *Homestead exemption*. An obligor may not claim any of the constitutional or statutory "homestead" exemptions to prevent the enforcement of a valid child support claim against the obligor's property. [*See* G.S. 1C-1601(e)(9) (exemptions in G.S. Chapter 1C, Article 16 are not applicable to claims for child support); *Walker v. Walker*, 204 N.C. 210, 167 S.E. 818 (1933) (child support not an ordinary debt against which a person may claim homestead and personal property exemptions).]

i. *Nonpaternity when that issue previously decided*. Attempts to challenge paternity have been rejected on the following grounds.

i. A prior determination of paternity is itself a bar. [*See Helms v. Landry*, 363 N.C. 738, 686 S.E.2d 674 (2009) (finding in 2002 custody order involving unmarried parents that plaintiff was the biological father was a judicial determination of paternity and was binding in a 2007 proceeding filed by mother contesting paternity; trial court properly denied mother's motion for paternity testing), *rev'g per curiam for reasons stated in dissenting opinion in* 194 N.C. App. 787, 671 S.E.2d 347 (2009) (Jackson, J, concurring in part and dissenting in part); *see also* G.S. 52C-3-314 and *Reid v. Dixon*, 136 N.C. App. 438, 524 S.E.2d 576 (2000) (when paternity was previously established by Alaska legal proceeding based on father's admission of paternity, father could not later plead nonparentage as a defense in a UIFSA enforcement proceeding); *Heavner v. Heavner*, 73 N.C. App. 331, 326 S.E.2d 78 (parentage already decided when former husband pled guilty in criminal nonsupport action and admitted paternity in divorce complaint), *review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985).]

ii. A prior adjudication is res judicata in a later proceeding. [*See Williams v. Holland*, 39 N.C. App. 141, 249 S.E.2d 821 (1978) (defendant barred by res judicata from putting paternity in issue in child support enforcement action based on Nevada divorce decree that found child to be child of the marriage).] For more on nonpaternity as a defense in a child support proceeding, see *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section I.G.4.

iii. **NOTE**: S.L. 2011-328, § 1, effective Jan. 1, 2012, and applicable to motions or claims for relief filed on or after that date, added G.S. 49-14(h), 50-13.13, and 110-132(a1) and (a2), which provide procedures to set aside orders of paternity or affidavits of parentage and to order genetic testing under G.S. 8-50.1(b1) under certain circumstances.

iv. Issues relating to paternity, including a paternity determination as res judicata, are discussed in more detail in *Paternity*, Bench Book, Vol. 1, Chapter 10.

j. *Lack of or interference with visitation*. Denial or frustration of the obligor's legal right to visit the child does not constitute a valid defense against enforcement of the obligor's child support obligation. [*See Appert v. Appert*, 80 N.C. App. 27, 341 S.E.2d 342 (1986) (right to receive child support is independent of the noncustodial parent's right to visitation).]

k. *Statute of limitations.*

i. North Carolina's ten-year statute of limitations for judgments in G.S. 1-47(1) may be raised as an affirmative defense in actions to collect child support arrearages that accrued more than ten years before the date the enforcement proceeding was initiated. [*Twaddell v. Anderson*, 136 N.C. App. 56, 523 S.E.2d 710 (1999), *review denied*, 351 N.C. 480, 543 S.E.2d 510 (2000); *Michigan ex rel. Pruitt v. Pruitt*, 94 N.C. App. 713, 380 S.E.2d 809 (1989).]

ii. If, however, past due child support arrearages are reduced to judgment pursuant to G.S. 50-13.4(f)(8), all child support arrearages included in the judgment may be enforced within ten years of the date of the judgment, notwithstanding that some or all of the arrearages included in the judgment may have accrued more than ten years before the date a child support enforcement proceeding based on the judgment was initiated. [*Twaddell v. Anderson*, 136 N.C. App. 56, 523 S.E.2d 710 (1999) (quoting *Silvering v. Vito*, 107 N.C. App. 270, 419 S.E.2d 360 (1992)), *review denied*, 351 N.C. 480, 543 S.E.2d 510 (2000).] Note that if a judgment for past due child support arrearages remains unsatisfied, a party may initiate an independent action on that judgment to obtain a new judgment for the amount still owed. [*See* G.S. 1-47(1) (complaint on a judgment must be filed within ten years of the entry of the original judgment); *Duplin Cty. DSS ex rel. Pulley v. Frazier*, 230 N.C. App. 480, 751 S.E.2d 621 (2013) (upon nonpayment of a judgment for child support arrearages of $23,600 entered in 2001, in a new action brought in 2010, the trial court properly entered a new judgment on the amount owed, $23,600, which defendant was properly ordered to pay in periodic payments of $275/month pursuant to G.S. 50.13.4(f)(8); the 2010 action was not a renewal of the 2001 judgment, for which North Carolina has no procedure, but was a new action on the prior debt, separate and distinct from the 2001 action in which the arrearages were originally reduced to judgment).]

iii. Failure to plead the statute of limitations as an affirmative defense in a timely manner constitutes a waiver of the defense. [*See Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E.2d 220 (1986) (defendant could not raise statute of limitations defense for the first time on appeal).]

iv. The ten-year statute of limitations begins to run from the date each unpaid child support payment under a child support order becomes due, not from the date the child support order was entered. [*Belcher v. Averette*, 136 N.C. App. 803, 526 S.E.2d 663 (2000); *Michigan ex rel. Pruitt v. Pruitt*, 94 N.C. App. 713, 380 S.E.2d 809 (1989).]

v. Application of payments made during the ten-year statute of limitations period may determine whether a claim is barred by the statute of limitations. [*See Belcher v. Averette*, 136 N.C. App. 803, 526 S.E.2d 663 (2000) (in determining whether father's arrearages were barred by ten-year statute of limitations, trial court properly applied father's child support payments within ten-year statute of limitations period to earlier arrearages first and then to later arrearages, thus allowing mother's claim to proceed).]

vi. Unlike a partial payment on a contractual obligation, partial payment on amounts owed pursuant to a judgment does not start the statute of limitations over again. [*McCaskill v. McKinnon*, 121 N.C. 192, 28 S.E. 265 (1897); *Hughes*

v. Boone, 114 N.C. 54, 19 S.E. 63 (1894); *Briley v. Couch*, 115 F.2d 443 (4th Cir. 1940) (appeal of an order of the U.S. District Court for the Western District of North Carolina).]

vii. In a UIFSA proceeding for arrearages under a registered child support order, the statute of limitations of the issuing state or foreign country, or North Carolina's ten-year statute of limitations, whichever is longer, applies. [G.S. 52C-6-604(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; *New Hanover Cty. ex rel. Mannthey v. Kilbourne*, 157 N.C. App. 239, 578 S.E.2d 610 (2003) (decided before amendment of G.S. 52C-6-604(b) to include a foreign country) (trial court must apply whichever statute of limitations is longer as between North Carolina and the second state).]

l. *Laches.*

i. When North Carolina law has been applied, laches has not been a valid defense in a proceeding to collect vested, past due child support arrearages under a North Carolina or a foreign order, to the extent not barred by North Carolina's ten-year statute of limitations (discussed in the preceding section). [*See Malinak v. Malinak*, 242 N.C. App. 609, 775 S.E.2d 915 (2015) (citing *Larsen v. Sedberry*, 54 N.C. App. 166, 282 S.E.2d 551 (1981)) (trial court erred in applying the doctrine of laches to bar recovery of court-ordered child support not barred by the statute of limitations); *Stephens v. Hamrick*, 86 N.C. App. 556, 358 S.E.2d 547 (1987) (laches did not bar enforcement under North Carolina law of a South Carolina order for child support entered eighteen years earlier; mother entitled to seek arrearages accruing under the South Carolina order within the ten years allowed under the North Carolina statute of limitations); *Larsen v. Sedberry*, 54 N.C. App. 166, 282 S.E.2d 551 (1981) (laches not a bar to action enforcing Florida support order even though enforcement not sought until fourteen years after order entered and after obligor's death; recovery allowed except to the extent barred by the ten-year statute of limitations), *review denied*, 304 N.C. 728, 288 S.E.2d 381 (1982); *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561 (1977) (laches did not prevent mother from seeking enforcement of a North Carolina child support order for period not barred by statute of limitations).]

ii. But when enforcing an order entered by another state based on that state's law, laches may be a valid defense. [*See Tepper v. Hoch*, 140 N.C. App. 354, 536 S.E.2d 654 (2000) (based on laches, as construed by the Illinois courts, the trial court correctly vacated registration of the Illinois child support order; wife's claim for arrearages denied).]

iii. *But see Elliott v. Estate of Elliott*, 163 N.C. App. 577, 596 S.E.2d 819 (federal Full Faith and Credit Clause required application of California law to substantive determinations, but whether to recognize laches as a defense is a matter of procedural law analyzed under North Carolina law), *cert. denied*, 358 N.C. 731, 601 S.E.2d 530 (2004).]

3. Credits for payments made by noncustodial parent.

a. Generally.

i. A trial judge has discretion to allow a credit against accrued child support arrearages for expenses paid by the noncustodial parent if injustice would exist

if a credit was not given. [*See Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977) (enunciating the principle on giving credit for voluntary expenditures for the first time and offering some guidelines for trial judges; case remanded to consider father's request for credit for expenditures for food, clothing, recreation, and medical care), *superseded by statute on other grounds as stated in Craig v. Craig*, 103 N.C. App. 615, 406 S.E.2d 656 (1991); *see also Transylvania Cty. Dep't of Soc. Servs. ex rel. Dowling v. Connolly*, 115 N.C. App. 34, 443 S.E.2d 892 (applying similar law in Georgia to allow credit for payments made by obligor's mother to custodial mother; Judge Greene concurring and noting that credits on a court-ordered child support obligation are permitted if the obligor has substantially complied with the child support order), *review denied*, 337 N.C. 806, 449 S.E.2d 758 (1994).]

ii. Decision whether to allow a credit is not bound by hard and fast rules, but is to be decided according to the equitable considerations of the facts and circumstances in each case. [*Jones v. Jones*, 52 N.C. App. 104, 278 S.E.2d 260 (1981).]

iii. For discussion of credits against future child support or credits when establishing child support, see *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section I.H.8.

b. Procedure.

i. A delinquent parent's right to receive credit against arrearages for child support payments made outside of a court order, in this case made directly to the children's mother or to the children themselves, is an affirmative defense and must be pleaded by the party asserting it. [*Shaw v. Shaw*, 63 N.C. App. 775, 306 S.E.2d 506 (1983).]

ii. Party seeking credit against arrearages for child support payments outside court order has burden of producing evidence showing that he has made such payments and the amount thereof. [*Shaw v. Shaw*, 63 N.C. App. 775, 306 S.E.2d 506 (1983) (father failed to show the amount for which he sought credit).]

c. Amount of credit.

i. The trial court has wide discretion, both in deciding initially whether justice requires that a credit be given under the facts of each case, and then in what amount the credit is to be awarded. [*Jones v. Jones*, 52 N.C. App. 104, 278 S.E.2d 260 (1981) (considering credit for expenditures made by father during children's visitation).]

ii. No abuse of discretion in awarding credit in amount lower than the actual expenditure. [*Lynn v. Lynn*, 44 N.C. App. 148, 260 S.E.2d 682 (1979) (obligor given $375 credit for furnace that cost $515).]

iii. Credit should not be allowed for obligations incurred before entry of the support order. [*Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977), *superseded by statute on other grounds as stated in Craig v. Craig*, 103 N.C. App. 615, 406 S.E.2d 656 (1991).]

d. Contempt still available. Fact that an obligor was given credit does not excuse the obligor from willfully violating the terms of a judicial order. The obligor can still be

held in contempt. [*See Lynn v. Lynn*, 44 N.C. App. 148, 260 S.E.2d 682 (1979) (obligor given credit against arrearages for having a furnace installed but still in contempt for willful violation of child support order).]

e. Contents of order giving credit. The trial court must conclude in its written order that, as a matter of law, an injustice would exist if the credit were not allowed, and it should support that conclusion by findings of fact based on competent evidence. [*Brinkley v. Brinkley*, 135 N.C. App. 608, 522 S.E.2d 90 (1999) (addressing the ability of the trial court to award a credit against future child support); *Kaiser v. Kaiser*, 259 N.C. App. 499, 511, 816 S.E.2d 223, 232 (2018) (quoting *Brinkley*, 135 N.C. App. at 612, 522 S.E.2d at 93) (order awarding father a credit against a child support award for car payments he previously made on mother's behalf was "well within [the trial court's] sound discretion" but was vacated and remanded when order did not include finding that an injustice would exist if the credit was not applied).]

f. Effect of final judgment establishing amount of arrearages. After a judgment has been entered establishing the amount of arrearages, it is error for a court to allow a credit for payments made before entry of the judgment. [*See Pieper v. Pieper*, 108 N.C. App. 722, 425 S.E.2d 435 (1993) (after entry of Iowa judgment establishing amount of arrearages, court erred in allowing father credit for payments directly to child for certain college expenses; Iowa judgment entitled to full faith and credit and not subject to modification except as provided in G.S. 50-13.10(a).]

II. UIFSA Proceedings to Enforce Child Support Orders of Another State or a Foreign Country

A. Child Support Orders Registered under Uniform Interstate Family Support Act (UIFSA)

1. Registration of a support order issued in another state or a foreign support order for the purpose of enforcement. [For the definition of a "foreign support order", see G.S. 52C-1-101(3b).]

   a. A support order or income withholding order issued in another state or a foreign support order may be registered in North Carolina for enforcement. [G.S. 52C-6-601, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

   b. A North Carolina court must enforce a support order issued in another state (for the definition of "state", see G.S. 52C-1-101(19)) or a foreign support order if:

      i. The order is properly registered for enforcement in North Carolina pursuant to G.S. 52C-6-602,

         (a) A petition to register a Florida order for custody and support pursuant to G.S. 50A-305 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) did not substantially comply with the UIFSA registration requirements in G.S. 52C-6-602 when the petition did not request modification or enforcement and failed to set out the amount of any child support arrearage. The trial court's dismissal of the petition pursuant to G.S. 1A-1, Rule 12(b)(6) was affirmed, with the appellate court describing the petition

as "both in substance and in form a petition to register a foreign custody order" under G.S. 50A-305, not a petition to register a foreign support order under UIFSA. [*Halterman v. Halterman*, 276 N.C. App. 66, 73, 855 S.E.2d 812, 817 (2021).]

ii. The obligor has been given notice of registration pursuant to G.S. 52C-6-605,

iii. The obligor fails to contest the validity or enforcement of the registered order pursuant to G.S. 52C-6-606 or fails to prove a valid defense to the validity or enforcement of the registered order pursuant to G.S. 52C-6-607, and

iv. The court has jurisdiction over the obligor or the obligor's property.

(a) In dismissing for lack of subject matter jurisdiction under G.S. 1A-1, Rule 12(b)(1) a petition to register a Florida order for custody and support filed pursuant to G.S. 50A-305 of the UCCJEA, the court of appeals noted the "essential differences in registration of foreign orders under the UCCJEA and UIFSA", specifically that subject matter jurisdiction under the UCCJEA is determined by the child's location, with personal jurisdiction over a parent not being required, while UIFSA requires personal jurisdiction over the obligor for child support modification and enforcement purposes. [*Halterman v. Halterman*, 276 N.C. App. 66, 76, 855 S.E.2d 812, 818 (2021).]

c. Prior to June 24, 2015, a foreign country that had enacted a law or established procedures substantially similar to UIFSA's procedures was considered a "state" as that term was then defined. [*Ugochukwu v. Ugochukwu*, 176 N.C. App. 741, 627 S.E.2d 625 (2006) (England was considered a "state" under G.S. 52C-1-101(19)(b)).] Definitions for "foreign country" and "foreign tribunal" were added in 2015, and the definition of "state" was revised to delete the reference to a foreign country with substantially similar procedures. [G.S. 52C-1-101(3a) (foreign country), 52C-1-101(3c) (foreign tribunal), *both added by* S.L. 2015-117, § 1, effective June 24, 2015; 52C-1-101(19) (state), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

d. Cases decided before 2015 amendments to UIFSA.

i. Enforcement of support orders of another state or foreign country under G.S. Chapter 52C provides a legal, not equitable, remedy. [*State ex rel. Lively v. Berry*, 187 N.C. App. 459, 653 S.E.2d 192 (2007) (any equitable defenses to the child support obligations that an obligor may wish to raise can be raised only in the initiating state).] G.S. 52C-6-604, *amended by* S.L. 2015-117, § 1, effective June 24, 2015, on choice of law is discussed in Section II.A.7, below.

ii. See *Lang v. Lang*, 132 N.C. App. 580, 583, 512 S.E.2d 788, 790 (1999), a case decided under the Uniform Reciprocal Enforcement of Support Act (URESA) and G.S. Chapter 52A (now repealed), in which mother and daughter plaintiffs sought only to register, not enforce, a foreign support order (not clear but appears to be a German order or agreement). After dismissing the appeal as interlocutory, the court made clear that following registration of the order, a plaintiff is not required to file a separate action to enforce a properly registered order from another jurisdiction, nor must a summons be issued. The court stated that a plaintiff need only file "a motion in the underlying causes to enforce the existing judgment." *See also Haker-Volkening v. Haker*, 143 N.C. App. 688,

547 S.E.2d 127 (decided following adoption of UIFSA) (petitioner could seek enforcement of a Swiss support order by filing a civil complaint seeking enforcement or by filing a petition for registration pursuant to UIFSA), *review denied*, 354 N.C. 217, 554 S.E.2d 338 (2001).

2. Procedure when the obligor fails to contest the validity or enforcement of a registered support order.
    a. If the obligor fails to request a hearing to contest the validity or enforcement of a registered support order within twenty days of the date he is served with notice of registration:
        i. The order is confirmed by operation of law, without any hearing or court approval [G.S. 52C-6-606(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015. *See Marshall v. Marshall*, 233 N.C. App. 238, 757 S.E.2d 319 (2014) (**unpublished**) (Tennessee support order confirmed by operation of law when defendant did not contest registration).] and
        ii. Upon confirmation, whether by operation of law or after notice and hearing, the obligor is precluded from further contesting the order with respect to any matter that could have been raised at the time of registration. [G.S. 52C-6-608, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]
    b. Confirmation by operation of law can be set aside for excusable neglect.
        i. If the obligor fails to contest registration and enforcement of the out-of-state order in a timely manner, the court may, upon a showing of excusable neglect, set aside confirmation of the registered order and allow the obligor to contest registration and enforcement of the out-of-state order. [*See Tepper v. Hoch*, 140 N.C. App. 354, 536 S.E.2d 654 (2000) (confirmation set aside under G.S. 1A-1, Rule 60(b)(1) due to former husband's inadvertent failure to request a hearing).]
3. Contesting the validity or enforcement of a registered support order. [G.S. 52C-6-606.]
    a. A respondent may contest the validity of a registered support order or seek to vacate the registration by asserting one or more of the following defenses:
        i. The issuing tribunal lacked personal jurisdiction over the nonregistering party in the original proceeding; [G.S. 52C-6-607(a)(1); Official Comment (2015), G.S. 52C-6-607.]
        ii. The order was obtained by fraud; [G.S. 52C-6-607(a)(2).]
        iii. The order has been vacated, suspended, or modified by a later order; [G.S. 52C-6-607(a)(3).]
        iv. The issuing tribunal has stayed the order pending appeal; [G.S. 52C-6-607(a)(4).]
        v. The registering state's law provides a defense against the remedy sought; [G.S. 52C-6-607(a)(5).]
            (a) "Remedy sought" refers only to the procedural means of enforcing child support orders, such as wage withholding, license revocation, or imprisonment. Under this interpretation, an obligor is not allowed to assert equitable defenses under North Carolina law as to the amount of arrearages. [*State ex rel. George v. Bray*, 130 N.C. App. 552, 503 S.E.2d 686 (1998)

(obligor would have to assert equitable defenses recognized in the issuing state).]

(b) This provision allows a defendant to assert defenses under North Carolina law to the enforcement procedures sought but does not allow a defendant to assert equitable defenses under North Carolina law to the amount of arrearages. [*Lacarrubba v. Lacarrubba*, 202 N.C. App. 532, 688 S.E.2d 769 (2010) (citing *State ex rel. George v. Bray*, 130 N.C. App. 552, 503 S.E.2d 686 (1998)); *State ex rel. Lively v. Berry*, 187 N.C. App. 459, 653 S.E.2d 192 (2007).]

vi. Full or partial payment has been made; [G.S. 52C-6-607(a)(6).]

vii. The statute of limitations under G.S. 52C-6-604 precludes enforcement of some or all of the alleged arrearages; [G.S. 52C-6-607(a)(7), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] or

viii. The alleged controlling order is not the controlling order. [G.S. 52C-6-607(a)(8), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

b. The respondent has the burden of proving any of the defenses listed immediately above. [G.S. 52C-6-607(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; *Martin Cty. ex rel. Hampton v. Dallas*, 140 N.C. App. 267, 535 S.E.2d 903 (2000) (trial court erred in placing the burden on the registering party to prove that a Virginia order should be registered in North Carolina; dispute as to amount of arrearages did not shift burden of proof to registering party).]

c. If the respondent presents evidence sufficient to establish a full or partial defense under at least one of the enumerated defenses in G.S. 52C-6-607(a), a tribunal may:

i. Stay enforcement of the registered order,

ii. Continue the proceeding to permit production of additional relevant evidence, and

iii. Issue other appropriate orders. [G.S. 52C-6-607(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

d. If the respondent does not establish a defense under G.S. 52C-6-607(a), the registering tribunal must issue an order confirming the registered support order. [G.S. 52C-6-607(c), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

e. If the respondent does not establish one of the eight specified defenses in G.S. 52C-6-607(a), the registering tribunal must issue an order confirming the registered support order. [G.S. 52C-6-607(c), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; *State ex rel. Lively v. Berry*, 187 N.C. App. 459, 653 S.E.2d 192 (2007) (where defendant's only defense to enforcement of two Florida orders was that he was denied visitation, which is not one of the (then) seven enumerated defenses, the trial court erred by refusing to confirm the registration of the Florida orders in full and without modification; enforcement of the order was compulsory); *Carteret Cty. ex rel. Amor v. Kendall*, 231 N.C. App. 534, 752 S.E.2d 764 (2014) (trial court erred when it denied registration of a Colorado child support order based not on any of the statutory defenses, but on defendant's contention that he was unable to secure employment, rendering him unable to pay support, because he had been wrongfully required to

register in North Carolina as a sex offender; a defendant cannot assert an equitable defense against enforcement of an out-of-state support order).]

f. The respondent's failure to contest the validity or enforcement of the registered support order in a timely manner constitutes a waiver of the defense, resulting in the order being confirmed by operation of law. [G.S. 52C-6-606(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

g. Confirmation of a registered support order, whether by operation or law or after notice and hearing, precludes further contest of the order as to any matter that could have been asserted at the time of registration. [G.S. 52C-6-608, *amended by* S.L. 2015-117, § 1, effective June 24, 2015; Official Comment (2015), G.S. 52C-6-608 (confirmation of a support order, whether by action or as the result of inaction, validates both the terms of the order and the asserted arrearages).]

h. The district court judge must consider and rule on the validity of any of the defenses in G.S. 52C-6-607 asserted by respondent (including defenses based on the issuing court's lack of jurisdiction, unless the issue of jurisdiction has been conclusively determined by a prior decision that is res judicata). [*See Martin Cty. ex rel. Hampton v. Dallas*, 140 N.C. App. 267, 535 S.E.2d 903 (2000) (conflicts in the evidence presented by defendant and by plaintiff are for the trial court to resolve; their mere presence does not justify or permit vacation of the prior registration).]

i. A partial registration of a foreign order may result in an impermissible modification of the order. [*See State ex rel. Lively v. Berry*, 187 N.C. App. 459, 653 S.E.2d 192 (2007) (trial court did not have authority to register a portion of a Florida child support order, the ongoing monthly child support, yet deny registration of the arrearages portion of that order; also, it was error to deny confirmation of a Florida public assistance order requiring payment of arrearages arising from time child was in foster care; refusal to register the arrearages portion of the orders affected the amount of the orders and was an impermissible modification).]

j. Additionally, a nonregistering party is permitted to contest a registered order by asserting any defense recognized in the issuing state. [*Tepper v. Hoch*, 140 N.C. App. 354, 536 S.E.2d 654 (2000) (North Carolina court correctly vacated the registration of an Illinois child support order based on laches, as construed by the Illinois courts, even though laches is not a defense available in North Carolina in a proceeding to enforce vested, past due child support arrearages).] G.S. 52C-6-604, *amended by* S.L. 2015-117, § 1, effective June 24, 2015, on choice of law is discussed in Section II.A.7, below.

4. Defense that full or partial payment has been made. [G.S. 52C-6-607(a)(6) (this provision was not amended in 2015).]

a. An obligor often contests the amount of arrearages by asserting that full or partial payment has been made. [*See Martin Cty. ex rel. Hampton v. Dallas*, 140 N.C. App. 267, 269, 535 S.E.2d 903, 906 (2000) (when obligor sought credit for the time he was incarcerated and for additional support payments he contends he made, court noted it was "not unusual" for questions about the correct amount of arrearages to be raised in multi-state child support matters).]

b. Dispute as to amount of arrearages does not preclude registration and enforcement. A North Carolina court may not refuse to register, confirm, or enforce a valid child support order issued by a court of another state simply because there is a dispute regarding the amount of arrearages owed under the order. [*See Martin Cty. ex rel. Hampton v. Dallas*, 140 N.C. App. 267, 535 S.E.2d 903 (2000) (dispute over amount of arrearages not grounds for vacating a registered foreign support order).]

c. Procedure when amount of arrearages has been determined by order. If a court of another state has entered a valid order determining the amount of arrearages owed under the registered order:

i. The obligor is bound by that order and

ii. The registering court must recognize the other court's decision with respect to the amount of arrearages owed. [*See Pieper v. Pieper*, 108 N.C. App. 722, 425 S.E.2d 435 (1993); *Fleming v. Fleming*, 49 N.C. App. 345, 271 S.E.2d 584 (1980).]

d. Procedure when amount of arrearages not determined by order. If a court of another state has not entered a valid order determining the amount of arrearages owed under the registered order:

i. The obligor may contest registration and enforcement by contesting the amount of arrearages claimed and

ii. The registering court must make a determination with respect to the amount of child support arrearages owed. [*See Martin Cty. ex rel. Hampton v. Dallas*, 140 N.C. App. 267, 269–70, 535 S.E.2d 903, 906 (2000) (stating that "[t]he correct amount of arrearage can be determined in a case of this sort just as it could in a dispute arising out of a North Carolina child support order").] Note that if an order of another state determines arrearages, confirmation of the order, whether by action or as the result of inaction, validates both the terms of the order and the asserted arrearages. [Official Comment (2015), G.S. 52C-6-608.]

5. Effect of an order registered for enforcement.

a. A registered support order issued in another state or a foreign country is enforceable in the same manner and is subject to the same procedures as a support order issued by a tribunal of the registering state. [G.S. 52C-6-603(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; *Marshall v. Marshall*, 233 N.C. App. 238, 757 S.E.2d 319 (2014) (**unpublished**) (not paginated on Westlaw) (emphasis in original) (once a foreign support order is registered and confirmed in North Carolina, it becomes "an *order* of our State's courts, explicitly enforceable as such").]

b. A trial court has authority to enforce by contempt all paragraphs and provisions in a foreign support order registered and confirmed in North Carolina, not just those related to support. [*Marshall v. Marshall*, 233 N.C. App. 238, 757 S.E.2d 319 (2014) (**unpublished**) (rejecting the notion of partial enforcement of a registered order and holding that trial court had jurisdiction to consider whether defendant was in contempt of provisions in order requiring support payments to wife, as well as provisions restraining defendant from harassing wife and other named individuals, and requiring defendant to give up certain causes of action).]

c. Registration in North Carolina does not, standing alone, give a North Carolina court jurisdiction to modify the registered order. [*See* G.S. 52C-6-603(c), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (except as otherwise provided in G.S. Chapter 52C, a tribunal of this state shall recognize and enforce, but may not modify, a registered support order if the issuing tribunal had jurisdiction); *see also Hinton v. Hinton*, 128 N.C. App. 637, 496 S.E.2d 409 (1998) (error for North Carolina court to modify an order when there was no evidence in the record that issuing state had lost jurisdiction or that parties had consented to North Carolina jurisdiction to modify the order).] See *Modification of Child Support Orders*, Part 3 of this Chapter, on limited circumstances that allow modification.

6. Enforcement of a registered order.

a. Enforcement when registered order is the controlling child support order.

i. A North Carolina court may enforce current and ongoing child support under a registered child support order if, and only if, the registered order is the controlling child support order that is entitled to recognition under the Uniform Interstate Family Support Act (UIFSA) (G.S. Chapter 52C) (applicable to a child support order issued by a state tribunal and to a foreign support order) and the federal Full Faith and Credit for Child Support Orders Act (FFCCSOA) (28 U.S.C. § 1738B) (applicable to a child support order issued by a state tribunal but not to a foreign support order). [See *Modification of Child Support Orders*, Part 3 of this Chapter, for more on the controlling order.]

ii. A North Carolina court is required to enforce child support arrearages that have accrued under the controlling child support order that is entitled to recognition under UIFSA and FFCCSOA.

iii. Trial court erred when it determined that the amount of child support arrearages owed under a Michigan judgment was $2,916, which was the amount of arrearages for the six-month period starting after registration of the Michigan judgment was confirmed, instead of $4,860, which was the amount of arrearages for the ten-month period starting with registration of the Michigan order. Because $4,860 in monthly support payments had accrued and vested under the Michigan judgment and Michigan law, the trial court erred in determining that a different amount was owed. [*State ex rel. Benford v. Bryant*, 208 N.C. App. 165, 701 S.E.2d 387 (2010).]

b. Enforcement when registered order is not the controlling child support order.

i. The Full Faith and Credit Clause of the U.S. Constitution requires a North Carolina court to enforce vested, past due child support arrearages that accrued under a child support order that is not entitled to recognition as the one "controlling" order under UIFSA and FFCCSOA if the arrearages accrued prior to the date the order was validly modified under UIFSA, FFCCSOA, or other applicable law or prior to the date another order was determined to be the one "controlling" order entitled to recognition under UIFSA and FFCCSOA. [*See New Hanover Cty. ex rel. Mannthey v. Kilbourne*, 157 N.C. App. 239, 578 S.E.2d 610 (2003) (calculating arrearages under two URESA orders for child support); *Fleming v. Fleming*, 49 N.C. App. 345, 271 S.E.2d 584 (1980) (calculating

arrearages under URESA orders for child support and alimony).] Note that neither the Full Faith and Credit Clause of the U.S. Constitution nor the FFCCSOA applies to orders entered by foreign countries.

ii. When the trial court determined that a 1989 Washington order was not the one "controlling" order but found controlling a 1991 Tennessee order which held that defendant had paid all support due under that order and thus owed no outstanding arrearages, trial court's dismissal of plaintiff's enforcement action was upheld. [*Uhrig v. Madaras*, 174 N.C. App. 357, 620 S.E.2d 730 (2005), *review denied*, 360 N.C. 367, 630 S.E.2d 455 (2006).]

7. Choice of law when enforcing a registered child support order.

a. G.S. 52C-6-604, *amended by* S.L. 2015-117, § 1, effective June 24, 2015, establishes choice of law rules based on the Uniform Interstate Family Support Act (UIFSA) principle that throughout the process, the controlling order remains the order of the tribunal of the issuing state or foreign country until a valid modification. [Official Comment (2015), G.S. 52C-6-604.]

b. Except as otherwise provided by G.S. 52C-6-604(d), a North Carolina court must:

i. Apply the law of the issuing state or foreign country with respect to the nature, extent, amount, and duration of current payments under a registered support order; [G.S. 52C-6-604(a)(1), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; *Ugochukwu v. Ugochukwu*, 176 N.C. App. 741, 627 S.E.2d 625 (2006) (substantive questions of law regarding support orders are determined according to the law of the "issuing state").]

ii. Apply the law of the issuing state or foreign country with respect to the computation and payment of arrearages and accrual of interest on the arrearages under the support order; [G.S. 52C-6-604(a)(2), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

iii. Apply the law of the issuing state or foreign country with respect to the existence and satisfaction of other obligations under the support order; [G.S. 52C-6-604(a)(3), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

iv. Apply, in a proceeding for arrearages under a registered support order, the statute of limitations of the issuing state or foreign country, or of North Carolina, whichever is longer; [G.S. 52C-6-604(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

v. Apply the procedures and remedies of this state to enforce current support and collect arrearages and interest due on a support order of another state or a foreign country registered in this state. [G.S. 52C-6-604(c), *added by* S.L. 2015-117, § 1, effective June 24, 2015.] Under this subsection, the responding tribunal applies local law with respect to enforcement. [Official Comment (2015), G.S. 52C-6-604.]

vi. After a tribunal of this state or another state determines which is the controlling order and issues an order consolidating arrearages, if any, a tribunal of this state must prospectively apply the law of the state or foreign country issuing the controlling order, including its law of interest on arrearages, on current and future

support, and on consolidated arrearages. [G.S. 52C-6-604(d), *added by* S.L. 2015-117, § 1, effective June 24, 2015.] Under this subsection, the responding tribunal applies the law of the issuing state or foreign country to the consolidated arrearages, "most particularly to the interest to be charged prospectively, even if the support orders of other states contributed a portion to those arrears." [Official Comment (2015), G.S. 52C-6-604.]

c. The applicability of the law of another tribunal, or whether there is a conflict between the laws of North Carolina and the laws of another state or a foreign jurisdiction, must be raised by a pleading or other reasonable written notice. [*Ugochukwu v. Ugochukwu*, 176 N.C. App. 741, 627 S.E.2d 625 (2006) (merely attaching an English order to defendant's motion to modify did not provide sufficient notice to the trial court that there was a conflict between North Carolina law and the law of a foreign jurisdiction).]

d. Where defendant failed to properly assert that English law should be applied to determine whether arrearages existed under an English support order, court's failure to do so could not be considered on appeal. [*Ugochukwu v. Ugochukwu*, 176 N.C. App. 741, 627 S.E.2d 625 (2006) (unclear whether court applied English or North Carolina law to decide question since there was no finding of fact on the issue; no error in any event) (*Ugochukwu* was decided before amendment of G.S. 52C-6-604(b) to include a foreign country).]

e. In a UIFSA proceeding for arrears under a registered child support order, a North Carolina court must apply North Carolina's ten-year statute of limitations, or the statute of limitations of the issuing state or foreign country, whichever is longer. [G.S. 52C-6-604(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; *New Hanover Cty. ex rel. Mannthey v. Kilbourne*, 157 N.C. App. 239, 578 S.E.2d 610 (2003) (trial court must apply whichever statute of limitations is longer as between North Carolina and the second state); *State ex rel. George v. Bray*, 130 N.C. App. 552, 503 S.E.2d 686 (1998) (applying Indiana's limitations period for enforcement of child support arrearages since it was longer than North Carolina's) (both *Mannthey* and *Bray* were decided before amendment of G.S. 52C-6-604(b) to include a foreign country).]

B. Child Support Orders Not Registered under UIFSA

1. A North Carolina court may enforce a child support order even if the order has not been, or could not be, registered for enforcement under the Uniform Interstate Family Support Act (UIFSA) (for example, because it was issued by a court of a foreign country that is not considered a "state" under UIFSA). The court, however, may lack jurisdiction to enforce the nonregistered order prospectively if another child support order is entitled to recognition under UIFSA and the Full Faith and Credit for Child Support Orders Act (FFCCSOA) as the "controlling" order governing the obligor's duty to support the child. [See Section I.A, above, on subject matter jurisdiction.]

2. An obligee may file a civil action to "domesticate" and enforce a support order issued in another state. [*See Pieper v. Pieper*, 108 N.C. App. 722, 425 S.E.2d 435 (1993) (following dismissal of Uniform Reciprocal Enforcement of Support Act action in *Pieper I*, plaintiff could obtain a final money judgment in Iowa and then return to North Carolina for enforcement of that judgment).]

3. The Full Faith and Credit Clause of the U.S. Constitution requires a North Carolina court to enforce vested, past due arrearages under a valid child support order issued by a court or tribunal in another state if the child support arrearages constitute a final judgment under the law of the issuing state. [*See Fleming v. Fleming*, 49 N.C. App. 345, 271 S.E.2d 584 (1980) (North Carolina court bound by Arizona decree that determined amount of arrearages as of date decree was entered).]
4. Other statutes relating to enforcement of support judgments issued by courts of other states or foreign countries.
    a. North Carolina Uniform Foreign-Country Money Judgments Recognition Act. [G.S. 1C-1850 *et seq*.]
        i. A "foreign-country judgment" is a judgment of a court of a foreign country. [G.S. 1C-1851(2).] A "foreign country" is a government other than the United States, a state, district, commonwealth, territory, or insular possession of the United States, or any other government with regard to which the decision in this state as to whether to recognize a judgment of that government's courts is initially subject to determination under the Full Faith and Credit Clause of the U.S. Constitution. [G.S. 1C-1851(1).] This act does not apply to recognition of sister-state judgments. [Official Comment, G.S. 1C-1851.]
        ii. A foreign-country judgment for child support may **not** be recognized in North Carolina pursuant to the North Carolina Uniform Foreign-Country Money Judgments Recognition Act. [G.S. 1C-1852(b)(3), *added by* S.L. 2009-325, § 2, effective Oct. 1, 2009, and applicable to all actions commenced on or after that date in which the issue of recognition of a foreign-country judgment is raised (excluding from recognition judgments for alimony, support, or maintenance in matrimonial or family matters).] For a case recognizing a foreign-country money judgment for attorney fees and expenses, awarded to plaintiff at the conclusion in his favor of an action for support under the Family Law (Scotland) Act, see *Savage v. Zelent*, 243 N.C. App. 535, 777 S.E.2d 801 (2015) (rejecting defendant's assertion that attorney fees awarded in a family law matter are in fact a judgment for support or alimony not subject to recognition under G.S. 1C-1852; even though the Scottish judgment for attorney fees arose from defendant's unsuccessful claim for maintenance, the judgment itself was for attorney fees, which may be recognized in North Carolina), *review denied*, 782 S.E.2d 898 (N.C. 2016).]
        iii. This act does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment to which this act does not apply. [G.S. 1C-1852(d).]
    b. Uniform Enforcement of Foreign Judgments Act. [G.S. 1C-1701 *et seq*.]
        i. A foreign judgment under this act means any judgment, decree, or order of a court of the United States or a court of any other state which is entitled to full faith and credit in this state, except a "child support order", as defined in G.S. 52C-1-101 (UIFSA); a "custody decree", as defined in G.S. 50A-102 (UCCJEA); or a domestic violence protective order, as provided in G.S. 50B-4(d). [G.S. 1C-1702(1).]

ii. Being excluded by G.S. 1C-1702(1), a foreign judgment for child support may **not** be enforced in North Carolina pursuant to the Uniform Enforcement of Foreign Judgments Act.

5. Enforcement in North Carolina of an income withholding order issued by another state without registration after June 24, 2015.

   a. Direct filing or recognition in North Carolina of an out-of-state withholding order means that an employer or payor in this state is notified of the out-of-state withholding order without the involvement of initiating or responding tribunals. [Official Comment (2015), G.S. 52C-5-501.]

   b. Except as provided in G.S. 52C-5-507 addressing the administrative enforcement of orders, none of the provisions in G.S Chapter 52C, Article 5 are intended to apply to foreign support orders. [Official Comment (2015), G.S. 52C-5-501.]

   c. A district court in North Carolina has jurisdiction to hear cases in which an obligor registers the out-of-state income withholding order in North Carolina and files a contest to that order as provided in G.S Chapter 52C, Article 6, or otherwise contests the order in the same manner as if the order had been issued by a North Carolina tribunal. [G.S. 52C-5-506(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

6. Judgments for child support issued by courts or tribunals in foreign countries.

   a. Judgments for child support issued by courts or tribunals in foreign countries are not entitled to recognition and enforcement under the Full Faith and Credit Clause of the U.S. Constitution but may be enforced by a North Carolina court under the doctrine of comity. [*See State ex rel. Desselberg v. Peele*, 136 N.C. App. 206, 523 S.E.2d 125 (1999) (neither Full Faith and Credit Clause of the U.S. Constitution nor Full Faith and Credit for Child Support Orders Act applies to orders entered by foreign countries), *cert. denied*, 351 N.C. 479, 543 S.E.2d 509 (2000); *Southern v. Southern*, 43 N.C. App. 159, 258 S.E.2d 422 (1979) (Full Faith and Credit Clause does not apply to decrees of foreign nations).]

   b. A North Carolina court may enforce a child support order entered by a court or tribunal of a foreign country if:

      i. The foreign court or tribunal had jurisdiction over the obligor;

      ii. The order was valid under the law of the foreign country;

      iii. The procedures in the foreign proceeding were fair (for example, the obligor received adequate notice and an opportunity to be heard); and

      iv. Enforcement of the foreign order would not be contrary to the public policy of North Carolina. [*See Haker-Volkening v. Haker*, 143 N.C. App. 688, 547 S.E.2d 127 (under comity, North Carolina court may enforce support order issued by court in foreign jurisdiction provided foreign court had jurisdiction over cause and parties), *review denied*, 354 N.C. 217, 554 S.E.2d 338 (2001); *State ex rel. Desselberg v. Peele*, 136 N.C. App. 206, 523 S.E.2d 125 (1999) (if foreign court had jurisdiction over the cause and parties, North Carolina court may choose to enforce a foreign order), *cert. denied*, 351 N.C. 479, 543 S.E.2d 509 (2000); *Mayer v. Mayer*, 66 N.C. App. 522, 311 S.E.2d 659 (comity did not require North Carolina to recognize a Dominican divorce decree that offended North

Carolina's public policy against the hasty dissolution of marriages), *review denied*, 311 N.C. 760, 321 S.E.2d 140 (1984); *Southern v. Southern*, 43 N.C. App. 159, 258 S.E.2d 422 (1979) (English court lacked jurisdiction to render a judgment in personam against defendant, so North Carolina court could not enforce it).]

c. Provisions in the Uniform Interstate Family Support Act (UIFSA) addressing the recognition and enforcement of a support order entered in another country on the basis of comity after June 24, 2015.

i. Remedies provided by G.S. Chapter 52C are cumulative and do not affect the availability of remedies under other law or the recognition of a foreign support order on the basis of comity. [G.S. 52C-1-103, *amended by* S.L. 2015-117, § 1, effective June 24, 2015, to add the comity language.]

ii. G.S. 52C-1-103 facilitates the recognition and enforcement of a support order from a nation state that is entitled to have its orders recognized by comity but is not a "foreign country" as defined in G.S. 52C-1-10(3a). [Official Comment (2015), G.S. 52C-1-103.]

iii. Applying comity to enforce a support order of a tribunal of another nation state intends courtesy and good will and extends due regard for the legislative, executive, and judicial acts of another nation, which is not a "foreign country" as defined in G.S. 52C-1-10(3a). [Official Comment (2015), G.S. 52C-1-103.]

iv. A North Carolina tribunal that is requested to recognize and enforce a support order on the basis of comity may apply the procedural and substantive provisions of Articles 1 through 6 of G.S. Chapter 52C (UIFSA). [G.S. 52C-1-104(b), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

III. Income Withholding, Wage Garnishment, and Wage Assignment

A. Income Withholding in Non-IV-D Cases

1. Generally.

a. For definition of a IV-D case and a non-IV-D case, see Section I.D.1.b, above.

b. Income withholding is both a means for paying child support (regardless of whether the obligor has failed to pay child support, owes past due support, or is delinquent in paying court-ordered child support) and a remedy for enforcing the child support obligation of an obligor who has failed to pay court-ordered child support, owes past due support, or is delinquent in paying child support.

i. Income withholding is intended to be a **preventive** and **remedial** measure and is not punitive in nature.

ii. When an obligor owes past due child support and is employed or receives regular income from any nonexempt source, income withholding should be employed as the **preferred** remedy to enforce the obligor's child support obligation.

c. Except as otherwise noted, the income withholding procedures discussed below apply with respect to child support orders issued by North Carolina courts as well as to child support orders that are registered for enforcement or "domesticated" in North Carolina under the procedures discussed in Section II, above. [See G.S. 52C-6-603(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015, to include registered support orders issued in a foreign country.]

d. North Carolina's statutes allowing income withholding and garnishment of an obligor's current and future earnings to collect child support are an exception to the general rule (under G.S. 1-362 and prior case law) prohibiting ongoing wage garnishment to collect debts. [*See Elmwood v. Elmwood*, 295 N.C. 168, 244 S.E.2d 668 (1978).]

e. Income withholding may be used to collect child support arrearages regardless of whether the obligor is still required to make ongoing payments for the current support of a child. [*See Griffin v. Griffin*, 103 N.C. App. 65, 404 S.E.2d 478 (1991) (affirming order to withhold husband's wages to collect child support arrearages that had been reduced to judgment; finding no distinction between a parent who owes both arrearages and current support payments and one whose total support obligation consists of arrearages); *McGee v. McGee*, 118 N.C. App. 19, 453 S.E.2d 531 (finding that the mandatory income withholding in IV-D cases applies with equal force to orders for current support and to orders directing payment of arrearages), *review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995).]

f. Child support payments collected via income withholding in both IV-D and non-IV-D cases must be paid through the State Child Support Collection and Disbursement Unit in Raleigh. [*See* G.S. 110-136.8(b)(1), 110-136.9, and 110-139(f).]

2. Withholding requirement in an enforcement action pursuant to G.S. 50-13.9(d).

a. Until Jan. 1, 2007, when an enforcement order was issued pursuant to G.S. 50-13.9(d) and the court found that the obligor had failed to pay court-ordered child support in a timely manner and had disposable income from which child support payments could be withheld, the court was to require income withholding pursuant to G.S. 110-136.5 unless income withholding was not an available or adequate remedy. [G.S. 50-13.9(d).]

b. Effective Jan. 1, 2007, the provisions in G.S. 50-13.9(d) set out in Section III.A.2.a, immediately above, were repealed. G.S. 50-13.9(d) was amended to allow the clerk or a district court judge, upon affidavit, to order a delinquent obligor to appear and show cause why she should not be subjected to income withholding, contempt, or both. [*See* G.S. 50-13.9(d), *amended by* S.L. 2005-389, § 1 and S.L. 2006-264, § 97.]

3. Withholding requirement for initial orders entered on or after Jan. 1, 1994.

a. Immediate income withholding is required for all initial child support orders entered in non-IV-D cases on or after January 1, 1994, unless:

i. There is "good cause" not to require immediate income withholding (for a definition of "good cause", see G.S. 110-136.5(c1)) or

ii. The parties agree in writing to an alternative arrangement. [G.S. 110-136.3(a), 110-136.5(c1).]

b. The court does not have to find that the obligor is or has been delinquent or erratic in paying child support.

4. Withholding requirement for orders entered before Jan. 1, 1994. In cases in which the support order was entered before Jan. 1, 1994, an obligor becomes subject to court-ordered withholding on the earliest of:

   a. The date on which the obligor fails to make payments equal to one month's support; [G.S. 110-136.3(b)(2)(a).]

   b. The date on which the obligor requests withholding; [G.S. 110-136.3(b)(2)(b) and 110-136.5(b).] or

   c. The date on which the court determines, pursuant to a request by the obligee, that the obligor is or has been delinquent or erratic in making support payments. [G.S. 110-136.3(b)(2)(c) and 110-136.5(a).]

5. Requests for withholding. Withholding may be implemented upon request of either the obligor or the obligee.

   a. Request of the obligor. [G.S. 110-136.3(b)(2)(b) and 110-136.5(b).]

      i. A court must order income withholding if the obligor requests, in open court or in a written request filed with the clerk of superior court, that income withholding be implemented. [G.S. 110-136.5(c).]

      ii. If the obligor files a written request for income withholding and is delinquent in paying child support, the court must hold a hearing before entering an income withholding order, unless the obligor waives the right to a hearing. [G.S. 110-136.5(b)(2).]

   b. Request of the obligee.

      i. An obligee may request the court to order income withholding by filing a verified motion in the cause or by filing a verified complaint in an independent action alleging that the obligor has been "erratic" or is "delinquent" in paying child support. [G.S. 110-136.5(a).]

      ii. This provision applies with respect to child support payable:

         (a) Under orders entered before, on, or after Jan. 1, 1994, that do not require income withholding [*See* G.S. 110-136.3(b)(2) and 110-136.5(a).] and

         (b) Pursuant to a legally enforceable agreement other than a court order. [*See* G.S. 110-136.5(a).]

      iii. A court must order income withholding if the obligor has been "erratic" or is "delinquent," at the time a motion or complaint requesting income withholding is filed or on the date the hearing on the motion or complaint is held, in making child support payments. [G.S. 110-136.5(c).]

      iv. At any time the parties may agree to income withholding by consent order. [G.S. 110-136.5(a).]

      v. An obligor is "delinquent" in paying child support if he owes past due child support and is not in compliance with a court order specifying the manner in which he may satisfy his obligation to pay the arrearage (usually, by making regular

payments on the arrearage in addition to the obligor's payments for current or ongoing child support). [*See Davis v. Dep't of Human Res.*, 126 N.C. App. 383, 485 S.E.2d 342 (1997) (considering delinquency for purposes of federal income tax refund intercept), *aff'd in part and rev'd in part*, 349 N.C. 208, 505 S.E.2d 77 (1998).]

6. Defenses to a request for income withholding.
    a. Statutory defenses. An obligor may raise the following defenses in response to an obligee's request for income withholding pursuant to G.S. 110-136.3(b)(3) or 110-136.5(a):
        i. The obligor was not, at the time the motion or complaint was filed and at the time of the hearing, delinquent in paying child support and has not been erratic in making child support payments (if income withholding is sought pursuant to G.S. 110-136.5(a)).
        ii. The obligor did not owe child support arrearages equal to at least the amount of child support owed for one month (if income withholding is sought pursuant to G.S. 110-136.3(b)(2)(a)). [*See* G.S. 110-129(10)(a).]
        iii. Child support payments can be ensured without income withholding [G.S. 110-136.5(c)(2).]
        iv. The obligor has no disposable income subject to withholding or income withholding is not feasible. [G.S. 110-136.5(c)(3).]
    b. Other possible defenses.
        i. Payment of arrearages. Except in child support enforcement proceedings pursuant to G.S. 50-13.9(d), the obligor's payment of child support arrearages before the hearing is not a defense to the entry of an income withholding order. [G.S. 110-136.4(a)(5) (IV-D cases); 110-136.5(c) (non-IV-D cases).] Effective Jan. 1, 2007, the provision in G.S. 50-13.9(d) allowing the clerk to withdraw the order upon receipt of the delinquent payment was repealed. [*See* G.S. 50-13.9(d), *amended by* S.L. 2005-389, § 1 and S.L. 2006-264, § 97.]
        ii. Lack of willfulness. The obligor's willfulness or lack thereof in failing to pay child support is not relevant with respect to the question of whether income withholding is an appropriate remedy. [*See Champion v. Champion*, 64 N.C. App. 606, 307 S.E.2d 827 (1983) (garnishment proper to collect child support even though no finding that defendant's failure to pay was "wilful").]
7. Service on the payor of an order or notice of withholding.
    a. Employers or other payors that may be served with an income withholding order or notice include federal, state, and local government employers or agencies, the military, banks, trusts, insurance companies, tenants, customers, and others. [G.S. 110-129(13).]
    b. If the court orders income withholding in a non-IV-D case, a copy of the order or notice of income withholding must be served on the payor pursuant to G.S. 1A-1, Rule 5, served on the obligor by first class mail, and filed with the clerk of superior court. [G.S. 110-136.5(d).]

c. An income withholding order or notice may be served on any employer or other payor who is domiciled in North Carolina, does business in North Carolina, or is otherwise subject to the exercise of personal jurisdiction by a North Carolina court.

d. An income withholding order or notice also may be served on any employer or other payor who is not subject to North Carolina's jurisdiction but is subject to the jurisdiction of a state that has enacted the Uniform Interstate Family Support Act. [*See* G.S. 52C-5-501.]

e. If the obligor changes employment within North Carolina while an income withholding order remains in effect, the clerk of superior court must serve a notice of income withholding on the obligor and the obligor's new employer and schedule the case for hearing if the obligor or the obligor's new employer gives notice that the income withholding order requires modification or adjustment. [*See* G.S. 110-136.8(c)(2).]

8. Contents of the order or notice for withholding.

a. Federal law requires that all income withholding orders and notices comply substantially with a standardized, federally approved income withholding notice. [The approved form, Income Withholding for Support (OMB 0970-0154), is available through the Administrative Office of the Courts and IV-D agencies.]

b. An income withholding order or notice must state, as a sum certain, the amount of current support and support arrearages that an employer or other payor must withhold from the obligor's disposable income. [*See* G.S. 110-136.6(a), (c).]

c. To the extent that it is not inconsistent with the federal requirements set out in Section III.A.8.a, above, an income withholding order or notice must contain additional information concerning the obligor's disposable income, the maximum withholding rates, and the payor's rights and responsibilities as specified in G.S. 110-136.6(c) and 110-136.8.

9. Priority of an order for income withholding and multiple orders.

a. Income withholding for child support has priority against any other garnishment or income withholding from the same disposable income. [*See* G.S. 110-136.8(b)(3).]

b. When an obligor is subject to more than one income withholding order for child support, withholding for current child support must be given priority over withholding for past due child support. [G.S. 110-136.7. *See also Guilford Cty. ex rel. Gray v. Shepherd*, 138 N.C. App. 324, 532 S.E.2d 533 (2000) (trial court erred in ordering that payments received through wage withholding be prorated between current and past due support).]

c. When an obligor is subject to more than one income withholding order for current child support, the amount withheld must be prorated based upon the amount of each order. [G.S. 110-136.7.]

10. Amount to be withheld.

a. Mandatory amount. The amount to be withheld from the obligor's disposable wages or other disposable income must include:

i. An amount sufficient to pay current or ongoing child support,

ii. An additional amount to liquidate any arrearages, and

iii. A processing fee retained by the employer unless waived. [G.S. 110-136.6(a).]

b. Discretionary amount. The amount to be withheld also may include court costs and attorney fees awarded in child support cases. [G.S. 110-136.6(a).]

i. The language in G.S. 110-136.6(a) allowing court costs and attorney fees to be included in the amount withheld by the court clearly contemplates that such claims should be asserted prior to the entry of the withholding order. [*Glatz v. Glatz*, 98 N.C. App. 324, 390 S.E.2d 763 (denial of motion for attorney fees filed three months after entry of the income withholding order affirmed), *review denied*, 327 N.C. 427, 395 S.E.2d 677 (1990). *Cf.* G.S. 50-13.6; *Bramblett v. Bramblett*, 218 N.C. App. 454, 721 S.E.2d 763 (2012) (**unpublished**) (not paginated on Westlaw) (order awarding attorney fees was upheld against claim that request was not timely when it was not included in complaint and was asserted more than a year after complaint was filed; motion for fees was filed after conclusion of hearing on child custody and support, and trial court heard and ruled on motion before entry of an order in custody and support action and prior to any appeal; court of appeals noted its research revealed "no case law imposing a time limitation for the filing of a motion for attorney's fees in a child custody and child support action pursuant to N.C. Gen. Stat. § 50-13.6, other than that a proper notice of appeal divests the trial court of jurisdiction to hear a motion filed after notice of appeal has been given in the case").]

ii. For more on requesting an award of attorney fees, see *Liability and Amount*, Part 1 of this Chapter, Section VIII.A.4.

c. Maximum amount when order is only for child support (no spousal support). The total amount withheld may not exceed:

i. 40 percent of an obligor's disposable income (per pay period per payor) when the obligor is subject to only one order for withholding for child support and related costs or fees during any pay period; [G.S. 110-136.6(b).]

ii. If there are multiple orders for withholding, 45 percent of the obligor's disposable income if the obligor is supporting a spouse or dependent children other than those who are supported via one of the income withholding orders; [G.S. 110-136.6(b)(1).]

iii. If there are multiple orders for withholding, 50 percent of the obligor's disposable income if the obligor is not supporting a spouse or dependent children other than those who are supported via one of the income withholding orders. [G.S. 110-136.6(b)(2).]

d. Total withholding for child support and alimony or postseparation support. When there is an income withholding order for alimony or postseparation support pursuant to G.S. 50-16.7, the total amount withheld for child support, alimony, and postseparation support may not exceed:

i. 50 percent of the obligor's aggregate disposable earnings, as defined in the federal Consumer Credit Protection Act (earnings minus legally required deductions), if the obligor is supporting a spouse or dependent child other than the spouse or child who is supported via the income withholding order;

ii. 55 percent of the obligor's disposable earnings if the obligor is supporting a spouse or dependent child and owes support arrearages that accrued at least twelve weeks prior to the date of withholding;

iii. 60 percent of the obligor's disposable earnings if the obligor is not supporting a spouse or dependent child other than the spouse or child who is supported via the income withholding order; or

iv. 65 percent of the obligor's disposable earnings if the obligor is not supporting a spouse or dependent child and owes support arrearages that accrued at least twelve weeks prior to the date of withholding. [*See* G.S. 110-136.6(b1); 15 U.S.C. § 1673(b)(2).]

e. Withholding for obligor's share of child's health care premiums. When an employer is required to withhold the obligor's share of the cost of health care premiums for court-ordered health insurance for the child for whom support is owed, that amount plus the amount of child support withheld from the obligor's earnings may not exceed the applicable amounts allowed under the federal Consumer Credit Protection Act (15 U.S.C. § 1673(b)). [*See* G.S. 108A-69(b)(4).]

11. Income or wages subject to withholding.

a. An obligor's disposable income includes any periodic payments made to the obligor, including wages, salary, commissions, self-employment income, bonus pay, severance pay, sick pay, incentive pay, vacation pay, compensation as an independent contractor, workers' compensation, unemployment compensation (in IV-D cases only), Social Security or other disability benefits, annuity benefits, survivor's benefits, pension and retirement benefits (including Social Security retirement benefits), interest, dividends, rents, royalties, trust income, and other similar payments, which remain after deduction of federal, state, and local taxes, Social Security, and involuntary retirement contributions. [G.S. 110-129(6). *See Evans v. Evans*, 111 N.C. App. 792, 434 S.E.2d 856 (portion of husband's Social Security benefits properly awarded to wife as alimony), *review denied*, 335 N.C. 554, 439 S.E.2d 144 (1993); *State v. Miller*, 77 N.C. App. 436, 335 S.E.2d 187 (1985) (requiring father to pay child support out of his workers' compensation benefits did not violate G.S. 97-21); *Felts v. Felts*, 192 N.C. App. 543, 665 S.E.2d 594 (**unpublished**) (not paginated on Westlaw) (workers' compensation lump sum settlement of $125,000 constituted "one-time, nonrecurring" income to the father under the child support guidelines), *review denied*, 362 N.C. 680, 670 S.E.2d 232 (2008).]

i. An obligor's disposable income, for purposes of income withholding for child support, is the amount of the obligor's gross income (or gross wage in the case of employment) minus amounts withheld for federal, state, and local taxes, federal Social Security contributions, and involuntary retirement contributions. [*See* G.S. 110-129(6).]

ii. Amounts that are deducted from an obligor's income but are not required under federal or state law to be withheld are **not** deducted from the obligor's income in determining the amount of the obligor's disposable income for child support income withholding. For example, health insurance premiums (even court-ordered health insurance for the child for whom support is owed), union dues, and voluntary retirement or stock option plans would not be deducted.

b. Under the Wage and Hour Act, "wage" includes all compensation for labor or services rendered by an employee, including vacation pay; sick pay; bonuses; commissions; severance pay; the reasonable cost of employer-furnished board, lodging, and other facilities; and other amounts promised when the employer has a policy or procedure of making such payments. [G.S. 95-25.2(16).]

c. Military pay and allowances (including basic allowance for quarters) and veterans' benefits are subject to withholding. [*See* 42 U.S.C. § 659 (making federal benefits, including those payable to members of the armed services, subject to income withholding for child support).]

12. Benefits or payments not subject to withholding.

a. Supplemental Security Income, Work First, and other public assistance benefits payable to an obligor. [G.S. 110-129(6).]

b. An obligor's unemployment compensation benefits in a non-IV-D case. [G.S. 110-129(6).]

c. One-time, lump sum payments, such as lump sum payments resulting from legal settlements, insurance claims, or inheritance (not subject to income withholding because they are not periodic payments).

d. Other income that is exempt from execution or levy under federal or state law. [*See, e.g.*, *Rose v. Rose*, 481 U.S. 619, 107 S. Ct. 2029 (1987) (veterans' disability benefits funds are exempt from garnishment or attachment while in the hands of the benefits administrator of Veterans Affairs, but once funds are delivered to the veteran, a state court can require the veteran to use them to satisfy an order of child support); 5 C.F.R. § 581.103 (listing monies that are subject to garnishment).]

13. Income withholding of retirement funds subject to Employee Retirement Income Security Act (ERISA).

a. To implement income withholding with respect to a pension, annuity, or retirement plan subject to ERISA, a court must enter a qualified domestic relations order (QDRO). [*See* 29 U.S.C. § 1056(d)(3).] For more on QDROs, including what an order must contain, how it becomes qualified and what prevents it from being qualified, see *Pension and Retirement Benefits*, Bench Book, Vol. 1, Chapter 6, Part 5.

b. A QDRO is a court order that:

i. Requires a participant in a covered pension plan to pay support for his child;

ii. Creates or recognizes an alternate payee's right to, or assigns to the alternate payee the right to, receive all or a portion of the benefits payable by the plan to the plan participant; [29 U.S.C. §§ 1056(d)(3)(B)(i)(I), (B)(i)(I).]

iii. Specifies the plan to which the order applies; [29 U.S.C. § 1056(d)(3)(C)(iv).]

iv. Specifies the number of payments or period to which the order applies; [29 U.S.C. § 1056(d)(3)(C)(iii).]

v. Designates the participant's child, former spouse, or spouse as an alternate payee under the plan; [29 U.S.C. §§ 1056(d)(3)(B)(i)(I), 1056(d)(3)(K).]

vi. States the names and mailing addresses of the participant and alternate payee; [29 U.S.C. § 1056(d)(3)(C)(i).]

vii. Specifies the amount or percentage of the participant's benefits that must be paid by the plan to the alternate payee or the manner in which the amount or percentage must be determined; [29 U.S.C. § 1056(d)(3)(C)(ii).] and

viii. Is served on and approved by the plan administrator. [29 U.S.C. § 1056(d)(3)(G)(i) (implied service requirement). *See Sippe v. Sippe*, 101 N.C. App. 194, 398 S.E.2d 895 (1990) (pension plan itself makes initial determination of whether a domestic relations order issued by the district court is a QDRO under the terms of the plan), *review denied*, 329 N.C. 271, 407 S.E.2d 840 (1991).]

c. A QDRO may not require a plan to:

i. Provide an alternate payee or participant with any type or form of benefit, or any option, not otherwise provided under the plan;

ii. Provide increased benefits (determined on the basis of actuarial value);

iii. Pay benefits to an alternate payee that are required by a prior QDRO to be paid to another alternate payee;

iv. Pay benefits to an alternate payee in the form of a qualified joint and survivor annuity for the lives of the alternate payee and his or her subsequent spouse; [U.S. Dep't of Labor, Emp. Benefits Sec. Admin., QDROs: The Division of Retirement Benefits through Qualified Domestic Relations Orders ch. 1, Question 1-6, p. 17, https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/qdros.pdf.] or

v. Begin payment earlier than the date the obligor is first eligible to receive benefits under the plan (usually the obligor's attainment of the earliest retirement age under the plan). [29 U.S.C. § 1056(d)(3)(E)(i).]

d. Plans subject to ERISA.

i. Most, but not all, pension plans (including 401(k) plans, simplified employee pensions, and employee stock ownership plans) sponsored by private sector employers and unions are subject to ERISA. [See 29 U.S.C. § 1003 for employee benefit plans subject to ERISA and 29 U.S.C. § 1002 for relevant definitions.]

ii. Federal, state, and local government pensions for the military, teachers, and government employees; pension plans established by religious or charitable organizations; pension plans established under the Railroad Retirement Act; and Individual Retirement Accounts (IRAs) are **not** subject to ERISA. [See 29 U.S.C. § 1003(b), exempting from ERISA coverage governmental plans and certain church plans.]

e. Distribution of plans not covered by ERISA. Plans not subject to ERISA may be distributed as follows:

i. Federal military retirement plans.

(a) Procedures for submitting orders to divide military pensions are set forth in Title 32, part 63 of the Code of Federal Regulations (C.F.R.). For discussion of procedures and samples of model orders, see Gary A. Shulman, David I. Kelley, & Daniel E. Kelley, Dividing Pensions in Divorce ch. 23 (3d ed. 2010).

(b) Pursuant to the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408(e), the total amount of the disposable retirement pay of a servicemember payable under all court orders may not exceed 50 percent of such disposable retirement pay.

(c) Also pursuant to USFSPA, a court cannot order that a plan administrator make direct payments to the nonparticipant spouse unless the servicemember has at least ten years of service. [10 U.S.C. § 1408(d).]

ii. Railroad retirement benefits. Tier II benefits can be distributed by an order complying with regulations found in Title 20, part 295 of the C.F.R. For discussion of procedures and samples of form orders, see Gary A. Shulman et al., Dividing Pensions in Divorce ch. 25 (3d ed. 2020) (hereinafter Dividing Pensions in Divorce 3d ed.).

iii. Federal civil service retirement systems. Guidelines for Interpreting State Court Orders Dividing Civil Service Retirement Benefits (federal Office of Personnel Management, 50 Fed. Reg. 20,081 (May 13, 1985); 5 C.F.R., Ch. I, subch. B, pt. 838, subpt. J (Court Orders Affecting Civil Service Retirement Benefits)). For discussion of procedures and samples of form orders, see Dividing Pensions in Divorce 3d ed., at ch. 24.

iv. North Carolina state retirement plan. Plan benefits held assignable by a consent order entered in an equitable distribution case. [*See* G.S. 135-9; *Patterson ex rel. Jordan v. Patterson*, 137 N.C. App. 653, 529 S.E.2d 484, *review denied*, 352 N.C. 591, 544 S.E.2d 783 (2000).]

14. Required contents of an income withholding order. All non-IV-D child support orders that require payment of child support through income withholding must:

a. Require the obligor to:

i. Keep the clerk of superior court informed of the obligor's current residence and mailing address, [G.S. 110-136.3(a)(1).]

ii. Cooperate fully in verifying the amount of the obligor's disposable income, [G.S. 110-136.3(a)(3).] and

iii. Keep the obligee informed of the name and address of any payor of the obligor's disposable income and of the amount and effective date of any substantial change in the obligor's disposable income. [G.S. 110-136.3(a)(5).]

b. Require the custodial party to keep the obligor informed of the custodial party's disposable income and the amount and effective date of any substantial change in that income. [G.S. 110-136.3(a)(4).]

c. Include the current residence and mailing address of the custodial parent or the address of the child if the address of the custodial parent and the address of the child are different. There is no requirement that the child support order contain the address of the custodial parent or the child if (1) there is an existing order prohibiting disclosure of the custodial parent's or child's address to the obligor or (2) the court has determined that notice to the obligor is inappropriate because the obligor has made verbal or physical threats of violence that constitute domestic violence under G.S. Chapter 50B. [G.S. 110-136.3(a)(4a), *amended by* S.L. 2014-115, § 44.5, effective Aug. 2, 2014.]

15. Payor (for example, an employer) who fails to comply with order to withhold or who engages in prohibited conduct.
    a. A payor who willfully fails to withhold child support from an obligor's disposable income as required is liable to the obligee for the amount of support that should have been withheld. [*See* G.S. 110-136.8(e).]
        i. The payor's liability may be enforced by filing a motion in the cause joining the payor as a third-party defendant.
        ii. If the payor is joined, the payor has thirty days to file an answer. [*See* G.S. 110-136.8(e).]
    b. A payor who refuses to hire, takes disciplinary action against, or discharges an obligor due to child support income withholding may be liable for civil penalties, damages, and other relief in a civil action brought by the obligor within one year. [G.S. 110-136.8(e).]
16. Modification or termination of income withholding.
    a. Modification.
        i. Any party may file a motion in the cause seeking modification of an income withholding order based on changed circumstances. [G.S. 110-136.5(e).]
        ii. In addition, the clerk or court on its own motion may initiate a hearing for modification if modification appears to be required or appropriate. [G.S. 110-136.5(e).]
    b. Termination. An income withholding order terminates when the court or IV-D agency notifies the payor that:
        i. The child support order has expired or become invalid,
        ii. The parties and court have agreed that income withholding may be terminated because there is another adequate means of collecting child support or arrearages, or
        iii. The whereabouts of the obligee and child are unknown and all child support arrearages owed to the state have been paid in full. [G.S. 110-136.10.]
    c. Effect of the order on the underlying obligation to support.
        i. The order modifying or terminating withholding will not modify or terminate the underlying child support obligation or accrued arrearages unless specifically ordered by the judge.
        ii. A party in a civil support action desiring to modify the underlying support obligation (and not simply the order for income withholding) may file a motion to modify the support order pursuant to G.S. 50-13.7.

B. Income Withholding in IV-D Cases

1. Generally.
    a. Except as noted, the statutory provisions that apply to income withholding in non-IV-D cases (discussed in Section III.A, above) apply with respect to income withholding in IV-D cases in which a new or modified child support order is entered. [G.S. 110-136.3(b)(1).]

b. The statutory provisions for mandatory income withholding in IV-D cases [G.S. 110-136.3 and 110-136.4.] apply with equal force to orders for current support and to orders directing payment of arrearages. [*McGee v. McGee*, 118 N.C. App. 19, 453 S.E.2d 531, *review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995).]

c. G.S. 110-136.3 and 110-136.4 require the trial court to order wage withholding in IV-D cases and eliminate the discretion the trial court generally has to establish an appropriate remedy. [*Guilford Cty. ex rel. Norwood v. Davis*, 177 N.C. App. 459, 629 S.E.2d 178 (2006) (when trial court failed to order wage withholding in IV-D case, matter reversed and remanded for entry of immediate withholding pursuant to G.S. 110-136.4).]

2. Immediate withholding required for orders entered or modified on or after Oct. 1, 1989.

a. A IV-D child support order entered or modified on or after Oct. 1, 1989, must order payment of child support through income withholding. [G.S. 110-136.3(a), 110-136.3(b)(1), and 110-136.4(b).] The court is not required to find that the obligor is delinquent or owes past due child support.

b. This requirement does not apply if the obligor is unemployed, information regarding the obligor's disposable income is unavailable, or the parties agree to an alternative arrangement for the payment of child support. [G.S. 110-136.4(b).]

3. Implementation of immediate income withholding: service on the payor.

a. If the court orders income withholding, the IV-D agency must serve an income withholding notice on the obligor's payor pursuant to G.S. 1A-1, Rule 5 or by electronic transmission in compliance with the federal Office of Child Support Enforcement electronic income withholding procedures, mail a copy of the notice to the obligor, and file a copy of the notice with the clerk of superior court. [*See* G.S. 110-136.4(b), *amended by* S.L. 2015-117, § 4, effective June 24, 2015.]

b. If the obligor's employment or source of disposable income changes, the IV-D agency, without further order of the court, may serve an income withholding notice on the new payor pursuant to G.S. 1A-1, Rule 5 or by electronic transmission in compliance with the federal Office of Child Support Enforcement electronic income withholding procedures, mail a copy of the notice to the obligor, and file a copy of the notice with the clerk of superior court. [*See* G.S. 110-136.4(c), *amended by* S.L. 2015-117, § 4, effective June 24, 2015.]

4. Administrative withholding when obligor is in arrears or upon request.

a. If an obligor is required to pay child support under an order entered before Oct. 1, 1989, or an order for immediate income withholding has not been entered, a IV-D agency may implement income withholding administratively (without a court order) if the obligor or obligee requests withholding or if the obligor has failed to make court-ordered child support payments in an amount equal to the support payable for one month. [G.S. 110-136.3(b)(1) and 110-136.4(a).]

b. A IV-D agency may implement income withholding administratively by serving an advance notice of income withholding on the obligor pursuant to G.S. 1A-1, Rule 4 after verifying the obligor's mailing address, the payor, and the obligor's disposable income. [G.S. 110-136.4(a)(1).]

c. Uncontested withholding. If the obligor fails to contest income withholding, the IV-D agency may implement income withholding by serving an income withholding notice on the payor pursuant to G.S. 1A-1, Rule 5 or by electronic transmission in compliance with the federal Office of Child Support Enforcement electronic income withholding procedures, mailing a copy of the notice to the obligor, and filing a copy of the notice with the clerk of superior court. [G.S. 110-136.4(a)(4), *amended by* S.L. 2015-117, § 4, effective June 24, 2015.]

d. Contested withholding.

i. An obligor may contest income withholding by requesting a hearing before the district court in the county in which the support order was entered within ten days of receipt of the advance notice of income withholding. [G.S. 110-136.4(a)(3).]

ii. The obligor must notify the IV-D agency of the request for hearing and specify the grounds on which the obligor is contesting income withholding. [G.S. 110-136.4(a)(3).] An obligor may contest income withholding based on the following "mistakes of fact" only:

(a) The obligor is not in arrears in an amount equal to the support payable for one month (unless income withholding has been requested by the obligor),

(b) The obligor did not request income withholding (if income withholding was allegedly requested by the obligor),

(c) The obligor is not the person subject to the child support order indicated in the advance notice of income withholding,

(d) The obligor does not owe the amount of current support or arrearages specified in the advance notice of income withholding, or

(e) The advance notice of income withholding specifies a withholding rate in excess of that allowed by law. [*See* G.S. 110-129(10).]

iii. The payment of past due child support by the obligor after an income withholding notice or order has been issued does not constitute a defense against implementing or continuing income withholding. [*See* G.S. 110-136.4(a)(5).]

iv. If the parties are unable to resolve the asserted mistake of fact by agreement, the court must hold a hearing within thirty days of the obligor's receipt of the advance notice of withholding to determine whether income withholding is precluded, in whole or in part, based on the asserted mistake of fact. The IV-D agency may not implement income withholding pending the hearing decision. [G.S. 110-136.4(a)(3).]

v. If the court determines that income withholding is not precluded based on a "mistake of fact," the IV-D agency may implement income withholding by serving an income withholding notice on the payor pursuant to G.S. 1A-1, Rule 5 or by electronic transmission in compliance with the federal Office of Child Support Enforcement electronic income withholding procedures, mailing a copy of the notice to the obligor, and filing a copy of the notice with the clerk of superior court. [G.S. 110-136.4(a)(3), *amended by* S.L. 2015-117, § 4, effective June 24, 2015, and 110-136.4(c).]

e. No stay pending appeal. An appeal of the court's decision does not stay implementation of income withholding, but if the appeal is decided in the obligor's favor, the obligee must promptly repay any moneys wrongly withheld from the obligor and notify the payor to cease income withholding. [G.S. 110-136.4(a)(3), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

5. Administrative modification of an order for income withholding.
   a. When an income withholding order has been entered, the IV-D agency, without further order of the court, may modify the order based on changed circumstances by serving the obligor with an advance notice of income withholding pursuant to G.S. 110-136.4(a)(1). [*See* G.S. 110-136.4(e).]
   b. If an obligor owes past due child support, a IV-D agency, without further order of the court, may increase the amount of income withholding, subject to the limitations under G.S. 110-136.6, by serving the obligor with an advance notice of income withholding pursuant to G.S. 110-136.4(a)(1). [*See* G.S. 110-129.1(a)(8)c.; *cf. Sampson Cty. ex rel. Bolton v. Bolton*, 93 N.C. App. 134, 377 S.E.2d 88 (1989) (decided before G.S. 110-129.1 was enacted and holding that due process requires that garnishment be at rate set out in controlling support order unless IV-D agency moves for modification).]
6. Income withholding of unemployment compensation benefits.
   a. A responsible parent may voluntarily assign unemployment compensation benefits to a IV-D agency, or a IV-D agency may request that a responsible parent voluntarily assign unemployment compensation benefits, to satisfy a child support obligation. [G.S. 110-136.2(a).]
   b. In the absence of a voluntary assignment of unemployment compensation benefits, the N.C. Department of Health and Human Services must implement income withholding as provided for in IV-D cases. [G.S. 110-136.2(f).]
   c. The amount withheld for child support must not exceed 25 percent of the obligor's unemployment compensation benefits. [G.S. 110-129(6) and 110-136.2(f).]
   d. The Employment Security Commission is exempt from the requirements of G.S. 110-136.8 (setting out the responsibilities of a payor), other than the requirements to withhold child support from the obligor's unemployment benefits and to transmit the payments to the N.C. Department of Health and Human Services or the child support agency of another state as required by G.S. 110-136.2(f). [G.S. 110-136.2(f).]
7. Required contents of an income withholding order. All IV-D child support orders that require payment of child support through income withholding must:
   a. Require the obligor to:
      i. Keep the IV-D agency informed of the obligor's current residence and mailing address, [G.S. 110-136.3(a)(1).]
      ii. Cooperate fully in verifying the amount of the obligor's disposable income, [G.S. 110-136.3(a)(3).] and
      iii. Keep the IV-D agency informed of the name and address of any payor of the obligor's disposable income and the amount and effective date of any substantial change in the obligor's disposable income; [G.S. 110-136.3(a)(5).]

b. Require the custodial party to keep the obligor informed of the custodial party's disposable income and the amount and effective date of any substantial change in this disposable income; [G.S. 110-136.3(a)(4).]

c. Include the current residence and mailing address of the custodial parent or the address of the child if the address of the custodial parent and the address of the child are different. There is no requirement that the child support order contain the address of the custodial parent or the child if (1) there is an existing order prohibiting disclosure of the custodial parent's or child's address to the obligor or (2) the court has determined that notice to the obligor is inappropriate because the obligor has made verbal or physical threats of violence that constitute domestic violence under G.S. Chapter 50B. [G.S. 110-136.3(a)(4a), *amended by* S.L. 2014-115, § 44.5, effective Aug. 11, 2014.]

C. Income Withholding Orders Issued in Another State

1. Direct enforcement of an out-of-state order.

a. A child support income withholding order issued in another state may be sent by or on behalf of the obligee, or by the child support enforcement agency, to an employer or payor in North Carolina without first filing a petition or comparable pleading or registering in North Carolina the order on which it is based. [G.S. 52C-5-501(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] Receipt of a copy of a withholding order by fax, regular first class mail, registered or certified mail, or any other type of direct notice is sufficient to provide the requisite notice to trigger direct income withholding in the absence of a contest by the employee-obligor. [Official Comment (2015), G.S. 52C-5-501.]

b. A North Carolina employer who receives an income withholding order that appears regular on its face must:

i. Treat the order as if it had been issued by a North Carolina court; [G.S. 52C-5-502(b).]

ii. Immediately provide a copy of the order to the obligor; [G.S. 52C-5-502(a).] and

iii. Except as otherwise provided in G.S. 52C-5-502(d) and 52C-5-503, withhold and distribute the funds as directed in the income withholding order. [G.S. 52C-5-502(c), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

c. Contest by obligor.

i. An obligor may contest implementation of an out-of-state income withholding order:

(a) Based on a "mistake of fact" (see G.S. 110-129(10) for definition) [G.S. 110-136.4(a)(3), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; 110-136.5(c)(1).] or

(b) By registering the order in a tribunal of this state and filing a contest to the order as provided in G.S. Chapter 52C, Article 6 or otherwise contesting the order in the same manner as if the order had been issued by a North Carolina tribunal. [G.S. 52C-5-506(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (contest of an order received directly by an employer in this state).]

ii. To contest implementation of an out-of-state income withholding order, the obligor must give notice of the contest to:

(a) A child support enforcement agency providing services to the obligee;

(b) Each employer that has directly received an income withholding order relating to the obligor; and

(c) The person designated to receive payments in the income withholding order or, if no person is designated, to the obligee. [G.S. 52C-5-506(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

d. Employer noncompliance.

i. An employer that willfully fails to comply with an income withholding order issued by a court or tribunal in another state and received for enforcement is subject to the same penalties that may be imposed for noncompliance with an income withholding order issued by a North Carolina court (discussed in Section III.A.15, above). [G.S. 52C-5-505, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

ii. If an employer fails to comply with an out-of-state income withholding order, the obligee may request that a North Carolina court enforce the underlying child support order and the income withholding order against the employer and the obligor by registering those orders for enforcement pursuant to G.S. 52C-6-601.

2. Enforcement by registration.

a. An income withholding order issued in another state may be registered in North Carolina for enforcement. [G.S. 52C-6-601, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

b. A registered support order issued in another state or a foreign support order is enforceable in the same manner and is subject to the same procedures as an order issued by a North Carolina tribunal. [G.S. 52C-6-603(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

3. Choice of law.

a. Except as provided in G.S. 52C-6-604(d), when a North Carolina court is asked to enforce an out-of-state income withholding order, it must apply:

i. The law of the issuing state or foreign country with respect to the nature, extent, amount, and duration of the obligor's child support obligation, the computation and payment of arrearages and interest on the arrearages, and the existence and satisfaction of other obligations under the support order; [*See* G.S. 52C-5-506(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (applicable to direct enforcement of out-of-state income withholding orders but not foreign orders).]

ii. In a proceeding for arrearages under a registered support order, the statute of limitations of North Carolina or of the issuing state or foreign country, whichever is longer; [*See* G.S. 52C-5-506(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (applicable to direct enforcement of out-of-state income withholding orders but not foreign orders), and 52C-6-604(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (applicable to enforcement by registration of orders issued by another state or foreign country).]

iii. The procedures and remedies of North Carolina to enforce current support and collect arrearages and interest due on a support order of another state or a foreign country registered in this state. [*See* G.S. 52C-5-506(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (applicable to direct enforcement of income withholding orders issued in another state but not foreign orders), and 52C-6-604(c), *added by* S.L. 2015-117, § 1, effective June 24, 2015 (applicable to enforcement by registration of orders issued by another state or foreign country).]

b. The law of the state of the obligor's principal place of employment governs the fee that the employer may charge in connection with income withholding, the maximum amount that may be withheld from the obligor's income, and the time limits for implementing income withholding and forwarding support payments. [*See* G.S. 52C-5-502(d) (applicable to direct enforcement).]

4. The alternative pre-UIFSA (Uniform Interstate Family Support Act) procedure established by G.S. 110-136.3(d) for enforcing interstate child support orders through income withholding has been rendered practically obsolete and redundant by the UIFSA procedures discussed above but has not been repealed. [*See* G.S. 110-136.3(d).]

D. Wage Garnishment

1. The post-judgment child support wage garnishment procedure established by G.S. 110-136 in 1976 is seldom used, given the availability of income withholding under G.S. 110-136.3 through 110-136.10.
2. Post-judgment wage garnishment differs from income withholding to enforce child support in a number of ways, including the following:
   a. A court may order garnishment only if the obligor is delinquent or erratic in paying support under a court order. [G.S. 110-136(b) and (b1).]
   b. Garnishment applies only to an obligor's "disposable earnings" and not to other types of income. [G.S. 110-136(a).]
   c. The obligor's employer must be joined as a third-party defendant before the garnishment order is issued. [G.S. 110-136(b).]
   d. An employer who violates a garnishment order is subject to contempt but not to the civil penalties set out in G.S. 110-136.8(e). [G.S. 110-136(e).] and
   e. The garnishment rate may never exceed 40 percent of the obligor's disposable earnings. [G.S. 110-136(c).]

E. Wage Assignment

1. The wage assignment provisions of G.S. 50-13.4(f)(1) and 110-136.1 are seldom used, given the availability of income withholding under G.S. 110-136.3 through 110-136.10.
2. A court may order an obligor to execute a wage assignment to ensure the future payment of the obligor's child support obligation or as a remedy based on the obligor's past failure to pay court-ordered child support. [G.S. 50-13.4(f)(1); 110-136.1.]
3. The wage assignment provisions of G.S. 50-13.4(f)(1) and 110-136.1 apply only with respect to wages, salary, or other income payable to an obligor by the obligor's employer. [G.S. 110-136.1.]

4. A wage assignment is effective only if the obligor's employer agrees in writing to recognize the wage assignment. [G.S. 95-31; 110-136.1.] An employer who has accepted an obligor's wage assignment for child support may terminate the assignment at any time by filing a written revocation with the court. [G.S. 110-136.1.]
5. A wage assignment is a "garnishment" under the federal Consumer Credit Protection Act (15 U.S.C. §§ 1672 *et seq*.) and is subject to the limits imposed by 15 U.S.C. § 1673 on the amount that may be garnished from an employee's disposable earnings for payment of child support. [See Section III.A.10, above.]

IV. License Revocation

A. License Revocation pursuant to G.S. 50-13.12

The revocation procedure set out in G.S. 50-13.12 is applicable to both IV-D and non-IV-D cases. However, additional revocation procedures are available in IV-D cases. [See Section IV.B, below.]

1. Licenses subject to revocation.
   a. G.S. 50-13.12 authorizes a district court judge to revoke some or all of the following state licensing privileges:
      i. Hunting, fishing, or trapping;
      ii. Occupational, professional, or business; and
      iii. Driving (regular and commercial). [G.S. 50-13.12(a)(2).]
   b. G.S. 50-13.12 does not apply with respect to local (county or municipal) business or occupational licenses.
2. Basis for revocation.
   a. G.S. 50-13.12(b) authorizes revocation of some or all of the state licensing privileges listed above if an obligor is **willfully delinquent** in paying child support and owes an amount of past due child support that equals at least one month's support.
      i. An obligor is "delinquent" in paying child support if she:
         (a) Owes past due child support and
         (b) Is not in compliance with a court order specifying the manner in which she may satisfy her obligation to pay the arrearage (usually, by making regular payments on the arrearage in addition to her payments for current or ongoing child support). [*See Davis v. Dep't of Human Res.*, 126 N.C. App. 383, 485 S.E.2d 342 (1997) (considering delinquency for purposes of federal income tax refund intercept), *aff'd in part and rev'd in part*, 349 N.C. 208, 505 S.E.2d 77 (1998).]
      ii. An obligor's delinquency is "willful" if he has failed, without just cause, to pay court-ordered child support and has the present ability to pay his current child support obligation plus an amount that would pay in full over time the child support arrearages that he owes. [*See Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966) (in contempt proceeding, willful imports knowledge and a stubborn resistance); *Forte v. Forte*, 65 N.C. App. 615, 309 S.E.2d 729 (1983) (in

contempt proceeding, willfulness means a bad faith disregard for authority and the law).]

b. A person's licensing privileges also may be revoked based on the person's willful failure to comply with a subpoena issued in a child support or paternity establishment proceeding. [G.S. 50-13.12(b).]

3. Stay of revocation. If the court determines that the obligor's licensing privileges are subject to revocation, the court may order that revocation of the obligor's licensing privileges be stayed on the condition that the obligor continue paying her current child support obligation plus an additional amount to pay in full over time the child support arrearage that she owes. [G.S. 50-13.12(b).]

4. No stay of revocation. If the court does not stay revocation of the obligor's licensing privileges, the clerk of superior court must notify each licensing agency that the obligor's licensing privileges have been revoked. [G.S. 50-13.12(b).]

   a. If the court revokes an obligor's driver's license, the obligor must surrender his license to the clerk of superior court. The clerk must send the obligor's driver's license to the Division of Motor Vehicles (DMV) along with the order and receipt for the license or must destroy the obligor's driver's license if notice of the revocation is transmitted electronically to DMV. [G.S. 20-24(a).]

   b. If the court revokes an obligor's driver's license, the court may permit the obligor to retain limited driving privileges. [*See* G.S. 20-179.3.]

   c. A licensing board must take all necessary steps to implement and enforce the license revocation. The obligor is not entitled to request a hearing under the state Administrative Procedure Act (G.S. Chapter 150B) in connection with the board's revocation of licensing privileges pursuant to G.S. 50-13.12. [G.S. 50-13.12(f).]

   d. The revocation of the obligor's licensing privileges remains in effect until the licensing board receives certification that the obligor is no longer delinquent in child support payments. [G.S. 50-13.12(f).]

5. Reinstatement pursuant to court order.

   a. An obligor whose licensing privileges are revoked under G.S. 50-13.12 may petition the court for reinstatement of her licensing privileges. [G.S. 50-13.12(d).]

   b. The court may enter an order authorizing reinstatement of the obligor's licensing privileges conditioned on the obligor's paying his current child support obligation plus an additional amount to pay in full over time the child support arrearage owed. [G.S. 50-13.12(d).]

6. Reinstatement pursuant to clerk certification (no court order).

   a. An obligor whose licensing privileges were revoked under G.S. 50-13.12 but who is no longer delinquent with respect to her court-ordered child support obligation may request that the clerk of superior court certify that she is no longer delinquent. [G.S. 50-13.12(c).]

   b. If there is satisfactory proof that the obligor is no longer delinquent, the clerk must, without a court order, issue a certificate authorizing reinstatement of the obligor's licensing privileges and, upon the obligor's request, mail a copy of the certificate to the appropriate licensing board(s). [G.S. 50-13.12(c).]

B. Additional License Revocation Procedure for IV-D Cases pursuant to G.S. 110-142.2

1. Licenses and registrations subject to revocation.
   a. In IV-D cases, G.S. 110-142.2(a) authorizes a district court judge to revoke some or all of the following state licensing privileges:
      i. Hunting, fishing, or trapping and
      ii. Driving (regular and commercial driver's licenses and motor vehicle registration).
   b. G.S. 110-142.2 does not apply with respect to business, occupational, or professional licenses. [See Section IX.E, below.]
2. Basis for revocation.
   a. In IV-D cases, G.S. 110-142.2(a) and (b) authorize revocation of some or all of the state licensing privileges listed above if the obligor has willfully failed to pay court-ordered child support and is at least ninety days in arrears.
   b. A person's licensing privileges also may be revoked based on the person's willful failure to comply with a subpoena issued in a child support or paternity establishment proceeding. [G.S. 110-142.2(b).]
   c. The court must enter an order instituting any one or more of the sanctions, if applicable, as provided in G.S 110-142.2(a) if the obligor is found in civil or criminal contempt for a third or subsequent time for failure to comply with a child support order. [G.S. 110-142.2(b).]
3. How to request revocation. A request to revoke an obligor's licensing privileges pursuant to G.S. 110-142.2 must be made through a child support enforcement proceeding initiated pursuant to G.S. 50-13.9(d). [*See* G.S. 110-142.2(a).]
4. Stay of revocation.
   a. If the court determines that the obligor's licensing privileges are subject to revocation, the court may order that revocation of the obligor's licensing privileges be stayed on the condition that the obligor continue paying his current child support obligation plus an additional amount to pay in full over time the child support arrearage that he owes. [G.S. 110-142.2(b).]
   b. The stay must be conditioned on the obligor's making an immediate payment of $500 or 5 percent of the child support arrearage (whichever is less), payment of the remaining delinquency within a reasonable time, and maintenance of current support. The obligor's total obligation for current support and arrearages may not exceed the income withholding limits pursuant to G.S. 110-136.6(b). [G.S. 110-142.2(b).]
   c. If the court stays revocation of the obligor's privileges with respect to motor vehicle registration and the obligor fails to comply with the conditions of the stay, the IV-D agency may, without further court order, notify the Division of Motor Vehicles (DMV) to refuse to register the obligor's vehicle pursuant to G.S. 20-50.4. [G.S. 110-142.2(h).]
5. No stay of revocation.
   a. If the court does not stay revocation of the obligor's licensing privileges, the obligor must surrender her licenses to the child support enforcement agency, and the agency

must notify each licensing authority that the obligor's licensing privileges have been revoked. [G.S. 110-142.2(b).]

b. If the court revokes an obligor's driver's license, the obligor must surrender his license to the IV-D agency. The agency must send the obligor's driver's license to the DMV along with the order and receipt for the license or must destroy the obligor's driver's license if notice of the revocation is transmitted electronically to DMV. [G.S. 20-24(a).]

c. If the court revokes an obligor's driver's license, the court may permit the obligor to retain limited driving privileges. [*See* G.S. 110-142.2(c) *and* 20-179.3.]

d. The revocation of the obligor's licensing privileges remains in effect until the licensing board or DMV receives certification authorizing reinstatement of the obligor's licensing privileges. [G.S. 110-142.2(f); 50-13.12(f).]

6. Reinstatement pursuant to court order.

a. An obligor whose licensing privileges are revoked under G.S. 110-142.2 may petition the district court for reinstatement of her licensing privileges. [G.S. 110-142.2(e).]

b. The court may enter an order authorizing reinstatement of the obligor's licensing privileges conditioned on the obligor's paying his current child support obligation plus an additional amount to pay in full over time the child support arrearage that he owed. [G.S. 110-142.2(e).]

7. Reinstatement pursuant to IV-D agency certification (no court order).

a. An obligor whose licensing privileges were revoked under G.S. 110-142.2 but who is no longer delinquent with respect to her court-ordered child support obligation may request that the IV-D agency certify that she is no longer delinquent. [G.S. 110-142.2(d).]

b. If there is satisfactory proof that the obligor is no longer delinquent, the agency must, without a court order, certify that the obligor is no longer delinquent and provide a copy of the certification to the obligor. [G.S. 110-142.2(d).]

V. Judgment and Execution

A. Judgment for Child Support Arrearages

1. When a child support judgment constitutes a judgment lien. Although a vested, past due court-ordered child support obligation constitutes a judgment under G.S. 50-13.10, a child support order or judgment may not be entered as a judgment on the judgment docket, does not constitute a judgment lien against the obligor's real property, and may not be enforced through a writ of execution unless:

a. It is perfected as a lien pursuant to G.S. 44-86; [See Sections VI.B and C, below.]

b. It expressly provides that it may be enforced as a judgment, sets out the amount of the judgment lien as a sum certain, and adequately describes the real property affected; [G.S. 50-13.4(f)(8).] or

c. The past due child support arrearage has been reduced to judgment pursuant to G.S. 50-13.4(f)(8).

2. Procedure to reduce a support arrearage to judgment pursuant to G.S. 50-13.4(f)(8).

a. The proceeding may be filed as a motion in the cause or as a separate action. [G.S. 50-13.4(f)(8).]

i. An order granting a money judgment for child support and alimony arrearages entered pursuant to defendant's answer and counterclaim seeking specific performance of those obligations has been upheld. [*Lasecki v. Lasecki*, 246 N.C. App. 518, 522, 786 S.E.2d 286, 290 (2016) (defendant specifically requested in her counterclaim that plaintiff be ordered to pay child support and alimony arrearages owed pursuant to a separation agreement and, while she had not requested that the court enter a money judgment, she had requested "such other and further relief as to the court may seem just, fit and proper;" it is not clear whether the money judgment was entered pursuant to G.S. 50-13.4(f)(8)).]

b. The obligor may raise the ten-year statute of limitations under G.S. 1-47(1) as a defense against entry of a judgment with respect to child support arrearages that accrued more than ten years before the date the enforcement motion or proceeding was filed. [See Section I.F.2.k, above.]

c. A trial court may reduce the obligor's arrearage to judgment under G.S. 50-13.4(f)(8) without finding that the obligor willfully failed to pay the support owed. [*Bogan v. Bogan*, 134 N.C. App. 176, 516 S.E.2d 641 (1999) (trial court may reduce child support arrearages to judgment upon proper motion, a judicial determination of amount properly due, and final judgment for the proper amount due).]

d. Note that if a judgment for past due child support arrearages remains unsatisfied, a party may initiate an independent action on that judgment to obtain a new judgment for the amount still owed. [*See* G.S. 1-47(1) (complaint on a judgment must be filed within ten years of the entry of the original judgment); *Duplin Cty. DSS ex rel. Pulley v. Frazier*, 230 N.C. App. 480, 751 S.E.2d 621 (2013) (upon nonpayment of a judgment for child support arrearages of $23,600 entered in 2001, in a new action brought in 2010, the trial court properly entered a new judgment on the amount owed, $23,600, which defendant was properly ordered to pay in periodic payments of $275/month pursuant to G.S. 50.13.4(f)(8); the 2010 action was not a renewal of the 2001 judgment, for which North Carolina has no procedure, but was a new action on the prior debt, separate and distinct from the 2001 action in which the arrearages were originally reduced to judgment).]

3. Payments on the judgment.

a. A judgment for past due child support arrearages entered pursuant to G.S. 50-13.4(f)(8) may require the obligor to make periodic payments to satisfy the judgment in addition to paying current or ongoing child support. [*See* G.S. 50-13.4(f)(8).] A trial court is authorized to order periodic payments in the original action reducing arrearages to judgment and in a new action on that judgment for amounts still owed. [*See Duplin Cty. DSS ex rel. Pulley v. Frazier*, 230 N.C. App. 480, 751 S.E.2d 621 (2013), discussed immediately above.] A trial court also may order income withholding to

collect child support arrearages that have been reduced to judgment. [*See Griffin v. Griffin*, 103 N.C. App. 65, 404 S.E.2d 478 (1991) (reducing arrearage to judgment and collecting the arrearage by income withholding are not inconsistent enforcement remedies).]

b. A judgment for past due child support arrearages pursuant to G.S. 50-13.4(f)(8) bears interest at the rate of 8 percent per annum from the date the judgment is entered until the date the judgment is satisfied. [*See* G.S. 50-13.4(f)(8); 24-1 and 24-5(c) (actions other than contract).]

c. When a support arrearage has not been reduced to judgment, the trial court has discretion whether to order interest on past due child support. [*See Wright v. Anderson*, 175 N.C. App. 422, 623 S.E.2d 367 (2006) (**unpublished**) (trial court did not abuse its discretion when it failed to order defendant to pay interest on past due child support; trial court rejected plaintiff's argument that because she had lost the use of the funds that defendant failed to pay for more than three years, although he had the means and ability to pay do so, she was entitled to interest).]

d. But where order allowed defendant approximately four years to pay past due support of $55,500, with no interest on the installment payments, matter remanded for findings regarding interest due on the installment plan payments going forward. [*Wright v. Anderson*, 175 N.C. App. 422, 623 S.E.2d 367 (2006) (**unpublished**).]

e. Unless otherwise provided by law, payments by the obligor to satisfy a judgment for child support arrearages should be credited first to accrued interest on the judgment and then to the principal amount of the judgment. [*See Morley v. Morley*, 102 N.C. App. 713, 403 S.E.2d 574 (1991).]

4. Judgment is a lien on obligor's real property. A judgment for past due child support arrearages pursuant to G.S. 50-13.4(f)(8) constitutes a lien on the obligor's interest in real property (except when that interest is in the form of a tenancy by the entirety) in any county in which the judgment is docketed and, except as noted in Section VI, below, may be enforced in the same manner and to the same extent as a civil judgment. [G.S. 44-86(b), (d).]

B. Execution of Judgment for Child Support Arrearages

1. Issuance of a writ of execution.

a. If a judgment for past due child support arrearages has been entered pursuant to G.S. 50-13.4(f)(8) and remains unsatisfied, the clerk of superior court, upon request of the obligee and after the time for appealing the judgment has expired, must issue a writ of execution on the judgment. [*See* G.S. 50-13.4(f)(10) *and* 1-305.]

b. The clerk may not issue a writ of execution on a judgment more than ten years from the date the judgment was entered. [G.S. 1-306.]

c. The writ of execution must be issued by the clerk of the county in which the judgment was rendered. A writ of execution may be issued to the sheriff of any county in the state in which the judgment has been docketed. [*See* G.S. 1-307 *and* 1-308.]

d. The exemptions from execution under North Carolina's constitutional "homestead" exemption provision and G.S. 1C-1601 do not apply to judgments for child support

arrearages. [*See* G.S. 1C-1601(e)(9); 50-13.4(f)(10); *Walker v. Walker*, 204 N.C. 210, 167 S.E. 818 (1933) (child support not an ordinary debt against which a person may claim homestead and personal property exemptions); *Barber v. Barber*, 217 N.C. 422, 8 S.E.2d 204 (1940) (homestead exemption cannot be used to defeat an allowance of alimony).]

2. Execution against personal property of the obligor.
    a. A judgment for past due child support does not constitute a lien on the obligor's personal property until the sheriff levies on (seizes) the property pursuant to a writ of execution. [G.S. 1-313(1).]
    b. The obligor's interest in tangible personal property (for example, furniture, jewelry, clothing, automobiles, appliances, boats, animals, crops, and other goods or chattels), money in the hands of the obligor, and the obligor's interest in choses in action represented by an indispensable instrument (for example, bank notes, checks, money orders, promissory notes, and stock certificates) in the obligor's possession are subject to levy under a writ of execution regardless of whether the property is subject to a lien or the property is jointly owned by the obligor and a third party (except when the property is a mobile home owned by the obligor and a spouse as tenants by the entirety). [*See* G.S. 1-315.]
    c. Except as noted below, tangible personal property owned by the obligor in the hands of a third party, the obligor's interest in a bank account, debts owed to the obligor by third parties, and property held in active trust for the obligor are not subject to levy under a writ of execution. [*See* G.S. 1-315.]
    d. Unless the obligor satisfies the judgment and pays related execution costs, property seized by the sheriff under a writ of execution must be sold pursuant to G.S. Chapter 1, Article 29B and the net proceeds of the sale must be applied to satisfy the judgment. [*See* G.S. 1-315 *and* 1-339.41.]
3. Execution against personal property of the obligor in hands of third party.
    a. If a writ of execution has been issued to enforce a judgment for child support arrearages, a bank in which the obligor has a checking, savings, or other account (or any other person or entity that owes money to the obligor) may, but is not required to, pay to the sheriff all or part of the amount of the obligor's interest in the bank account (or the amount owed to the obligor) to the extent necessary to satisfy the execution. [*See* G.S. 1-359(a), *amended by* S.L. 2015-238, § 2.5(a), effective Sept. 10, 2015.]
    b. If a judgment for child support arrearages has been entered, the obligee may use supplemental proceedings pursuant to G.S. Chapter 1, Article 31 before the clerk or a district court judge to enforce the judgment against the obligor's personal property in the hands of third parties, to enforce the judgment against debts owed to the obligor by third parties, or to determine what property the obligor owns if execution has been returned unsatisfied.
4. Execution against real property of the obligor.
    a. The obligor's interest (except when that interest is in the form of a tenancy by the entirety) in real property (including real property that is subject to a prior mortgage

or lien) in any county in which a judgment for child support arrearages has been docketed may be sold pursuant to G.S. Chapter 1, Article 29B if the obligor's personal property is insufficient to satisfy the judgment. [*See* G.S. 1-313(1).]

b. If an obligor's real property is subject to a properly docketed judgment lien for child support arrearages and the obligor sells or transfers the property to a third party before satisfying or discharging the lien on the property, the property remains subject to the judgment lien, and judgment may be executed through sale of the property pursuant to G.S. Chapter 1, Article 29B. [*See Moses v. Major*, 201 N.C. 613, 160 S.E. 890 (1931) (land is not relieved of the judgment lien by a transfer of the debtor's title); G.S. 1-339.68(b) (real property sold under execution remains subject to all liens which became effective prior to the lien of the judgment pursuant to which the sale is held, in the same manner and to the same extent as if no such sale had been held).]

5. Execution against obligor's person.

a. If a judgment for child support arrearages has been entered and a writ of execution against the obligor's property has been returned unsatisfied, an order for arrest and writ of execution against the obligor's person may be issued if the court finds that the obligor:

i. Is about to flee the jurisdiction to avoid his creditors,

ii. Has concealed or diverted assets in fraud of his her creditors, or

iii. Will conceal or divert assets in fraud of his creditors unless he is immediately detained. [G.S. 1-311.]

b. An indigent obligor is entitled to court-appointed counsel if she is arrested and detained pursuant to an order for arrest or writ of execution against the person issued pursuant to G.S. 1-311 and 1-313(3). [*See* G.S. 1-311 *and* 1-313(3).]

6. Effect of an appeal of the child support order on execution.

a. An order for the payment of child support is a judgment directing the payment of money under G.S. 1-289. [*See Romulus v. Romulus*, 216 N.C. App. 28, 715 S.E.2d 889 (2011) (citing *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982)) (a distributive award entered in an equitable distribution proceeding was a money judgment within the meaning of G.S. 1-289 and was subject to enforcement through execution).]

b. A judgment directing the payment of money is subject to execution even while the judgment is on appeal, unless the party against whom the execution will issue posts a bond to stay execution pursuant to G.S. 1-289. [G.S. 1-289(a); *Romulus v. Romulus*, 216 N.C. App. 28, 715 S.E.2d 889 (2011) (citing *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982), and *Joyner v. Joyner*, 256 N.C. 588, 124 S.E.2d 724 (1962)) (orders for the payment of alimony or child support have been recognized as judgments under G.S. 1-289 that may be enforced by execution during an appeal unless stay or supersedeas is ordered). For a case in which defendant stayed payment of a lump sum child support award with an undertaking filed in accordance with G.S. 1-289 during appeal but did not seek to stay an order awarding attorney fees pending appeal, see *Simms v. Bolger*, 264 N.C. App. 456, 826 S.E.2d 467 (2019) (when defendant father did not seek to stay awards of attorney fees included in a child support order by posting bond pursuant to G.S. 1-289, the trial court had jurisdiction to find defendant in

contempt pursuant to G.S. 50-13.4(f)(9) for failure to pay the fees while the matter was on appeal).]

c. However, if a child support award is payable over time, only the amount presently due and owing when the appeal is filed is subject to execution. [*See Romulus v. Romulus*, 216 N.C. App. 28, 715 S.E.2d 889 (2011) (considering a distributive award in an equitable distribution proceeding).] While a child support order is on appeal, the trial court does not have jurisdiction to (1) determine the amount of periodic payments that come due under the child support order after appeal is taken or (2) if unpaid, to reduce that amount to a judgment enforceable by execution. [*Romulus v. Romulus*, 216 N.C. App. 28, 715 S.E.2d 889 (2011) (citing *Carpenter v. Carpenter*, 25 N.C. App. 307, 212 S.E.2d 915 (1975)) (treating distributive award payments and alimony payments the same for purposes of G.S. 1-289); *Carpenter* (husband's appeal of an order entered in June 1974 finding him in arrears of provisions in a separation agreement for support of his wife and children divested the trial court of jurisdiction to determine in an order entered in November 1974 the amounts owed by husband).] Thus, while a child support order is "theoretically" enforceable by execution during appeal when the appealing spouse does not post an execution bond, a trial court may not reduce to judgment, and execution may not issue for, amounts that come due during the appeal making contempt a "more satisfactory answer" during appeal of an order for child support. [*See Romulus v. Romulus*, 216 N.C. App. 28, 38, 715 S.E.2d 889, 895 (2011) (discussing execution for payments due under a distributive award payable over time).]

VI. Child Support Liens

A. Judgment Liens for Child Support Arrearages

1. Generally, a judgment (order) for child support does not become a lien against real property of the obligor. [*See* G.S. 50-13.4(f)(8).]
2. A judgment for child support arrearages entered pursuant to G.S. 50-13.4(f)(8) constitutes a lien on the obligor's interest (except when that interest is in the form of a tenancy by the entirety) in real property in any county in which the judgment has been docketed. [See Section V.A, above.]
3. A judgment for child support arrearages entered pursuant to G.S. 50-13.4(f)(8) does not constitute a lien on the obligor's interest in personal property until the property is levied on pursuant to a writ of execution. [See Section V.B.2, above.]

B. Judicial Liens for Child Support Arrearages in Non-IV-D Cases

1. G.S. 44-86 creates a general lien on the real and personal property of an obligor who owes past due, court-ordered child support arrearages of at least $3,000 or the amount of support payable for three months, whichever occurs first. [G.S. 44-86(b).]
2. The benefit of G.S. 44-86 is that it allows a lien to be created without having to reduce the arrearage to judgment.

3. In order to perfect a child support lien under G.S. 44-86, an obligee must file a verified statement of child support delinquency with the clerk of superior court in the county in which the child support order was entered. [G.S. 44-86(c), (d).] The obligee must serve a notice of the lien on the obligor pursuant to G.S. 1A-1, Rule 4. [G.S. 44-86(d).]
4. If the obligor fails to contest the lien within thirty days of service of notice, the obligee may request that the clerk perfect the lien by recording it on the judgment docket. [G.S. 44-86(d)(2).]
5. If the obligor makes a timely request for a hearing contesting the lien, the district court must determine, after hearing, whether the lien is valid. If the district court judge determines that the lien is valid, the judge must order the clerk to perfect the lien by recording and indexing it on the judgment docket. [G.S. 44-86(d)(2).]
6. Upon the obligee's request, the clerk must issue a transcript of judgment to docket the lien in another county. [G.S. 44-86(d).]
7. Except as otherwise provided by law, a perfected lien for child support arrearages under G.S. 44-86 takes priority over all subsequent liens. [G.S. 44-86(e).]
8. A perfected child support lien under G.S. 44-86 may be enforced in the same manner as a civil judgment, [G.S. 44-86(f) and Section V.A, above.] except that no interest accrues.
9. An obligor may discharge a child support lien under G.S. 44-86 by depositing with the clerk of superior court an amount of money equal to the amount of the lien and by filing a petition in the cause requesting that the district court determine the validity of the lien. The money deposited by the obligor may be disbursed to the obligor or obligee only upon order of the court following a hearing on the merits. [G.S. 44-87(a)(2).]
10. If the obligor satisfies the lien in full, the obligee, within thirty days of receipt of payment, must file an acknowledgment with the clerk directing the clerk to note on the judgment docket that the lien has been satisfied or discharged. If the obligor satisfies the lien in full and the obligee does not notify the clerk to discharge the lien as required by law, the obligor may file a civil action in district court seeking discharge of the lien and reasonable attorney fees to be taxed as court costs against the obligee. [G.S. 44-87(a)(1), (b).]

C. Judicial Liens for Child Support Arrearages in IV-D Cases

1. Except as noted below, the procedure for creating and enforcing a child support lien under G.S. 44-86 in a IV-D case is the same as that described in Section VI.B, immediately above.
2. In a IV-D case, a child support lien is perfected as soon as the verified statement of lien is filed with the clerk of superior court. [G.S. 44-86(d)(1).]
3. An obligor may file a motion in the cause contesting the lien. [G.S. 44-86(d)(1).]
4. The lien may not be enforced through a writ of execution or otherwise until thirty days after the perfected lien has been docketed by the clerk. [G.S. 44-86(f).]
5. In IV-D cases, federal law requires that the IV-D agency enter into agreements with financial institutions doing business in the state under which a financial institution, in response to a notice of lien or levy, will encumber or surrender assets held by the institution on behalf of an obligor against whose property a child support lien has been imposed. [*See* 42 U.S.C. § 666(a)(17)(ii); G.S. 110-139.2; *see also* G.S. 1-359(a).]

D. Enforcing Out-Of-State Child Support Liens

1. G.S. 44-86(g) requires a North Carolina court to give "full faith and credit" to a child support lien arising in another state if the child support lien is registered, perfected, and docketed in North Carolina under the procedures set forth in G.S. 44-86 and 1C-1701 *et seq*.
2. If an out-of-state child support lien is registered, perfected, and docketed in North Carolina pursuant to G.S. 44-86(g), the lien may be enforced only with respect to the obligor's interest in personal property that (1) is subject to execution or supplemental proceedings under G.S. Chapter 1, Articles 28 and 31 and (2) was subject to the issuing state's jurisdiction (usually located within the issuing state) at the time the lien was created. An out-of-state child support lien cannot be enforced against the obligor's interest in real property located in North Carolina. [*See Hawley v. Murphy*, 736 A.2d 268 (Me. 1999) (portion of Connecticut divorce decree imposing a lien on obligor's real property in Maine void; case remanded so that obligee could petition Maine court to impose a lien on the property).]

E. Mortgages, Deeds Of Trust, and Security Interests

1. A court may, at the time it enters a child support order or upon motion in a proceeding to enforce a child support order, require the obligor to execute a mortgage, deed of trust, or security interest with respect to real or personal property owned by the obligor in order to secure the obligor's **future** payment of child support. [*See* G.S. 50-13.4(f)(1), *amended by* S.L. 2015-23, § 2, effective Oct. 1, 2015.]
2. If the obligor has not previously defaulted in paying court-ordered child support, the court should not require the obligor to execute a mortgage, deed of trust, or security interest securing child support payments unless the court finds there is good reason to believe that such security is required. [*See Gilbert v. Gilbert*, 71 N.C. App. 160, 321 S.E.2d 455 (1984) (trial judge did not find sufficient facts to support conveyance of a half interest in the marital home and other real estate as security for the payment of alimony).]
3. If the obligor refuses to execute a mortgage, deed of trust, or security interest as required by the court, the court may enter an order transferring title to the property pursuant to G.S. 1A-1, Rule 70 and G.S. 1-228 or directing that the mortgage, deed of trust, or security interest be executed by another person on behalf of the obligor pursuant to G.S. 1A-1, Rule 70. [G.S. 50-13.4(f)(1), (2).] G.S. 1A-1, Rule 70 allows a court in an order to "direct" another to execute on behalf of the party who failed to act, but the order must be written, signed, and filed to be effective. [*Dabbondanza v. Hansley*, 249 N.C. App. 18, 791 S.E.2d 116 (2016).]
4. A mortgage, deed of trust, or security interest in property required under G.S. 50-13.4(f)(1) must be filed, recorded, and perfected in accordance with other applicable law. It may then be enforced by the obligee, upon the obligor's default in paying court-ordered child support, in accordance with the terms of the mortgage, deed of trust, or security interest and other applicable law without further order of the court in the child support action.

F. Statutory Lien on Insurance Benefits

1. An obligee (IV-D or non-IV-D) may establish a lien for child support arrearages against insurance proceeds payable to an obligor who is a claimant or beneficiary under any

insurance policy (life, health, property, automobile, workers' compensation, etc.) issued pursuant to North Carolina's insurance law and who owes past due child support. [*See* G.S. 58-3-185(a).]

a. A lien pursuant to G.S. 58-3-185 attaches only if the insurance proceeds payable to the obligor are at least $3,000 (either as a lump-sum amount or aggregate periodic payments). [G.S. 58-3-185(a).]

b. A lien pursuant to G.S. 58-3-185 is subordinate to liens on insurance proceeds pursuant to G.S. 44-49 and 44-50 (giving unpaid medical expenses a lien on personal injury recoveries). [G.S. 58-3-185(b).]

c. A lien pursuant to G.S. 58-3-185 is subordinate to valid health care provider claims covered by health benefit plans other than disability income insurance. [G.S. 58-3-185(b).]

d. Except as noted above, a lien pursuant to G.S. 58-3-185 attaches to the entire amount of the insurance proceeds payable to the obligor (not just the insurance proceeds in excess of $3,000) up to the amount of the past due child support owed, without deduction for attorney fees (except attorney fees awarded pursuant to G.S. 97-90 in connection with workers' compensation insurance settlements) or other claims. [*See Orange Cty. ex rel. Byrd v. Byrd*, 129 N.C. App. 818, 501 S.E.2d 109 (1998) (plaintiff had a valid lien for past due child support on defendant's entire $18,000 settlement).]

2. G.S. 58-3-185 does not require a showing that the obligor's failure to pay child support is willful.

3. A lien pursuant to G.S. 58-3-185 is created by the obligee's giving written notice of the lien to the insurance company along with a certified copy of the child support order and proof regarding the existence and amount of the child support arrearage. [G.S. 58-3-185(a).]

a. The obligee is not required to reduce the child support arrearage to judgment pursuant to G.S. 50-13.4(f)(8) or to obtain a court order authorizing the imposition of a lien pursuant to G.S. 58-3-185.

b. G.S. 58-3-185 is silent with respect to whether or how the lien may be enforced judicially if the insurer fails to recognize the lien.

c. A court has no authority to "apportion" the insurance proceeds payable to an obligor or limit the amount of insurance proceeds applied to satisfy the lien in any manner inconsistent with the provisions of G.S. 58-3-185, but it may determine the amount of the obligor's child support arrearage. [*See Orange Cty. ex rel. Byrd v. Byrd*, 129 N.C. App. 818, 501 S.E.2d 109 (1998) (trial court erred in apportioning defendant's workers' compensation settlement between defendant's counsel, his child support arrearages, and defendant personally).]

VII. Contempt

A. Distinction between Civil and Criminal Contempt

1. For more on civil or criminal contempt generally, and for a checklist for use when finding a party in either civil or criminal contempt, see *Contempt of Court*, Bench Book, Vol. 2, Chapter 4.
2. For an online module on contempt, see Michael Crowell, *Contempt of Court* (UNC School of Government, Nov. 2010), https://www.sog.unc.edu/courses/online-modules/contempt-court.
3. Regarding the use of contempt in enforcement proceedings involving the IV-D child support enforcement program, see Cheryl Howell, *New Regulations Regarding Contempt in IV-D Child Support Cases*, UNC Sch. of Gov't: On the Civil Side Blog (June 30, 2017), https://civil.sog.unc.edu/new-regulations-regarding-contempt-in-iv-d-child-support-cases. *See also* Michael Crowell, *Contempt*, Admin. of Just. Bull. No. 2015/03 (UNC School of Government, Dec. 2015), http://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/aojb1503.pdf.
4. Importance of distinction. Distinguishing between civil and criminal contempt is important because the nature of the proceeding determines in large part:
   a. The procedures that must be followed by the court,
   b. The legal rights accorded to the alleged contemnor,
   c. The elements that must be proved to establish contempt,
   d. The burden of proof,
   e. The available sanctions and remedies, and
   f. The appellate procedure. [John. L. Saxon, *Using Contempt to Enforce Child Support Orders*, Special Series No. 17 (UNC School of Government, Feb. 2004) (hereinafter Saxon Special Series No. 17).]
5. Civil contempt.
   a. Civil contempt is a civil remedy to be utilized exclusively to enforce compliance with court orders. [*Reynolds v. Reynolds*, 147 N.C. App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting), *rev'd per curiam for reasons stated in dissenting opinion*, 356 N.C. 287, 569 S.E.2d 645 (2002); *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988) (civil contempt is remedial in nature; its purpose is to compel an obligor to comply with a court order); *Brower v. Brower*, 70 N.C. App. 131, 318 S.E.2d 542 (1984) (civil contempt is employed to coerce disobedient defendants into complying with orders of the court).]
   b. The length of time that a defendant can be imprisoned for civil contempt is not limited by law, except as limited by G.S. 5A-21(b1) and (b2), since the defendant can obtain his release immediately upon complying with the court's order. [G.S. 5A-21(b); *Brower v. Brower*, 70 N.C. App. 131, 318 S.E.2d 542 (1984).]
6. Criminal contempt.
   a. Criminal contempt is punitive in purpose and the contemnor "cannot undo or remedy what has been done, . . . nor shorten the term by promising not to repeat the

offense." [*Reynolds v. Reynolds*, 147 N.C. App. 566, 577, 557 S.E.2d 126, 133 (2001) (John, J., dissenting) (citations omitted), *rev'd per curiam for reasons stated in dissenting opinion*, 356 N.C. 287, 569 S.E.2d 645 (2002).]

b. Criminal contempt is administered as punishment for acts already committed that have impeded the administration of justice in some way. The punishment that courts can impose, either a fine or imprisonment, is circumscribed by law. [*Brower v. Brower*, 70 N.C. App. 131, 133, 318 S.E.2d 542, 544 (1984).]

7. Appeal.

a. Appeals in district court civil contempt matters are directly to the court of appeals pursuant to G.S. 5A-24. A district court order that finds a party not to be in civil contempt may be appealed to the court of appeals only if the order affects a substantial right of the appellant. [*Hardy v. Hardy*, 270 N.C. App. 687, 842 S.E.2d 148 (2020).]

b. A person who is found in criminal contempt by a judicial official inferior to a superior court judge may appeal to the superior court for hearing de novo. [G.S. 5A-17(a); 15A-1431(b).] A district court order that finds a party in criminal contempt is appealable to the superior court for hearing de novo. [G.S. 5A-17(a); 15A-1431(b).] There is no right to appeal a district court order that does not find a person in criminal contempt. [*Hardy v. Hardy*, 270 N.C. App. 687, 842 S.E.2d 148 (2020).]

c. Upon appeal in a case imposing confinement for criminal contempt, a bail hearing must be held within a reasonable time after imposition of the confinement, with the contemnor being retained in custody no more than twenty-four hours from the time of imposition of confinement without a bail determination being made by a superior court judge. If a superior court judge has not acted within twenty-four hours of the imposition of confinement, any judicial official shall hold a bail hearing. [G.S. 5A-17(b), (c), *added by* S.L. 2013-303, § 1, effective Dec. 1, 2013, and applicable to confinement imposed on or after that date.]

8. Standard of proof.

a. The facts upon which the determination of criminal contempt is based must be established beyond a reasonable doubt. [G.S. 5A-15(f).]

b. G.S. Chapter 5A does not clearly specify the standard of proof in civil contempt proceedings. At a minimum, a court should not find an obligor in civil contempt unless there is sufficient proof, based on a preponderance of the evidence, that the obligor's failure to comply with a child support order is willful.

9. Order entered without jurisdiction.

a. It is not contempt to disobey an order entered by a court without jurisdiction. [*Harding v. Harding*, 46 N.C. App. 62, 264 S.E.2d 131 (1980) (court was without subject matter jurisdiction to modify a parent's duty to support after the age of majority that arose in a contract; to whatever extent the court exceeded father's contractual obligation of support the order was void, and father could not be held in contempt for his failure to comply with the void portions).]

B. Civil Contempt

1. Generally.
   a. A person may be held in civil contempt for failure to comply with a child support order as long as:
      i. The order remains in force,
      ii. The purpose of the order may still be served by the person's compliance with the order,
      iii. The person's failure to comply with the order is willful, and
      iv. The person has the present ability to comply with the order (in whole or in part) or to take reasonable measures that would enable him to comply with the order (in whole or in part). [*See* G.S. 5A-21(a); *Jones v. Jones*, 52 N.C. App. 104, 278 S.E.2d 260 (1981).] For a discussion on the required findings on willfulness precluding a default judgment in contempt matters, see Cheryl Howell, *No Default Judgment in Contempt*, UNC Sch. of Gov't: On the Civil Side Blog (May 1, 2015), http://civil.sog.unc.edu/no-default-judgment-in-contempt.
   b. An obligor or obligee may be held in civil contempt for willfully failing to comply with a child support order. [*See* G.S. 50-13.4(f)(9).]
   c. Although civil contempt may be an effective remedy for enforcing child support orders, it is also an overused and misused remedy.
   d. Although an obligor may be cited for both civil and criminal contempt for failing to pay court-ordered child support, he may not be held in both civil and criminal contempt with respect to a particular failure to pay court-ordered child support. [*See* G.S. 5A-12(d), 5A-21(c), 5A-23(g).]
2. Orders that are enforceable by contempt.
   a. All civil child support orders, including registered child support orders of another state or foreign child support orders. [*Ugochukwu v. Ugochukwu*, 176 N.C. App. 741, 627 S.E.2d 625 (2006) (obligor in contempt of a registered child support order issued in England; when *Ugochukwu* was decided, a foreign country that had enacted a law or established procedures substantially similar to procedures in the Uniform Interstate Family Support Act (UIFSA) was considered a "state" as that term was then defined); *Marshall v. Marshall*, 233 N.C. App. 238, 757 S.E.2d 319 (2014) (**unpublished**) (Tennessee marital dissolution agreement registered in North Carolina as a support order under UIFSA was enforceable by civil contempt). *See* G.S. Chapter 52C, Article 6, Part 3 (registration and modification of child support order of another state); Chapter 52C, Article 6, Part 4 (registration and modification of foreign child support order).]
   b. Consent orders. [*White v. White*, 289 N.C. 592, 223 S.E.2d 377 (1976) (prior version of the contempt statute); *Barker v. Barker*, 228 N.C. App. 362, 745 S.E.2d 910 (2013); *Ross v. Voiers*, 127 N.C. App. 415, 490 S.E.2d 244, *review denied*, 347 N.C. 402, 496 S.E.2d 387 (1997) (in *Barker* and *Ross*, the defendants were held in contempt for violating consent orders requiring payment of child's college expenses); *Blazer v. Blazer*, 109 N.C. App. 390, 427 S.E.2d 139 (1993) (husband in contempt for violating consent order directing him to provide medical insurance); *Hartsell v. Hartsell*, 99 N.C. App.

380, 393 S.E.2d 570 (1990) (in domestic relations action, a consent judgment adopted by the court may be enforced by civil contempt), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).]

c. Voluntary separation agreements filed with and approved by a district court judge under G.S. 110-132(a3) and 110-133.

d. Child support provisions included in separation agreements that have been incorporated into divorce decrees or court orders. [*Powers v. Powers*, 103 N.C. App. 697, 407 S.E.2d 269 (1991) (consent judgment incorporating former spouses' separation agreement, as modified, was enforceable through court's contempt powers).]

3. Actions that can be the basis for civil contempt.

a. Willful nonpayment of child support. [*Ugochukwu v. Ugochukwu*, 176 N.C. App. 741, 627 S.E.2d 625 (2006).]

b. Unilateral reduction in court-ordered child support payments. [*Chused v. Chused*, 131 N.C. App. 668, 508 S.E.2d 559 (1998) (father in contempt for unilaterally reducing child support payment from $3,200 to $1,050 per month while request for modification was pending; father had ability to pay full amount from his sizeable estate).]

c. Failure to pay support while motion to modify pending. [*Hill v. Hill*, 261 N.C. App. 600, 821 S.E.2d 210 (2018) (in an alimony case, payor had no right to avoid support obligation until motion to modify is heard; the prior order stays in force for purposes of civil contempt, even if it is subsequently modified to reduce the amount of support).]

d. Nonpayment of court-ordered attorney fees. [*See Cox v. Cox*, 133 N.C. App. 221, 515 S.E.2d 61 (1999) (defendant in contempt for not paying plaintiff's attorney fees as directed by an earlier order).]

e. Partial payment of support during pendency of appeal. [*Burnett v. Wheeler*, 133 N.C. App. 316, 515 S.E.2d 480 (1999) (father in contempt when he refused to pay higher child support during appeal of order requiring larger amount).]

f. Failure to comply with specific directions in a court order. [*Eakes v. Eakes*, 194 N.C. App. 303, 669 S.E.2d 891 (2008) (mother's willful use of money in a fund for purposes other than those established by court orders and her failure to account for her use of the funds in response to an order to do so constituted contempt); *Barker v. Barker*, 228 N.C. App. 362, 363, 745 S.E.2d 910, 912 (2013) (defendant in civil contempt of consent order that required him to pay 90 percent of children's college expenses "as long as they diligently applied themselves to the pursuit of education"); *Young v. Young*, 224 N.C. App. 388, 736 S.E.2d 538 (2012) (husband in contempt of child support provisions in a separation and property settlement agreement incorporated into a consent judgment); *Sharpe v. Nobles*, 127 N.C. App. 705, 493 S.E.2d 288 (1997) (father's failure to comply with order to deposit money for child's college education and to provide certified copy of deposit to former wife was basis for contempt); *Ross v. Voiers*, 127 N.C. App. 415, 490 S.E.2d 244 (ex-husband in civil contempt for noncompliance with consent order in which he agreed to pay all college expenses of parties' daughter), *review denied*, 347 N.C. 402, 496 S.E.2d 387 (1997); *Blazer v. Blazer*, 109 N.C. App. 390, 427 S.E.2d 139 (1993) (husband in contempt for willfully avoiding his obligation to provide insurance in contravention of consent order); *Powers*

v. Powers, 103 N.C. App. 697, 407 S.E.2d 269 (1991) (father in contempt because he unreasonably withheld consent to daughter's choice of college; consent judgment provided that husband could not unreasonably withhold consent to daughter's selection of a college).]

4. When contempt should not be used.

   a. Civil contempt may not be used when no underlying order has been entered pursuant to G.S. 1A-1, Rule 58. In other words, there can be no contempt when no order is "in force" when the contempt order is entered. [*Spears v. Spears*, 245 N.C. App. 260, 784 S.E.2d 485 (2016) (trial court erred when it found that defendant had not complied with purge conditions in a contempt order when the contempt order had not been entered pursuant to G.S. 1A-1, Rule 58 before the hearing to review defendant's purge condition noncompliance); *Carter v. Hill*, 186 N.C. App. 464, 650 S.E.2d 843 (2007) (contempt reversed when trial court gave an oral judgment for plaintiffs but never reduced the judgment to writing or entered it; since an order is not enforceable by contempt until entered pursuant to G.S. 1A-1, Rule 58, defendants could not be in contempt of it); *Carland v. Branch*, 164 N.C. App. 403, 595 S.E.2d 742 (2004) (custody arrangement announced in open court on November 19, 2001, was not an enforceable order until it was entered on May 13, 2002); *Cty. of Durham ex rel. Willis v. Roberts*, 228 N.C. App. 567, 749 S.E.2d 110 (2013) (**unpublished**) (not paginated on Westlaw) (citing *Carland*) (2012 contempt order, based on defendant's failure to pay $110/month toward child support arrearages as required by a 2002 consent order, reversed; 2002 consent order not in effect in 2012 when a 2003 order had declined to order defendant to pay $110/month toward child support arrearages and had declined to order that defendant owed $9,306 in arrears; that defendant had made child support payments in 2004 and 2011 did "not alter the fact" that there was no order subsequent to the 2003 order requiring defendant to make arrearages payments).] *See* Cheryl Howell, *Rule 58 and Entry of Civil Judgments*, UNC Sch. of Gov't: On the Civil Side Blog (May 3, 2017), https://civil.sog.unc.edu/rule-58-and-entry-of-civil-judgments-statements-from-the-bench-are-not-court-orders.

   b. The North Carolina Department of Health and Human Services' Child Support Services (CSS) Manual (1) informs child support enforcement workers that the federal office of child support enforcement has said that "[c]ivil contempt that leads to incarceration is not, nor should it be, standard or routine child support practice," and (2) instructs that "[p]rior to considering the use of contempt proceedings in a delinquent case, CSS caseworkers should consider the use of administrative enforcement remedies." [N.C. Dep't of Health & Hum. Servs., Enforcement 107, http://policies.ncdhhs.gov/divisional/social-services/child-support/policy-manual/csecp.pdf (select heading 18, "Show Cause for civil comtempt [sic] proceedings," then subheading 3, "Guidelines for Use of Civil Contempt in IV-D Cases."] *See* Cheryl Howell, *New Regulations Regarding Contempt in IV-D Child Support Cases*, UNC Sch. of Gov't: On the Civil Side Blog (June 30, 2017), https://civil.sog.unc.edu/new-regulations-regarding-contempt-in-iv-d-child-support-cases.

   c. Civil contempt may not be used to enforce a child support order unless the obligor has the **present ability** to pay at least part of the child support that he owes and, despite his present ability to do so, stubbornly, recalcitrantly, deliberately, willfully, or

intentionally refuses to pay support to the extent he is able to do so. [*See* G.S. 5A-21(a).] For more on ability to pay in contempt matters, see the following blog posts by Cheryl Howell: *Contempt: Establishing Ability to Pay*, UNC Sch. of Gov't: On the Civil Side Blog (May 8, 2015), http://civil.sog.unc.edu/contempt-establishing-ability-to-pay; *No Contempt for the Nonpayment of Money Without Actual Evidence of Ability to Pay*, UNC Sch. of Gov't: On the Civil Side Blog (Dec. 5, 2018), https://civil.sog.unc.edu/no-contempt-for-the-nonpayment-of-money-without-actual-evidence-of-ability-to-pay.

d. Civil contempt may not be used to enforce a judgment for support arrearages that does not include a provision for periodic payments or other deadline for payment. [*Brown v. Brown*, 171 N.C. App. 358, 615 S.E.2d 39 (North Carolina judgment giving full faith and credit to Maryland judgment required father to pay back child support and provided for execution against father's property but did not provide for scheduled payments on the support arrearages; a money judgment for a liquidated sum of child support arrearages that does not require periodic payments in a specific amount nor set any deadlines or ongoing monthly dates for arrearages payments is not enforceable by contempt; under G.S. 50-13.4(f)(8)–(9), a money judgment for a liquidated sum of child support arrearages that provides for periodic payments is enforceable by contempt), *review denied*, 360 N.C. 60, 621 S.E.2d 175 (2005).] Construing *Brown* in *Smith v. Smith*, 247 N.C. App. 166, 170, 785 S.E.2d 434, 438 (2016), the court of appeals found that a directive for payment of private school tuition is a "periodic payment, whether [plaintiff] chooses to pay it once a year, once a semester or over ten months."

e. Civil contempt may not be the most appropriate remedy to enforce a child support order if the obligor has identifiable income or property from which child support can be paid and other remedies (for example, income withholding, execution of judgment or liens, etc.) can be used to enforce the order against the obligor's income or property. [See Section III, above, on income withholding; Section V, above, on judgment and execution; and Section VI, above, on child support liens.] *See* Cheryl Howell, *New Regulations Regarding Contempt in IV-D Child Support Cases*, UNC Sch. of Gov't: On the Civil Side Blog (June 30, 2017), https://civil.sog.unc.edu/new-regulations-regarding-contempt-in-iv-d-child-support-cases (contempt that leads to incarceration should not be standard or routine practice in child support enforcement).

f. Child support provisions included in unincorporated separation agreements may not be enforced through civil contempt. [*See Jones v. Jones*, 144 N.C. App. 595, 601, 548 S.E.2d 565, 569 (2001) (alimony case stating that "[w]here a separation agreement is neither submitted, by one or both parties thereto, to the trial court for its approval, nor specifically incorporated into a court order or judgment, the separation agreement is preserved as a contract and remains enforceable and modifiable only under traditional contract principles").] For more on the enforcement of an unincorporated separation agreement, see *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

5. Reimbursement of sums paid pursuant to a contempt order later vacated.

a. In *Brown v. Brown*, 181 N.C. App. 333, 638 S.E.2d 622 (2007), father sought reimbursement of amounts he had paid to purge himself of contempt after the contempt

orders were vacated on appeal. [*See Brown v. Brown*, 171 N.C. App. 358, 615 S.E.2d 39 (judgment for liquidated sum of support arrearages with no provision for periodic payment not enforceable by contempt), *review denied*, 360 N.C. 60, 621 S.E.2d 175 (2005) (discussed at Section VII.B.4.d, above).] The trial court set off, apparently as a matter of right, the amount of support arrearages the father owed against the amount father had paid pursuant to the vacated contempt orders. The appellate court reversed and remanded the issue of setoff. On remand, the trial court was to:

i. Decide in its discretion and as a matter of equity whether setoff was appropriate;

ii. Consider the equitable principles of setoff, such as clean hands and the fact that mother had caused the contempt power to be misused, as well as any deceptive or fraudulent conduct of father in attempting to avoid paying child support; and

iii. Include findings of fact or conclusions of law to support the decision on setoff. [As to the attorney fees that defendant was ordered to pay plaintiff's attorney for obtaining the invalid contempt order, the court stated that it would be "unconscionable" to require defendant to pay for the services of an attorney who improperly instituted contempt proceedings resulting in defendant's incarceration).]

6. How civil contempt proceedings are initiated in a child support action.

   a. The obligee or another person interested in enforcing a child support order, including a judge, may file a motion accompanied by a sworn statement or affidavit, pursuant to G.S. 5A-23(a).

   b. An obligee or other aggrieved party may serve a motion accompanied by a sworn statement or affidavit and notice of hearing on the obligor pursuant to G.S. 5A-23(a1).

   c. Upon affidavit of an obligee, the clerk or district court judge may order an obligor to appear and show cause why the obligor should not be adjudged in contempt. [G.S. 50-13.9(d).]

   d. In contempt proceedings pursuant to G.S. 5A-23(a) (motion and sworn statement or affidavit of a person interested in enforcing a child support order), and contempt proceedings pursuant to G.S. 5A-23(a1) (motion and sworn statement or affidavit of an aggrieved party), the required sworn statements or affidavits must be included with the motion for a trial court to have subject matter jurisdiction to adjudicate civil contempt. [*Walker v. Surles*, 271 N.C. App. 382, 841 S.E.2d 617 (2020) (**unpublished**).] While *Walker* does not address initiation of a civil contempt proceeding pursuant to G.S. 50-13.9, that statute requires an affidavit by an obligee, making it likely that a trial court would lack subject matter jurisdiction if the required affidavit was not included.

   e. In cases involving the IV-D child support enforcement agency, the agency is required to "[p]rovide clear notice to the noncustodial parent that his or her ability to pay constitutes the critical question in the civil contempt action." [45 C.F.R. § 303.6(c)(4)(iii).] *See* Cheryl Howell, *New Regulations Regarding Contempt in IV-D Child Support Cases*, UNC Sch. of Gov't: On the Civil Side Blog (June 30, 2017), https://civil.sog.unc.edu/new-regulations-regarding-contempt-in-iv-d-child-support-cases.

7. Contempt proceedings initiated pursuant to G.S. 5A-23(a).
    a. The motion accompanied by a sworn statement or affidavit must (1) allege that the obligor has willfully failed to pay court-ordered child support or comply with other provisions contained in a child support order despite the present ability to do so and (2) request that a judicial official issue an order or notice requiring the obligor to show cause why he or she should not be held in contempt. A judicial official is defined in G.S. 5A-23(d) as "the trier of facts at the show cause hearing." Therefore, a clerk cannot issue a show cause order pursuant to G.S. 5A-23(a) unless in a situation where a clerk is statutorily authorized to exercise contempt authority. [*Moss v. Moss*, 222 N.C. App. 75, 730 S.E.2d 203 (2012).] But see G.S. 50-13.9(d), specifically authorizing clerk to issue show cause orders in proceedings initiated pursuant to that statute.
    b. A judicial official must determine, based on the verified motion and sworn statement or affidavit filed by the obligee or other interested person, whether there is **probable cause** to believe that the obligor is in civil contempt. [*See* G.S. 5A-23(a).]
        i. Probable cause, in the context of civil contempt proceedings in child support actions, refers to credible allegations that provide a reasonable ground for believing that an obligor is willfully failing to comply with a child support order. [See Section VII.B.12, below.]
            (a) An allegation that the obligor owes arrearages under a valid child support order is probably insufficient, standing alone, to support a finding of probable cause because there must be a reasonable ground to believe that failure to pay is willful.
            (b) "Probable cause refers to those facts and circumstances within [the judicial official's] knowledge and of which he ha[s] reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the alleged contemnor is in civil contempt." [*Young v. Mastrom, Inc.*, 149 N.C. App. 483, 484–85, 560 S.E.2d 596, 597 (2002) (contempt action brought for failure to comply with order directing payment of money).]
            (c) In cases involving the IV-D child support enforcement agency, the agency has the obligation to "[p]rovide the court with such information regarding the noncustodial parent's ability to pay, or otherwise comply with the order, which may assist the court in making a factual determination regarding the noncustodial parent's ability to pay the purge amount or comply with the purge conditions." [45 C.F.R. § 303.6(c)(4)(ii).] *See* Cheryl Howell, *New Regulations Regarding Contempt in IV-D Child Support Cases*, UNC Sch. of Gov't: On the Civil Side Blog (June 30, 2017), https://civil.sog.unc.edu/new-regulations-regarding-contempt-in-iv-d-child-support-cases.
        ii. A judicial official's determination of probable cause under G.S. 5A-23(a) is generally ex parte. The obligor is not entitled to prior notice or an opportunity to be heard before the judicial official issues an order or notice to show cause pursuant to G.S. 5A-23(a).
    c. If there is probable cause to believe that an obligor is in civil contempt, the judicial official must issue a notice or order to show cause directed to the obligor. [*See* G.S. 5A-23(a).]

i. An **order** to show cause requires the obligor to appear before a district court judge at a specified reasonable time to show cause why she should not be held in civil contempt.

ii. A **notice** to show cause does not require the obligor's appearance but notifies the obligor that he will be found in civil contempt unless he appears before a district court judge at a specified reasonable time and shows cause why he should not be held in civil contempt.

iii. Most contempt proceedings initiated pursuant to G.S. 5A-23(a) in child support actions involve the issuance of **show cause orders** rather than notices to show cause.

d. Absent good cause, a show cause order or notice issued pursuant to G.S. 5A-23(a) must be served on the alleged contemnor at least five days before the scheduled hearing. [G.S. 5A-23(a).]

i. G.S. 5A-23(a) does not specify the manner in which a show cause order or notice must be served. G.S. 1A-1, Rule 5 allows all orders to be served either pursuant to Rule 4 or pursuant to Rule 5.

ii. However, G.S. 50-13.9(d) provides that an order to appear and show cause issued pursuant to that statute shall be served pursuant to G.S. 1A-1, Rule 4.

iii. A trial court may shorten the five-day notice period on good cause. [*Smith v. Smith*, 247 N.C. App. 166, 785 S.E.2d 434 (2016) (trial court had good cause to require father to appear at a hearing for civil contempt two days after issuance of a show cause order when the underlying order had been entered more than a month earlier and father had had ample time to prepare a defense to enforcement of that order).]

e. Failure to appear as required by a show cause order. There is no statute or case law authorizing the court to order the alleged contemnor's arrest if she fails to appear in a civil contempt proceeding. [*But see* G.S. 15A-305(b)(8) (allowing arrest when show cause violated in criminal contempt case) and 5A-16(b) (judicial official who finds probable cause to believe a person charged with criminal contempt will not appear may issue an order for arrest).]

f. Burden of proof. Proceeding initiated by an order or notice issued by a judicial official pursuant to G.S. 5A-23(a).

i. A show cause order in a civil contempt proceeding that is based on a sworn affidavit and a finding of probable cause by a judicial official shifts the burden of proof to the defendant to show cause why he should not be held in contempt. [*Shumaker v. Shumaker*, 137 N.C. App. 72, 527 S.E.2d 55 (2000) (the sworn statement or affidavit from which the court determines probable cause moves the burden to the opposing party to show cause why he should not be found in contempt for failure, in this case, to pay alimony); *Belcher v. Averette*, 136 N.C. App. 803, 526 S.E.2d 663 (2000) (father failed to meet burden of proof when he neither argued nor presented any evidence at the civil contempt hearing that he was unable to pay child support arrearages or that he did not act willfully in failing to pay same); *Plott v. Plott*, 74 N.C. App. 82, 327 S.E.2d 273 (1985) (party alleged to be delinquent clearly has burden of proof).]

ii. However, the obligee or other party seeking to hold an obligor in civil contempt for failing to pay court-ordered child support probably has the ultimate burden of persuasion with respect to the issue of contempt. [*See Henderson v. Henderson*, 307 N.C. 401, 298 S.E.2d 345 (1983) (finding of willfulness unsupported by the evidence when no evidence was presented at hearing as to any assets or liabilities of defendant, any inventory of his property, his present ability to work, or even his present salary); *Cty. of Durham ex rel. Wilson v. Burnette*, 262 N.C. App. 17, 821 S.E.2d 840 (2018) (absence of evidence by a defendant who has the burden does not create evidence for the plaintiff; when plaintiff presented evidence only as to the amount of arrears owed by defendant, evidence was not sufficient to support a finding as to defendant's ability to pay either the child support owed or the purge payment ordered by the court), *aff'd per curiam*, 372 N.C. 64, 824 S.E.2d 397 (2019)); *Lamm v. Lamm*, 229 N.C. 248, 49 S.E.2d 403 (1948) (no evidence offered at hearing to rebut defendant's assertion that he lacked ability to comply with alimony order, so judgment of contempt set aside).]

iii. If the obligor fails to offer any evidence at the contempt hearing, the court may find the obligor in contempt if there is sufficient evidence in the record to establish as an affirmative fact that obligor has the present ability to comply with the terms of the order. [*See Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990) (stating that a defendant who refuses to present evidence that he was not in contempt does so at his own peril and holding that while the trial court should make specific findings to show ability to comply, a general finding of present ability to comply will be sufficient if there is specific evidence in the record to show actual ability to comply), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991); *Plott v. Plott*, 74 N.C. App. 82, 327 S.E.2d 273 (1985) (where obligor offered no evidence except a stipulation as to the amount of the arrearage, obligor's showing not sufficient to refute the motion's verified allegations on contempt).]

iv. Even if the obligor fails to appear in response to the show cause order or appears but does not testify or present evidence, the court cannot hold the obligor in contempt unless evidence is introduced that is sufficient to establish that the obligor has the ability to comply with the support order. [*Tigani v. Tigani*, 256 N.C. App. 154, 805 S.E.2d 546 (2017) (neither defendant nor his counsel appeared at the hearing, no witnesses testified, and no exhibits were offered into evidence; civil contempt order reversed as finding as to defendant's ability to pay was not supported by any record evidence); *Cumberland Cty. ex rel. Mitchell v. Manning*, 262 N.C. App. 383, 822 S.E.2d 305 (2018) (obligor appeared at hearing but did not present evidence and no witnesses were called to testify, resulting in a record devoid of evidence of obligor's ability to pay the child support ordered or the purge amount at the time of the hearing; obligor's affidavit of indigency dated two months before contempt hearing was not evidence of her ability to pay at the time of the hearing).]

v. Whether or not the obligor presents evidence regarding their ability to pay, the shifting of the burden of proof that occurs when the court issues an order to show cause for civil contempt does not relieve the court of the responsibility to

make findings of fact supported by the evidence as to the obligor's present ability to comply with the support order and the purge conditions imposed by the court. [*Cty. of Durham ex rel. Alston v. Hodges*, 257 N.C. App. 288, 809 S.E.2d 317 (2018) (obligor presented testimony from two treating doctors as to a medical disability that rendered him incapable of gainful employment, which was not refuted by DSS; trial court erred in holding obligor in civil contempt where finding that obligor had the ability to pay was not supported by evidence in the record); *Cumberland Cty. ex rel. Lee v. Lee*, 265 N.C. App. 149, 828 S.E.2d 548 (2019) (where obligor presented no evidence, the failure to meet his burden of proof to show cause why he should not be held in civil contempt did not relieve the agency of its burden to present sufficient evidence to support a finding of his ability to pay, in addition to all other findings required for contempt), *review denied*, 372 N.C. 708, 830 S.E.2d 836 (2019). *See also Cty. of Durham ex rel. Wilson v. Burnette*, 262 N.C. App. 17, 821 S.E.2d 840 (2018) (quoting *Hodges*), *aff'd per curiam*, 372 N.C. 64, 824 S.E.2d 397 (2019); *Cumberland Cty. ex rel. Mitchell v. Manning*, 262 N.C. App. 383, 822 S.E.2d 305 (2018) (quoting *Hodges*).]

vi. For more on the findings necessary to support a determination of a party's ability to pay, see Cheryl Howell, *No Contempt for the Nonpayment of Money without Actual Evidence of Ability to Pay*, UNC Sch. of Gov't: On the Civil Side Blog (Dec. 5, 2018), https://civil.sog.unc.edu/no-contempt-for-the-nonpayment-of-money-without-actual-evidence-of-ability-to-pay.

8. Contempt proceedings initiated pursuant to G.S. 5A-23(a1).

   a. When contempt proceedings in a child support action are initiated by motion pursuant to G.S. 5A-23(a1), the obligee must serve a copy of the motion, sworn statement or affidavit, and notice of hearing on the obligor pursuant to G.S. 1A-1, Rule 5 at least five days before the scheduled hearing, absent good cause. [*See* G.S. 5A-23(a1) and *Trivette v. Trivette*, 162 N.C. App. 55, 590 S.E.2d 298 (2004) (pursuant to G.S. 5A-23(a1), service at least five days in advance of the hearing is adequate notice of a contempt proceeding).]

   b. G.S. 5A-23(a1) allows a contempt proceeding to be initiated upon motion and notice by an alleged aggrieved party without a judicial finding of probable cause. [*Trivette v. Trivette*, 162 N.C. App. 55, 590 S.E.2d 298 (2004).]

   c. In a proceeding initiated pursuant to G.S. 5A-23(a1), the burden of proof is on the aggrieved party. [G.S. 5A-23(a1); *Price v. Biggs*, 272 N.C. App. 315, 846 S.E.2d 781 (2020) (in a proceeding under G.S. 5A-23(a1), a finding that no evidence was presented on an essential element of civil contempt compels the court to find that movant failed to meet burden of proving defendant's contempt).] It does not shift to the alleged contemnor. [*Trivette v. Trivette*, 162 N.C. App. 55, 590 S.E.2d 298 (2004) (trial court erroneously placed burden on defendant to prove a lack of willful contempt).]

9. Contempt proceeding initiated pursuant to G.S. 50-13.9.

   a. Upon affidavit of an obligee, a clerk or a district court judge may order the obligor to appear and show cause why the obligor should not be subjected to income withholding or adjudged in contempt of court, or both. [G.S. 50-13.9(d).]

b. Form AOC-CV-602, Order to Appear and Show Cause for Failure to Comply with Support Order and Order to Produce Records and Licenses, may be used to initiate a contempt proceeding pursuant to G.S. 50-13.9(d). An obligor's failure to bring to the hearing records and information related to the obligor's employment and income is grounds for contempt. [G.S. 50-13.9(d)(5).]

c. An enforcement order issued pursuant to G.S. 50-13.9(d) must be served on the obligor pursuant to G.S. 1A-1, Rule 4. [G.S. 50-13.9(d).]

10. Hearing.

a. Civil contempt hearings are held before a district court judge, without a jury, in the pending child support action. [*See* G.S. 5A-23(d).]

b. A person ordered to show cause may move to dismiss a show cause order. [G.S. 5A-23(c).]

c. In cases involving the IV-D child support enforcement agency, the agency has the obligation to "[p]rovide the court with such information regarding the noncustodial parent's ability to pay, or otherwise comply with the order, which may assist the court in making a factual determination regarding the noncustodial parent's ability to pay the purge amount or comply with the purge conditions." [45 C.F.R. § 303.6(c)(4)(ii).] *See* Cheryl Howell, *New Regulations Regarding Contempt in IV-D Child Support Cases*, UNC Sch. of Gov't: On the Civil Side Blog (June 30, 2017), https://civil.sog.unc.edu/new-regulations-regarding-contempt-in-iv-d-child-support-cases.

11. Right to and appointment of counsel.

a. An alleged contemnor has the right to be represented by legal counsel in civil contempt proceedings.

i. The court should advise each alleged contemnor, in writing in the notice or order to show cause and orally before the contempt hearing begins, that she may be incarcerated if found in civil contempt, that she has the right to be represented by retained counsel, and that she may be entitled to court-appointed counsel if unable to afford an attorney. [*See McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993) (at the outset of a contempt proceeding, the trial court should (1) assess how likely it is that the defendant will be incarcerated; (2) if it is likely, the court should inquire of the defendant if he desires counsel and determine his ability to pay for representation; and (3) if the defendant desires counsel but is indigent, the court is to appoint counsel to represent him).]

ii. An alleged contemnor may waive her right to legal representation. [G.S. 7A-457(a).]

(a) Any waiver must be knowing, informed, voluntary, and written. If an alleged contemnor waives the right to legal representation, the court must make a written finding that at the time of waiver the alleged contemnor acted "with full awareness of his rights and of the consequences of the waiver." [G.S. 7A-457(a).]

(b) Even though G.S. 7A-457 speaks to waiver by an indigent, any waiver must be in accordance with G.S. 7A-457, notwithstanding its limiting language. [*State v. Williams*, 65 N.C. App. 498, 309 S.E.2d 721 (1983).]

iii. If an alleged contemnor does not waive the right to legal representation, the court must determine, before it hears the civil contempt proceeding, whether the alleged contemnor is entitled to court-appointed counsel.

b. An alleged contemnor is entitled to court-appointed counsel in a civil contempt proceeding if (1) he is indigent **and** (2) there is a significant likelihood that he will actually be incarcerated as a result of the hearing. [*See McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993); *King v. King*, 144 N.C. App. 391, 547 S.E.2d 846 (2001) (for appointment of counsel, a defendant must show that she is indigent and that her liberty interest is at stake); *Young v. Young*, 224 N.C. App. 388, 736 S.E.2d 538 (2012) (citing *Turner v. Rogers*, 564 U.S. 431, 131 S. Ct. 2507 (2011), and *King*) (father who failed to meet his burden of proving indigence not entitled to counsel at civil contempt hearing for failure to pay child support); *cf. Turner*, 564 U.S. at 446, 448, 131 S. Ct. at 2518, 2520 (the Fourteenth Amendment Due Process Clause does not automatically require the state to appoint counsel at civil contempt proceedings for an indigent individual who is subject to a child support order if the state provides "alternative" or "additional or substitute" procedural safeguards).]

i. Determinations of indigency and entitlement to counsel and appointment of counsel may be made by a district court judge or by the clerk of superior court. [*See* G.S. 7A-452(a), (c).]

ii. An alleged contemnor is indigent if he has insufficient income and resources, based on guidelines approved by the state's Office of Indigent Defense Services, to retain an attorney to represent him in the contempt hearing. [*See* G.S. 7A-452; see G.S. 7A-450(a) for definition of "indigent person".]

iii. A finding that an obligor is entitled to court-appointed counsel based on indigency may indicate that the obligor lacks the present financial ability to pay court-ordered child support and, therefore, may preclude a finding of civil contempt for willfully failing to pay court-ordered child support.

iv. Counsel for indigent obligors in civil contempt proceedings in child support cases are appointed pursuant to procedures approved by the state's Office of Indigent Defense Services. [*See* G.S. 7A-452(a).] For more on appointed counsel, see Austine Long, *Appointed Counsel in Child Support Cases: How Far Do You Go?,* UNC Sch. of Gov't: On the Civil Side Blog (Feb. 25, 2015), http://civil.sog.unc.edu/appointed-counsel-in-child-support-cases-how-far-do-you-go.

c. An indigent obligor may not be incarcerated for civil contempt in a child support action unless she has waived or forfeited the right to court-appointed counsel or has been represented by court-appointed counsel. [*McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993) (due process requires that, absent the appointment of counsel, indigent civil contemnors may not be incarcerated for failure to pay child support arrearages).]

12. Requirement that the obligor acted willfully.

a. The primary issue in most contempt proceedings in child support cases is whether the obligor is **willfully** failing to pay court-ordered child support. [*See Henderson v. Henderson*, 307 N.C. 401, 298 S.E.2d 345 (1983) (setting aside decree committing defendant to imprisonment for contempt because finding that failure to pay was

willful was not supported by the record); *Harris v. Harris*, 91 N.C. App. 699, 373 S.E.2d 312 (1988) (husband was in willful contempt for failure to make court-ordered child support payments); *Brower v. Brower*, 75 N.C. App. 425, 331 S.E.2d 170 (1985) (rejecting defendant's argument that voluntary placement of his assets in bankruptcy made his noncompliance with the child support order not only "non-willful" but impossible), *superseded by statute on other grounds as stated in Craig v. Craig*, 103 N.C. App. 615, 406 S.E.2d 656 (1991).]

b. A finding of willful failure to pay court-ordered child support must be based on evidence that the obligor is purposefully, deliberately, stubbornly, or in bad faith disobeying a child support order or disregarding an obligation to pay child support required by a court order despite the present ability to do so. [*See Lueallen v. Lueallen*, 249 N.C. App. 292, 790 S.E.2d 690 (2016) (mother's argument that her failure to pay child support pursuant to a temporary child support order was not willful because she was unemployed at the time was rejected based on findings that mother had (1) not applied for a teaching position in Mecklenburg County in the past three years, despite stating in a verified motion to modify support that she had; (2) resigned from a teaching position in Union County without having another job lined up; and (3) told father that mothers did not have to pay child support); *Clark v. Gragg*, 171 N.C. App. 120, 614 S.E.2d 356 (2005) (willfulness is an ability to comply with the court order and a deliberate and intentional failure to do so); *Barker v. Barker*, 228 N.C. App. 362, 745 S.E.2d 910 (2013), *Meehan v. Lawrance*, 166 N.C. App. 369, 602 S.E.2d 21 (2004), and *Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966) (all three cases noting that willfulness imports knowledge and a stubborn resistance); *Forte v. Forte*, 65 N.C. App. 615, 309 S.E.2d 729 (1983) (willfulness involves more than deliberation or conscious choice; it imports a bad faith disregard for authority and the law).]

c. An obligor's failure to pay court-ordered child support is not willful if it is based on the obligor's good faith reliance on the obligee's agreement to terminate, suspend, or reduce the obligor's child support payments. [*See Forte v. Forte*, 65 N.C. App. 615, 309 S.E.2d 729 (1983) (no contempt where husband stopped making payments in reliance on wife's agreement to support child if he would waive his visitation rights).] Nor was an obligor's failure to pay court-ordered support willful when obligor "was under the mistaken apprehension that he could simply stop paying" after 17-year-old son left the custodial parent's home and did not return. [*Morris v. Powell*, 269 N.C. App. 496, 501, 840 S.E.2d 223, 227 (2020).]

d. Failure to pay may be willful within the meaning of the contempt statutes when a supporting spouse is unable to pay because she voluntarily takes on additional financial obligations or divests herself of assets or income after entry of the support order. [*See Shippen v. Shippen*, 204 N.C. App. 188, 693 S.E.2d 240 (2010) (father who admitted that he was physically and mentally able to be employed, and in fact was employed full-time when the child support order was entered, but who voluntarily quit his job thereafter to become a member of a religious community that prohibited its members from earning outside income, and who testified that he would not take outside employment under any circumstances, willfully failed to pay support and was properly held in civil contempt; that father's religious beliefs were sincerely held was

irrelevant); *cf. Spears v. Spears*, 245 N.C. App. 260, 278, 784 S.E.2d 485, 497 (2016) (trial court found defendant in civil contempt of an order requiring defendant to pay a total monthly obligation of $5,880 for child support, alimony, equitable distribution, and attorney fees; trial court further found that defendant showed "disregard for his familial and legal obligations" by quickly remarrying and having four additional children; court of appeals found that defendant's exercise of his fundamental right to marry and procreate, in this particular situation, did not demonstrate disregard of obligations to his family).]

e. Father's noncompliance with consent order, requiring him to pay 90 percent of child's college expenses as long as she "diligently applied" herself, was willful based on finding that father unilaterally decided that daughter was not diligently applying herself and his testimony that he withheld payment as "leverage" to get daughter to improve her grades. [*Barker v. Barker*, 228 N.C. App. 362, 745 S.E.2d 910 (2013).]

13. Present ability to comply.

a. Generally.

i. "Trial courts . . . have a responsibility to consider the basic subsistence needs of an alleged contemnor before determining he has the ability to pay child support as ordered and the ability to pay purge payments. Although the exact details of basic subsistence needs will vary in different cases and the trial court has wide discretion in determining these needs, basic subsistence needs normally will include food, water, shelter, and clothing at the very least. The trial court must make sufficient findings of fact to show that an alleged contemnor has the ability to pay his child support obligation and purge payment for civil contempt *after* considering his income, assets, and basic subsistence needs." [*Cty. of Durham ex rel. Wilson v. Burnette*, 262 N.C. App. 17, 17–18, 821 S.E.2d 840, 843 (2018), *aff'd per curiam*, 372 N.C. 64, 824 S.E.2d 397 (2019).]

ii. The present ability to comply includes the present ability to take reasonable measures that would enable one to comply. [*Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).]

iii. "Reasonable measures" may well include liquidating equity in encumbered assets. [*Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E.2d 220 (1986).] It is not reasonable to require or expect a defendant to liquidate an encumbered asset to pay a support obligation to a former spouse if the encumbered asset is real property owned as tenants by the entirety with a subsequent spouse. [*See Spears v. Spears*, 245 N.C. App. 260, 784 S.E.2d 485 (2016) (error for trial court to "fault" defendant for not making an effort to sell a beach house owned as tenants by the entirety with his second wife; appellate court further noted that even if a sale had occurred, it would have only eliminated defendant's monthly mortgage payment and would not have generated cash to pay arrears).]

iv. The majority of cases have held that to satisfy the "present ability" test, a defendant must possess some amount of cash or assets readily converted to cash. [*McMiller v. McMiller*, 77 N.C. App. 808, 336 S.E.2d 134 (1985) (no finding relating to defendant's ability to come up with $4,320 in readily available cash).

Cf. Barker v. Barker, 228 N.C. App. 362, 745 S.E.2d 910 (2013) (defendant's present ability to comply with obligation to pay daughter's second-year college expenses could be inferred from his testimony that he paid those expenses for her first year and was willing and able to pay for her third year and that his failure to pay for her second year was based on her poor academic performance, not because of an inability to pay).]

v. Where findings demonstrated that defendant had several assets (automobiles and real estate) available to him at the time of the hearing that could have been sold or liquidated, as well as consistent and recurring deposits and monies from a "friend" and present income from service on a city council, trial court did not err when it concluded defendant had the present ability to comply with the child support order. [*Onslow Cty. ex rel. Eggleston v. Willingham*, 199 N.C. App. 755, 687 S.E.2d 541 (2009) (**unpublished**).]

vi. The following findings, drawn in part from father's own testimony or admissions, established that father had sufficient income and assets to comply with an order requiring payment of private school tuition: father had substantial monthly income, having listed his income at $47,000/month on a loan application; father owned stocks, bonds, and securities valued at over $140,000 and had retirement accounts worth in excess of $900,000; and father had claimed unreasonable monthly expenses in his financial affidavit. [*Smith v. Smith*, 247 N.C. App. 166, 785 S.E.2d 434 (2016).]

vii. The argument that if a parent's monthly salary is less than the monthly amount of support owed, the parent does not have the ability to comply has been rejected. [*Adams v. Adams*, 171 N.C. App. 514, 615 S.E.2d 738 (2005) (**unpublished**) (a trial court is not limited to considering only the monthly salary a parent receives, noting in this case that the father had a "number of avenues by which to obtain funds").] Note that in *Spears v. Spears*, 245 N.C. App. 260, 278, 784 S.E.2d 485, 497 (2016), when defendant servicemember's "clear and undisputed" income information established a monthly disposable income of $2,288 and a total monthly obligation of $5,880 for child support, alimony, equitable distribution, and attorney fees, the trial court erred when it found that defendant had the ability to comply.

viii. Amounts not considered as income in the original child support calculation may not be considered in a related contempt proceeding. [*See Cty. of Durham ex rel. Wood v. Orr*, 229 N.C. App. 196, 749 S.E.2d 113 (2013) (**unpublished**) (because Supplemental Security Income (SSI) payments are not considered in initial child support calculations, a defendant's SSI payments could not be considered in determining his ability to pay in a related contempt proceeding; order for civil contempt based on defendant's receipt of SSI payments, which was defendant's only income and was used in full each month to pay rent for himself and a child not subject to support order being enforced, reversed).]

ix. The trial court must find as a fact that the defendant presently possesses the means to comply. [*Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966).]

b. The obligor's ability to comply with a child support order often is subsumed within the issue of willfulness. [Saxon Special Series No. 17.]

i. An obligor's failure to pay court-ordered child support cannot be willful unless the obligor has the **present ability** to pay at least part of the child support owed under the order or to take reasonable measures that would enable him to comply with the order. [*See Lamm v. Lamm*, 229 N.C. 248, 49 S.E.2d 403 (1948) (one does not act willfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered); *Miller* (*Sikes*) *v. Miller*, 153 N.C. App. 40, 568 S.E.2d 914 (2002) (to find willfulness, court must find failure to comply and that obligor presently possesses means to comply); *Teachey v. Teachey*, 46 N.C. App. 332, 264 S.E.2d 786 (1980) (for court to find willfulness, it must be established as an affirmative fact that defendant possessed the means to comply with the support order at some time after its entry); *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977) (for court to find failure to pay support willful, there must be particular findings as to the ability to pay during the period of delinquency), *superseded by statute on other grounds as stated in Craig v. Craig*, 103 N.C. App. 615, 406 S.E.2d 656 (1991).]

ii. Evidence that the obligor has the present ability to pay all or part of the child support owed under an order may not be sufficient in itself to support a finding that the obligor's failure to pay court-ordered child support is willful. Although ability to pay is a necessary condition precedent to a finding of willful nonpayment, willfulness may be an issue even when there is no issue regarding the obligor's ability to pay court-ordered child support. [*See Spencer v. Spencer*, 133 N.C. App. 38, 514 S.E.2d 283 (1999) (obligor's unilateral reduction in court-ordered child support payments when she obtained physical custody of one of the parties' two children did not constitute willful failure to comply with child support order); *see also Meehan v. Lawrance*, 166 N.C. App. 369, 602 S.E.2d 21 (2004) (where parties orally agreed to modify defendant's child support obligation, trial court's finding that defendant did not act willfully was affirmed).]

c. Ability to pay all or a portion of support owed.

i. Ability to pay part of an arrearage is insufficient to support incarceration until entire amount is paid. [*See Green v. Green*, 130 N.C. 578, 41 S.E. 784 (1902) (where court found that obligor could pay at least a portion of the alimony, it was error to imprison him until he paid the whole amount); *Brower v. Brower*, 70 N.C. App. 131, 318 S.E.2d 542 (1984) (citing *Green*) (order that required defendant's imprisonment until he paid entire arrearage was vacated when supported only by finding that defendant had present ability to pay a portion of that amount).] Note, however, that the ability to pay part of an arrearage is sufficient to support incarceration until that part is paid. [*But see Clark v. Gragg*, 171 N.C. App. 120, 125, 614 S.E.2d 356, 360 (2005) (emphasis in original) (court's finding that "the Plaintiff has the present ability to comply *with at least a portion* of the Orders of this Court" was insufficient to support a finding of willfulness; case remanded for specific findings addressing plaintiff's willful noncompliance, including findings regarding his ability to pay during the period that he was in default).]

ii. Civil contempt cannot be based on an obligor's failure to pay the full amount of support due when the obligor is only able to pay a portion. [*Spears v. Spears*, 245 N.C. App. 260, 284, 784 S.E.2d 485, 500 (2016) (citing *Green v. Green*, 130 N.C. 578, 41 S.E. 784 (1902)) (error to find defendant in civil contempt for failure to pay a total monthly obligation of $5,880 for child support, alimony, equitable distribution, and attorney fees when trial court's findings established that defendant could pay only a portion; trial court erred further when it required defendant to pay an additional $900 per month indefinitely as a purge condition when defendant was unable to pay the total monthly obligation, "much less $900.00 in addition to that amount").]

iii. Civil contempt may be based on an obligor's failure to pay part of an arrearage when the obligor has the ability to pay a portion but paid none or less than he or she could have paid. [*Cty. of Durham ex rel. Wilson v. Burnette*, 262 N.C. App. 17, 821 S.E.2d 840 (2018), *aff'd per curiam*, 372 N.C. 64, 824 S.E.2d 397 (2019).]

iv. A present ability to pay court-ordered child support may not be presumed based solely on the existence of a prior order and the absence of a motion to modify that order. [*See Smithwick v. Smithwick*, 218 N.C. 503, 11 S.E.2d 455 (1940) (right to move for modification does not sustain conclusion that failure to comply was willful and contemptuous); *Graham v. Graham*, 77 N.C. App. 422, 335 S.E. 2d 210 (1985) (failure to move for modification is not evidence of willful contempt).]

v. Mother who failed to pay child support pursuant to a temporary support order was properly found in civil contempt based on a finding that mother had the ability to pay based in part on her earning capacity rather than her actual income. [*Lueallen v. Lueallen*, 249 N.C. App. 292, 318, 790 S.E.2d 690, 707 (2016) (trial court properly concluded that mother had "willfully suppressed her income to avoid her child support obligation" and "that she had acted in bad faith based on her failure to make reasonable efforts to obtain a new full-time position").]

vi. In considering a person's ability to pay child support, the ability to "work" means a person has the present ability to maintain a wage-paying job. [*Cty. of Durham ex rel. Wilson v. Burnette*, 262 N.C. App. 17, 821 S.E.2d 840 (2018), *aff'd per curiam*, 372 N.C. 64, 824 S.E.2d 397 (2019).]

vii. Evidence that an obligor is able-bodied, not incapacitated, presently employed, or able to work is generally insufficient, standing alone, to support a finding that the obligor has willfully failed to pay court-ordered child support despite her present ability to do so. [*See Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966) (court must find not only failure to comply but that defendant presently possesses the means to comply); *Clark v. Gragg*, 171 N.C. App. 120, 614 S.E.2d 356 (2005) (findings that defendant was an able-bodied, 32-year-old man with a tenth grade education, whose work experience included running a Tenon machine in the furniture industry, was insufficient); *Hodges v. Hodges*, 64 N.C. App. 550, 553, 307 S.E.2d 575, 577 (1983) (finding that defendant was able-bodied at least part of the time and "was capable of and had the means or should have had the means" to make support payments was not sufficient); *Self v. Self*,

55 N.C. App. 651, 286 S.E.2d 579 (1982) (while evidence established that defendant was physically able to work, it did not establish that work was available to him, so his conduct was not willful).]

viii. A court, however, may find that an unemployed obligor's failure to pay court-ordered child support is willful if the obligor is able to work but deliberately and in bad faith fails to look for work or accept available employment. [*See Frank v. Glanville*, 45 N.C. App. 313, 262 S.E.2d 677 (1980) (concurring with official commentary to G.S. 5A-21 stating that a person can be guilty of civil contempt, even if he does not have the money to make court-ordered payments, if he could take a job that would enable him to make the payments but does not do so).]

d. The court must determine a party's ability to comply during two periods of time. The trial court must find that the party:

i. Possessed the means to comply with the court's order during the period the party was in default [*Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966) (requiring a finding that defendant possessed the means to comply with alimony and child support orders during the period when he was in default); *Clark v. Gragg*, 171 N.C. App. 120, 614 S.E.2d 356 (2005) (to address the requirement of willfulness, the trial court must make findings as to the ability of the party to comply with the order at issue during period of default); *Sowers v. Toliver*, 150 N.C. App. 114, 562 S.E.2d 593 (2002) (contempt order vacated when it lacked findings as to plaintiff's ability to comply with order during period when in default).] and

ii. Has the present means to comply with the purge conditions set out in the order. [*Shippen v. Shippen*, 204 N.C. App. 188, 191, 693 S.E.2d 240, 244 (2010) (quoting *McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985)) ("[t]o justify conditioning defendant's release from jail for civil contempt upon payment of a large lump sum of arrearages, the district court must find as fact that defendant has the present ability to pay those arrearages"); *Spears v. Spears*, 245 N.C. App. 260, 284, 784 S.E.2d 485, 500 (2016) (trial court erred further when it required defendant to pay indefinitely as a purge condition an additional $900/month over and above the total monthly obligation of $5,880 when defendant was unable to pay $5,880, "much less $900.00 in addition to that amount"); *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988) (contempt reversed when no findings made as to defendant's ability to pay at date of hearing); *Hodges v. Hodges*, 64 N.C. App. 550, 307 S.E.2d 575 (1983) (contempt order vacated when court did not determine ability to pay as of date of hearing); *Cox v. Cox*, 10 N.C. App. 476, 179 S.E.2d 194 (1971) (remanded for court to find whether defendant presently possessed means to comply).]

iii. An obligor's inability to comply at the time of the contempt hearing must be genuine and not deliberately effected. [*See Bennett v. Bennett*, 21 N.C. App. 390, 393, 204 S.E.2d 554, 556 (1974) (affirming contempt in child support context, noting that a "defendant may not deliberately divest himself of his property and in effect pauperize himself for appearance at a hearing for contempt and thereby escape punishment because he is at that time unable to comply with the court order").]

e. Full payment of arrearage by time of hearing is a defense.

i. An obligor who is ordered to show cause for failing to pay court-ordered child support may not be held in civil contempt if he pays the full amount of the arrearage before the contempt hearing is held. [*See Reynolds v. Reynolds*, 147 N.C. App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (husband not in contempt when he paid all arrearages due, even though compliance did not occur until after he was served with motion to show cause), *rev'd on other grounds per curiam for reasons stated in dissenting opinion*, 356 N.C. 287, 569 S.E.2d 645 (2002); *Hudson v. Hudson*, 31 N.C. App. 547, 230 S.E.2d 188 (1976) (no contempt where, between filing of contempt motion and hearing thereon, defendant brought support payments up to date); *see also Ruth v. Ruth*, 158 N.C. App. 123, 579 S.E.2d 909 (2003) (in custody case, compliance after party was served precluded finding of contempt).]

f. Use of a defendant's prior statement or position to preclude defendant from taking a contrary position, i.e., use of judicial estoppel.

i. Father was judicially estopped from asserting as a defense in a 2002 contempt proceeding for failure to pay child support that he had not been properly served in a 1994 North Carolina proceeding to establish that support. Judicial estoppel was based on father's assertion in a 1996 complaint filed in Washington state seeking marital dissolution that the 1994 North Carolina judgment ordering father to pay child support was conclusive on that issue. [*Price* (*Nercessian*) *v. Price*, 169 N.C. App. 187, 609 S.E.2d 450 (2005) (father's legal contention in 1996 proceeding that the 1994 North Carolina order was conclusive on the issue of child support, and his legal argument in 2002 that the contempt matter should be dismissed and the 1994 child support order vacated, were inconsistent legal contentions warranting application of judicial estoppel; also favoring use of judicial estoppel was fact that father waited to have his motion to dismiss heard until after children had reached age of majority, which, if granted, would have precluded wife from seeking arrearages or support).]

14. Orders for contempt.

a. When an obligor is held in contempt for willfully failing to pay child support, the order should indicate clearly and unambiguously whether the obligor is being held in civil contempt or in criminal contempt.

b. Findings.

i. The trial court must make findings as follows:

(a) On each of the elements in G.S. 5A-21(a) [G.S. 5A-23(e).];

(b) As to the facts constituting contempt [G.S. 5A-23(e).];

(c) That the party had the ability to comply during the period when the party was in default [*Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966).]; and

(d) That the party has the present means to comply with the purge conditions set out in the order. [*Shippen v. Shippen*, 204 N.C. App. 188, 693 S.E.2d 240 (2010).]

ii. At the conclusion of the hearing, the judicial official must enter a finding for or against the alleged contemnor on each of the elements set out in G.S. 5A-21(a). If civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and specifying the action that the contemnor must take to purge herself of the contempt. [G.S. 5A-23(e) and -22(a).]

iii. An order adjudicating an obligor in civil contempt for failing to pay court-ordered child support is fatally defective if it does not include ultimate findings of fact that the obligor's failure to comply with the child support order is willful and that the obligor has the present ability to comply with the order. [*See Smith v. Smith*, 247 N.C. 223, 100 S.E.2d 370 (1957) (no finding as to willful noncompliance); *Clark v. Gragg*, 171 N.C. App. 120, 614 S.E.2d 356 (2005) (trial court never actually found that plaintiff's noncompliance was "willful" and never specifically found that he had the means to comply with the orders during the period of default); *Hodges v. Hodges*, 64 N.C. App. 550, 307 S.E.2d 575 (1983) (no finding as to present ability to comply, and evidence otherwise insufficient to plainly show that defendant was capable of complying with the court's order).]

iv. An unspecific finding of a present means to comply has been found sufficient when competent evidence was presented in support of the finding. [*Maxwell v. Maxwell*, 212 N.C. App. 614, 619, 713 S.E.2d 489, 493 (2011) (citing *Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E.2d 220 (1986)) (finding that "[a]t all times since entry of the Consent Order, Plaintiff/Father has been aware of its terms, has had the ability to comply with the child support provisions, and has willfully failed to provide any child support as ordered without any justification" was sufficient when supported by wife's testimony that husband had threatened her by saying he had sufficient financial resources to keep her in court for her lifetime and that, to her knowledge, father had been employed since support order entered); *Watson v. Watson*, 187 N.C. App. 55, 652 S.E.2d 310 (2007) (citing *Adkins*) (a general finding of present ability to comply with a support order was held to be sufficient when there was evidence in the record regarding defendant's assets), *review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008); *Shippen v. Shippen*, 204 N.C. App. 188, 191, 693 S.E.2d 240, 244 (2010) (trial court found that "[d]efendant has the ability to comply or take reasonable efforts to do so" but made no finding that defendant had the present ability to pay the arrearage at issue and purge himself of contempt; finding was not as specific or detailed as might be preferred but was minimally sufficient); *Shumaker v. Shumaker*, 137 N.C. App. 72, 527 S.E.2d 55 (2000) (contempt order sufficient if it is implicit in the court's findings that the delinquent obligor both possessed the means to comply and willfully refused to do so); *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990) (although specific findings as to contemnor's present ability to comply are preferable, a general finding of present ability to comply is sufficient), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991); *Plott v. Plott*, 74 N.C. App. 82, 327 S.E.2d 273 (1985) (although explicit findings are preferable, they are not absolutely essential where the findings otherwise indicate that a contempt order is warranted); *Medlin v. Medlin*, 64 N.C. App. 600, 602, 307 S.E.2d 591, 592 (1983) (explicit findings of present ability to comply or to take reasonable measures to enable compliance, and of willful failure or refusal to do

so, are preferable, but finding that obligor "has sufficient assets to pay alimony as ordered" was adequate); *Moore v. Moore*, 35 N.C. App. 748, 242 S.E.2d 642 (1978) (implicit findings of willfulness and present ability are sufficient if supported by evidence in record).]

c. Appellate court's consideration of findings.

i. While the order must include the ultimate finding that the failure to pay is willful, specific findings of fact regarding the obligor's willful failure to pay court-ordered child support are often useful with respect to appellate review but are not required as long as there is evidence in the record to establish that the obligor's failure to pay was willful. [*See Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E.2d 220 (1986) (noting that specific findings supporting the contemnor's present means are preferable); *cf. Price v. Biggs*, 272 N.C. App. 315, 319, 846 S.E.2d 781, 785 (2020) (lack of express findings addressing (1) whether the obligor's failure to pay overdue support was willful and (2) the obligor's present ability to comply with the child support order were "fatal to the order"; trial court erred when it found obligor in contempt when there was no evidence in the record to establish the obligor's ability to pay).]

ii. The court's order must be supported by its conclusions of law, its legal conclusions must be supported by its findings of fact, and its findings of fact must be supported by sufficient, competent evidence in the record. [*See Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E.2d 220 (1986) (discussing review in contempt proceedings).]

d. Purge conditions.

i. If the court incarcerates an obligor for civil contempt, the court's order must clearly specify the conditions under which the obligor may purge herself of contempt. [*See* G.S. 5A-23(e) and 5A-22(a).] If the order does not clearly specify what the defendant can and cannot do to purge herself of the civil contempt, the order will be reversed. [*See Cox v. Cox*, 133 N.C. App. 221, 515 S.E.2d 61 (1999) (vague condition that mother shall not place children in a stressful situation or a situation detrimental to their welfare and not punish children in manner that is stressful, abusive, or detrimental did not set out what mother could do to purge herself of contempt; contempt order reversed).]

ii. A contempt order must include a definite date by which a defendant may purge the contempt. [*Lueallen v. Lueallen*, 249 N.C. App. 292, 790 S.E.2d 690 (2016) (contempt order requiring purge payments to be applied to child support arrearages was impermissibly vague when ending date for the payments was uncertain); *Spears v. Spears*, 245 N.C. App. 260, 784 S.E.2d 485 (2016) (contempt order vacated as impermissibly vague when it did not set an ending date for defendant's alimony purge payments); *Wellons v. White*, 229 N.C. App. 164, 183, 748 S.E.2d 709, 722 (2013) ("We will not allow the district court to hold [defendant] indefinitely in contempt.").] *See* Daniel Spiegel, *Civil Contempt and "Springing" Orders for Arrest*, UNC Sch. of Gov't: On the Civil Side Blog (Mar. 7, 2018), https://civil.sog.unc.edu/civil-contempt-and-springing-orders-for-arrest.

iii. The conditions under which an obligor may purge himself of contempt must be conditions that he has the **actual, present ability** to meet, so that the obligor "holds the key to his own jail by virtue of his ability to comply." [*See Jolly v. Wright*, 300 N.C. 83, 93, 265 S.E.2d 135, 143 (1980), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993); Official Comment, G.S. 5A-21.]

iv. A court is authorized to allow a defendant to purge herself of contempt upon a payment of some amount less than that owed. [*Bogan v. Bogan*, 134 N.C. App. 176, 516 S.E.2d 641 (1999) (allowing payment of amount less than amount owed was not an impermissible modification of order).]

v. A court may not incarcerate an obligor for civil contempt and condition his release on payment of the entire amount of the child support arrearage owed under the order unless the court finds that the obligor has the present ability to pay the entire amount of the arrearage. [*See Clark v. Gragg*, 171 N.C. App. 120, 614 S.E.2d 356 (2005) (if the party is to be imprisoned until he pays the full amount of any arrearages, the court must find that the party has the present ability to pay the total outstanding amount); *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988) (where there were no findings of defendant's ability to pay entire arrearage, contempt reversed); *Brower v. Brower*, 70 N.C. App. 131, 318 S.E.2d 542 (1984) (order vacated that required defendant's imprisonment until full payment of arrearages when supported by a finding that defendant could pay only a portion of arrears); *Jones v. Jones*, 62 N.C. App. 748, 303 S.E. 2d 583 (1983) (contempt reversed when there was no evidence in record that defendant actually possessed arrearage amount or could take reasonable measures that would enable him to comply).]

vi. If an unemployed obligor is found in civil contempt and has no income or property from which child support may be paid, the court may require her to purge contempt by taking reasonable measures, such as looking for work, accepting employment, or applying for public assistance or disability benefits to which she may be entitled that are within her present ability and which would enable her to comply with the order. [*See Frank v. Glanville*, 45 N.C. App. 313, 262 S.E.2d 677 (1980) (concurring with official commentary to G.S. 5A-21 stating that a person can be guilty of civil contempt, even if he does not have the money to make court-ordered payments, if he could take a job that would enable him to make the payments but does not do so).]

vii. A finding that the obligor has the present ability to purge herself of contempt must be supported by competent evidence in the record. [*See Lee v. Lee*, 78 N.C. App. 632, 337 S.E. 2d 690 (1985) (evidence that obligor was employed at minimum wage job was insufficient to support finding that he had present ability to pay $1,000 child support arrearage).]

viii. Purge conditions established in civil contempt proceedings may not require the obligor to make continued or future child support payments or take other future actions (because doing so is not within the obligor's present ability). [*See Bennett v. Bennett*, 71 N.C. App. 424, 322 S.E.2d 439 (1984) (error for court to require defendant to make child support payments that accrued after his incarceration

in order to obtain his release).] *See* Daniel Spiegel, *Civil Contempt and "Springing" Orders for Arrest*, UNC Sch. of Gov't: On the Civil Side Blog (Mar. 7, 2018), https://civil.sog.unc.edu/civil-contempt-and-springing-orders-for-arrest.

15. Sanctions for civil contempt

    a. Imprisonment until the respondent has complied with the purge condition is the only authorized sanction for civil contempt. [G.S. 5A-21(b).] Note, however, that "[a] fixed term of imprisonment is an appropriate sanction for criminal contempt, but not civil contempt." [*Cty. of Durham ex rel. Wilson v. Burnette*, 262 N.C. App. 17, 31 n.8, 821 S.E.2d 840, 851 n.8 (2018); *Cty. of Durham ex rel. Alston v. Hodges*, 257 N.C. App. 288, 292 n.2, 809 S.E.2d 317, 321 n.2 (2018).]

    b. A person who is found in civil contempt is not subject to the imposition of a fine. [G.S. 5A-21(d), *added by* S.L. 2015-210, § 1, effective Oct. 1, 2015, and applicable to civil contempt orders entered on or after that date.] The 2015 amendment to G.S. 5A-21 changed the result in *Tyll v. Berry*, 234 N.C. App. 96, 758 S.E.2d 411 (a fine is a "statutorily permitted" sanction for civil contempt proceedings), *review denied*, *appeal dismissed*, 367 N.C. 532, 762 S.E.2d 207 (2014).]

    c. A person who is incarcerated for civil contempt may be imprisoned as long as the civil contempt continues, subject to the limitations in G.S. 5A-21(b1) and (b2). [G.S. 5A-21(b) (neither 5A-21(b1) nor (b2) apply to nonpayment of child support).] The limitations on incarceration for civil contempt under G.S. 5A-21(b1) and (b2) do **not** apply to cases in which a person is found in civil contempt for failing to pay court-ordered child support or for failing to comply with other provisions of child support orders that do not involve the payment of a money judgment.

    d. There is no limitation on the term of imprisonment when a person is held in civil contempt for failing to pay court-ordered child support or for failing to comply with a court order that does not involve the payment of money. [G.S. 5A-21(b).]

    e. While the court of appeals has held that an obligor cannot be held in contempt indefinitely, [*See Wellons v. White*, 229 N.C. App. 164, 183, 748 S.E.2d 709, 722 (2013) ("We will not allow the district court to hold [defendant] indefinitely in contempt.")] it has upheld orders that postpone imprisonment for a short amount of time when evidence shows that the obligor will be able to take reasonable steps to enable compliance with the purge condition in that time period. [*See Gordon v. Gordon*, 233 N.C. App. 477, 757 S.E.2d 351 (2014) (upholding sixty-day stay of incarceration where evidence established that the obligor would receive funds to pay the purge condition in sixty days); *Watson v. Watson*, 187 N.C. App. 55, 652 S.E.2d 310 (2007) (affirming order of civil contempt allowing defendant ninety days to take reasonable measures to pay the purge amount); *Abernethy v. Abernethy*, 64 N.C. App. 386, 307 S.E.2d 396 (1983) (order of commitment activated when defendant failed to comply with purge condition requiring payment of arrearages and attorney fees over four-month period); *Guerrier v. Guerrier*, 155 N.C. App. 154, 574 S.E.2d 69 (2002) (commitment stayed to give defendant an opportunity to purge himself of contempt by compliance with the order and judgment); *Ruth v. Ruth*, 158 N.C. App. 123, 579 S.E.2d 909 (2003) (commitment suspended on condition that wife purge herself of contempt by paying $2,637 into trust account of former husband's attorney).]

f. However, the court of appeals also has held that before the court can incarcerate for failure to comply with a purge condition, due process requires a hearing to determine that the failure to comply was willful. [*Unger v. Unger*, 268 N.C. App. 142, 834 S.E.2d 649 (2019), *appeal dismissed*, 837 S.E.2d 721 (N.C.), *cert. denied*, 851 S.E.2d 610 (N.C. 2020).]

16. Release from incarceration.

a. Release without further order from the court. An obligor who is incarcerated for civil contempt for failing to pay court-ordered child support must be released when her civil contempt no longer continues. The civil contempt order must specify how the person may purge herself of the contempt. Upon finding compliance with the order's specifications, the sheriff or other officer having custody may release the person without further order from the court. [G.S. 5A-22(a).]

b. Release pursuant to obligor's motion upon compliance or if compliance no longer possible.

i. On motion by an incarcerated obligor directed to the judge who found the obligor in contempt, the judge (or another district court judge if the judge who held the obligor in contempt is not available) must determine if the obligor is subject to release. On an affirmative determination, the judge must order the obligor's release. [G.S. 5A-22(b).]

ii. The obligor may also seek his release under other procedures available under the law of North Carolina. [G.S. 5A-22(b).]

17. Award of attorney fees in contempt proceeding to enforce child support.

a. The court may award attorney fees to an obligee pursuant to G.S. 50-13.6 in connection with civil contempt proceedings to enforce a child support order. [*See Ugochukwu v. Ugochukwu*, 176 N.C. App. 741, 627 S.E.2d 625 (2006) (citing *Blair v. Blair*, 8 N.C. App. 61, 173 S.E.2d 513 (1970)) (award of fees to wife based on husband's willful contempt for failure to pay child support upheld; payment of fees does not appear to be a purge condition); *Belcher v. Averette*, 152 N.C. App. 452, 568 S.E.2d 630 (2002) (defendant in contempt of child support provisions in a consent decree ordered to pay plaintiff's attorney fees pursuant to G.S. 50-13.6); *Smith v. Smith*, 121 N.C. App. 334, 465 S.E.2d 52 (1996) (agreement to pay college expenses is in nature of child support, so court was authorized to award attorney fees when father failed to pay those expenses). *But cf. Powers v. Powers*, 103 N.C. App. 697, 407 S.E.2d 269 (1991) (court reversed an award of attorney fees to wife after finding husband in contempt of consent judgment requiring husband to pay for child's college expenses, holding that order was not for "child support").]

b. Contempt power of the trial court includes the authority to require payment of reasonable attorney fees to opposing counsel as a condition of being purged of contempt for failure to comply with a child support order. [*See Shippen v. Shippen*, 204 N.C. App. 188, 693 S.E.2d 240 (2010) (quoting *Eakes v. Eakes*, 194 N.C. App. 303, 669 S.E.2d 891 (2008)) (order required payment of attorney fees as a condition of being purged of contempt for failure to comply with an order for child support and post-separation support; order vacated when it did not include the findings required when awarding attorney fees); *Eakes* (citing *Blair v. Blair*, 8 N.C. App. 61, 173 S.E.2d 513

(1970)) (contempt power of the trial court includes the authority to require payment of reasonable attorney fees to opposing counsel as a condition of being purged of contempt for failure to comply with a child support order).]

c. Required findings.

i. Before any award of attorney fees, including for contempt, the trial court must make specific findings of fact concerning:

(a) The ability of a party to defray the cost of the suit, i.e., that the party is unable to employ adequate counsel in order to proceed as a litigant to meet the other litigants in the suit;

(b) The good faith of the party in proceeding with the suit;

(c) The lawyer's skill;

(d) The lawyer's hourly rate;

(e) The nature and scope of the legal services rendered. [*Shippen v. Shippen*, 204 N.C. App. 188, 693 S.E.2d 240 (2010); *Eakes v. Eakes*, 194 N.C. App. 303, 669 S.E.2d 891 (2008) (orders in both *Shippen* and *Eakes* required payment of attorney fees as a condition of being purged of contempt for failure to comply with a child support order; both orders vacated and remanded for required findings).]

ii. Note, however, that in an unpublished opinion the court of appeals has held that when a court orders payment of attorney fees to opposing counsel as a condition of being purged of contempt, rather than as a discretionary award pursuant to G.S. 50-13.6, findings as to the plaintiff's good faith and insufficient means are unnecessary. [*Walker v. Hamer*, 175 N.C. App. 796, 625 S.E.2d 202 (2006) (**unpublished**) (mother in contempt of an order allowing father visitation). *Cf. Best v. Gallup*, 234 N.C. App. 115, 761 S.E.2d 755 (2014) (**unpublished**) (citing *Wiggins v. Bright*, 198 N.C. App. 692, 679 S.E.2d 874 (2009)) (defendant ordered to pay attorney fees as a purge condition in custody contempt order; award of fees reversed when contempt order awarding fees contained only one of the two findings required by G.S. 50-13.6).]

d. As a general rule, attorney fees in a civil contempt action are not available unless the moving party prevails. However, in the limited situation where contempt fails because the alleged contemnor complies with the previous orders after the motion to show cause is issued and prior to the contempt hearing, an award of attorney fees has been found proper. [*Ruth v. Ruth*, 158 N.C. App. 123, 579 S.E.2d 909 (2003) (when mother had returned children to father at time of contempt hearing, no contempt was found, but award of attorney fees to father under G.S. 50-13.6 affirmed). *See also Wiggins v. Bright*, 198 N.C. App. 692, 679 S.E.2d 874 (2009) (father ordered to pay mother's attorney fees when father's motion for contempt for mother's failure to comply with custody order was denied; order for fees affirmed, as fees were authorized by G.S. 50-13.6 and trial court made required statutory findings as to good faith and insufficient means, making it immaterial whether the recipient of fees was the movant or the prevailing party; G.S. 50-13.6 requires only that recipient be "an interested party;" father's argument that party awarded fees must have prevailed is contrary to *Burr v. Burr*, 153 N.C. App. 504, 570 S.E.2d 222 (2002), which awarded

attorney fees to a nonprevailing party in an action involving child custody and support but not contempt).]

18. Appeal of a civil contempt order.
    a. To whom directed.
        i. An aggrieved party may appeal the district court's order in a civil contempt proceeding to the court of appeals by filing a notice of appeal within thirty days after the order is entered. [*See* N.C. R. App. P. 3(c); G.S. 5A-24 and 7A-27(b)(2) (if order is a final order) or (b)(3)a. (if order affects a substantial right).]
        ii. A motion to stay an obligor's incarceration under a civil contempt order must be directed initially to the district court. [N.C. R. App. P. 8(a).]
    b. Contempt order as interlocutory.
        i. A civil contempt order is interlocutory when it delays the entry of the sanction of imprisonment or resolves less than all the matters before the trial court. [*Guerrier v. Guerrier*, 155 N.C. App. 154, 574 S.E.2d 69 (2002).]
        ii. Even though a contempt order may be interlocutory, the court of appeals has held that an appeal of an interlocutory order that finds a party in civil contempt affects a substantial right and is therefore immediately appealable. [*Ross v. Ross*, 215 N.C. App. 546, 715 S.E.2d 859 (2011) (citing *Guerrier v. Guerrier*, 155 N.C. App. 154, 158, 574 S.E.2d 69, 71 (2002)); *Guerrier* (statement that appeal of "any contempt order" affects a substantial right and is immediately appealable should be considered to apply only to orders finding a person in civil contempt). *But see Guerrier*, 155 N.C. App. at 160, 574 S.E.2d at 73 (Biggs, J., dissenting) (civil contempt order may affect a substantial right in some cases but not in others); *Anderson v. Lackey*, 166 N.C. App. 279, 603 S.E.2d 168 (2004) (**unpublished**) (an order finding a party in civil contempt does not affect a substantial right when the party is not at imminent risk of punishment; mother in *Anderson* not at imminent risk of punishment because trial court took under advisement the sanctions to be imposed for her contempt; appellate court distinguished *Guerrier* on the basis that the court in that case did not take sanctions under advisement); *Moore v. Moore*, 226 N.C. App. 583, 741 S.E.2d 513 (2013) (**unpublished**) (appeal of an order dismissing a motion for criminal contempt does not affect a substantial right; appeal of the order dismissing defendant's motion for civil contempt did not affect a substantial right when defendant failed to show the possibility of inconsistent verdicts absent appellate court's consideration of the appeal).]
        iii. An order determining that a person is not in civil contempt may be appealed only if the order affects a substantial right of the appellant. [*Hardy v Hardy*, 270 N.C. App. 687, 842 S.E.2d 148 (2020).]
    c. Standard of review on appeal.
        i. The standard of review the court of appeals follows in a civil contempt proceeding is limited to determining whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law. [*Price v. Biggs*, 272 N.C. App. 315, 846 S.E.2d 781 (2020); *Eakes v. Eakes*, 194 N.C. App. 303, 669 S.E.2d 891 (2008); *Ugochukwu v. Ugochukwu*,

176 N.C. App. 741, 627 S.E.2d 625 (2006); *Miller* (*Sikes*) *v. Miller*, 153 N.C. App. 40, 568 S.E.2d 914 (2002); *McKillop v. Onslow Cty.*, 139 N.C. App. 53, 532 S.E.2d 594 (2000).]

ii. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment. [*Eakes v. Eakes*, 194 N.C. App. 303, 669 S.E.2d 891 (2008) (citing *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990)).]

iii. A trial court's conclusions of law are reviewed de novo. [*Price v. Biggs*, 272 N.C. App. 315, 846 S.E.2d 781 (2020).]

19. Enforcing an order by contempt after appeal of child support order filed.

a. Pursuant to G.S. 1-294, when an appeal is perfected, the trial court is divested of jurisdiction "upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure." [G.S. 1-294, *amended by* S.L. 2015-25, § 2, effective May 21, 2015. *See Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981) (noting as "well settled" that an appeal, even of an appealable interlocutory order, operates as a stay of all proceedings relating to issues included therein until the matters are determined on appeal; further noting that jurisdiction of the trial court is divested from the date that notice of appeal was given); *Guerrier v. Guerrier*, 155 N.C. App. 154, 159 n.4, 574 S.E.2d 69, 72 n.4 (2002) (noting in dicta that appeal of an order finding father in contempt of an equitable distribution judgment for removing funds from children's investment accounts left the trial court without jurisdiction to address issues in an enforcement order such as reimbursement of the funds removed or removal of father as custodian of the accounts; enforcement order vacated on other grounds, but court noted that unlike child support, child custody, and alimony, no statute provided that an equitable distribution order remains enforceable pending appeal); *Smith v. Smith*, 247 N.C. App. 166, 170, 785 S.E.2d 434, 437 (2016) (citing *Guerrier*) (G.S. 50-13.4(f)(9) "establishes an express exception" to the stay rule in G.S. 1-294 when the trial court enters an order for child support).]

b. Notwithstanding G.S. 1-294, an order for the periodic payment of child support or a child support judgment that provides for periodic payments may be enforced through civil contempt pending appeal of those orders. [G.S. 50-13.4(f)(9); *Smith v. Smith*, 247 N.C. App. 166, 170, 785 S.E.2d 434, 438 (2016) (construing *Brown v. Brown*, 171 N.C. App. 358, 615 S.E.2d 39 (2005)) (an order requiring father to pay private school tuition was an order for the periodic payment of child support, even though father could choose between several payment options offered by the school; payments would constitute "a periodic payment, whether [plaintiff] chooses to pay it once a year, once a semester or over ten months;" moreover, mother's cross-appeal of the order did not preclude enforcement pursuant to G.S. 50-13.4(f)(9) of father's obligation to pay the required tuition during appeal of the order).] The original order, and the finding of contempt based on a violation of that order, may be enforced pending appeal. [*See Guerrier v. Guerrier*, 155 N.C. App. 154, 574 S.E.2d 69 (2002) (G.S. 50-13.4(f)(9) is an exception to G.S. 1-294 and allows enforcement of orders for the payment of child support pending appeal, including any sanctions entered

pursuant to an order of civil contempt; appeal of an order finding defendant in contempt for failure to pay child support did not divest the court of jurisdiction to enter an enforcement order sanctioning defendant $100 for failure to comply with purge condition that required payment of past child support and medical expenses).]

c. An award for attorney fees is "an enforceable component of child custody, child support, and alimony awards pending appeal." Thus, when defendant did not seek to stay an award of attorney fees included in a child support order by posting bond pursuant to G.S. 1-289, the trial court had jurisdiction to find defendant in contempt pursuant to G.S. 50-13.4(f)(9) for failure to pay the fees while the matter was on appeal. [*Simms v. Bolger*, 264 N.C. App. 456, 459, 826 S.E.2d 467, 469 (2019).]

d. When the trial court enters an order of contempt while the child support order is on appeal, the court of appeals may, upon motion of an aggrieved party, stay an order for civil contempt entered for child support until the appeal is decided, if justice requires. [G.S. 50-13.4(f)(9). *See also* N.C. R. App. P. 23.]

e. For more on the appeal of a support order generally, including the effect of G.S. 50-19.1, see *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section I.I. For more on the effect of an appeal on a trial court's jurisdiction, see *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section I.I.6. For a discussion of contempt when appeal of an order is pending, see *Contempt of Court*, Bench Book, Vol. 2, Chapter 4.

C. Criminal Contempt

1. Generally.

   a. An obligor may be held in criminal contempt for willfully failing to comply with a civil child support order. [*See* G.S. 50-13.4(f)(9); 5A-12(a)(3), *amended by* S.L. 2009-335, § 1, effective Dec. 1, 2009.]

   b. The purpose of criminal contempt is to **punish** the contemnor's willful noncompliance with the court's order, not to **compel** the contemnor's compliance with the order. [*See Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988) (discussing distinction between civil and criminal contempt).]

   c. For more on criminal contempt, see *Contempt of Court*, Bench Book, Vol. 2, Chapter 4.

2. Direct vs. indirect criminal contempt.

   a. Criminal contempt is direct criminal contempt when the act:

      i. Is committed within the sight or hearing of a presiding judicial official;

      ii. Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and

      iii. Is likely to interrupt or interfere with matters then before the court. [G.S. 5A-13(a)(1)–(3).]

   b. Any criminal contempt other than direct criminal contempt is indirect criminal contempt.

   c. The distinction between direct and indirect criminal contempt is important because summary proceedings are available only for direct criminal contempt.

i. Because G.S. 5A-13(b) requires plenary proceedings for indirect criminal contempt, it would be reversible error to proceed summarily in the case of indirect criminal contempt.

ii. Because proceedings for direct criminal contempt may be plenary or summary, direct contempt mislabeled as indirect contempt has been found not to warrant reversal. [*See Adams Creek Assocs. v. Davis*, 186 N.C. App. 512, 652 S.E.2d 677 (2007) (incorrectly identifying contempt as indirect when it was direct was not reversible error), *review denied*, *appeal dismissed*, *stay dissolved*, 362 N.C. 354, 662 S.E.2d 900 (2008).]

d. Willful failure to pay child support as required by court order constitutes **indirect** criminal contempt, rather than **direct** criminal contempt. [See G.S. 5A-13, defining direct and indirect criminal contempt.]

e. The court therefore must follow the plenary procedures applicable to indirect criminal contempt under G.S. 5A-15, rather than the summary procedures applicable to direct criminal contempt under G.S. 5A-14, when faced with a willful failure to pay court-ordered child support. [*See* G.S. 5A-15.]

3. Procedure.

a. Criminal contempt proceedings for willful nonpayment of court-ordered child support are probably ancillary proceedings in the pending child support action rather than independent criminal actions. [See G.S. 5A-15(a), providing that proceedings are initiated by order to appear and show cause; *Blue Jeans Corp. v. Amalgamated Clothing Workers*, 275 N.C. 503, 169 S.E.2d 867 (1969) (proceeding with a contempt matter based on violation of an injunction not as an independent proceeding but as part of the original injunction suit).]

b. Criminal contempt hearings are tried before a district court judge, without a jury, in the pending child support action. [*See* G.S. 5A-15(d).]

c. A judicial official (district court judge or clerk or assistant clerk of superior court) may initiate criminal contempt proceedings in a child support case by issuing an order requiring the alleged contemnor to appear before a district court judge, at a reasonable time specified in the order, to show cause why she should not be held in contempt for willfully disobeying a child support order. [G.S. 5A-15(a).]

d. Although a party is not required to file a verified petition or affidavit as a prerequisite to the issuance of a show cause order for criminal contempt, a proceeding for criminal contempt may be initiated by a motion requesting that a party be required to show cause why the party should not be held in contempt. [*See Mather v. Mather*, 70 N.C. App. 106, 318 S.E.2d 548 (1984) (husband's motion alleged sufficient facts to show wife's willful disobedience of order setting out husband's visitation rights).]

e. The show cause order in a criminal contempt proceeding must provide the alleged contemnor with adequate notice of the specific factual basis for the alleged contempt. [*See O'Briant v. O'Briant*, 313 N.C. 432, 329 S.E. 2d 370 (1985) (criminal contempt order was reversed where notice to plaintiff did not inform her that she should be prepared to defend herself for her failures to appear at prior hearings on contempt charges).]

f. G.S. 5A-15 does not specify the manner in which a show cause order must be served. In practice, most show cause orders in child support cases are served by the sheriff pursuant to G.S. 1A-1, Rule 4.

g. An obligor who has been cited for alleged criminal contempt may not be compelled to testify against himself. [G.S. 5A-15(e).]

h. An alleged contemnor may move to dismiss a show cause order. [G.S. 5A-15(c).]

4. Order for arrest of a person charged with criminal contempt to be heard at a plenary proceeding.

a. In a proceeding for criminal contempt, the court may order the obligor's arrest if the court finds, based on a sworn statement or affidavit, probable cause to believe that the obligor will not appear in response to the show cause order or if the obligor fails to appear as required by the show cause order. [*See* G.S. 5A-16(b) *and* 15A-305(b)(8), (9); Form AOC-CR-217, Order for Arrest; *see also Mather v. Mather*, 70 N.C. App. 106, 318 S.E.2d 548 (1984) (court had power to have plaintiff wife arrested and held until she posted bail to assure her appearance).] An order for arrest has been reversed when the court failed to make a probable cause finding that plaintiff would not appear. [*Mather v. Mather*, 70 N.C. App. 106, 318 S.E.2d 548 (1984).]

b. If a court issues an order for an obligor's arrest and the obligor is not brought before a judge for hearing in the contempt proceeding immediately following arrest, the obligor must be released from jail pending the contempt hearing upon posting an appearance bond or satisfying other pretrial release requirements pursuant to G.S. 15A-534. [*See* G.S. 5A-16(b).]

c. The bond posted by (or on behalf of) an arrested obligor in a contempt proceeding is an **appearance** bond—**not** a compliance bond imposed pursuant to G.S. 50-13.4(f)(1). The amount of the appearance bond posted by or on behalf of an arrested obligor in a contempt proceeding may not be applied to satisfy the obligor's child support arrearage unless it is returned to the obligor when she appears for the contempt hearing and the obligor agrees to apply it toward the child support arrearage, or unless the bond is garnished through supplemental proceedings or other legal process after the obligor appears.

d. If the obligor fails to appear at the contempt hearing after being arrested and released from custody, the obligor's appearance bond may be forfeited for the benefit of the public schools but may not be applied to satisfy the obligor's child support arrearage. [*See Mussallam v. Mussallam*, 321 N.C. 504, 364 S.E.2d 364 (1988) (discussing distinction between appearance bond and compliance bond in contempt proceeding relating to civil action for child custody); G.S. 15A-544.7(c)(1) (providing for "clear proceeds" to go to county finance officer for benefit of the public schools).]

5. Right to and appointment of counsel.

a. An alleged contemnor has the right to be represented by legal counsel in criminal contempt proceedings.

i. The court should advise each alleged contemnor, in writing in the notice or order to show cause and orally before the contempt proceeding begins, that he may be incarcerated if found in criminal contempt, that he has the right to be

represented by retained counsel, and that he may be entitled to court-appointed counsel if unable to afford an attorney.

ii. An alleged contemnor may waive her right to legal representation. [G.S. 7A-457(a).]

(a) An alleged contemnor's waiver of legal representation must be knowing, informed, voluntary, and written. If an alleged contemnor waives the right to legal representation, the court must a make written finding that at the time of waiver the alleged contemnor acted "with full awareness of his rights and of the consequences of the waiver." [G.S. 7A-457(a).]

(b) Even though G.S. 7A-457 speaks to waiver by an indigent, any waiver must be made in accordance with G.S. 7A-457, notwithstanding its limiting language. [*State v. Williams*, 65 N.C. App. 498, 309 S.E.2d 721 (1983).]

iii. If an alleged contemnor does not waive the right to legal representation, the court must determine, before it hears the criminal contempt proceeding, whether the alleged contemnor is entitled to court-appointed counsel.

b. An alleged contemnor is entitled to court-appointed counsel in a criminal contempt proceeding if (1) she is indigent **and** (2) there is a significant likelihood that she will actually be incarcerated as a result of the hearing. [G.S. 7A-451(a)(1) (an indigent person is entitled to court-appointed counsel in any case in which imprisonment, or a fine of $500, or more, is likely to be adjudged); *Hammock v. Bencini*, 98 N.C. App. 510, 391 S.E.2d 210 (1990) (noting that G.S. 7A-451(a)(1) requires appointment of counsel in any case in which imprisonment is likely to be adjudged and includes citations for criminal contempt for failure to comply with civil child support orders).]

i. Determinations of indigency and entitlement to counsel and appointment of counsel may be made by the district court judge or by the clerk of superior court. [*See* G.S. 7A-452(c).]

ii. An alleged contemnor is indigent if he has insufficient income and resources, based on guidelines approved by the state's Office of Indigent Defense Services, to retain an attorney to represent him in the contempt hearing. [*See* G.S. 7A-452; see G.S. 7A-450(a) for definition of "indigent person".]

iii. Counsel for indigent obligors in criminal contempt proceedings in child support cases are appointed pursuant to procedures approved by the state's Office of Indigent Defense Services. [*See* G.S. 7A-452.]

c. An indigent obligor may not be incarcerated for criminal contempt in a child support action unless she has waived or forfeited the right to court-appointed counsel or has been represented by court-appointed counsel. [*See Hammock v. Bencini*, 98 N.C. App. 510, 391 S.E.2d 210 (1990).]

6. Requirement that defendant acted willfully.

a. A person may not be held in criminal contempt for failing to pay court-ordered child support unless he has willfully failed to pay child support as required by the order. [*See Harris v. Harris*, 91 N.C. App. 699, 373 S.E.2d 312 (1988); G.S. 5A-11(a)(3) (requiring willful disobedience of a court's order or of its execution).]

i. In most cases, a finding of willful failure to pay court-ordered child support must be based on evidence that the obligor was financially able to pay at least part of her court-ordered child support obligation when it became due (or thereafter) and yet deliberately and purposefully failed to do so without justification or excuse. [*See Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966) (civil contempt judgment for failure to pay alimony set aside because no finding made that husband presently possessed means to comply); *Lamm v. Lamm*, 229 N.C. 248, 49 S.E.2d 403 (1948) (civil contempt set aside when no evidence presented that husband possessed means to comply with order for alimony and counsel fees); *Faught v. Faught*, 67 N.C. App. 37, 312 S.E.2d 504 (defendant in criminal contempt when he became unable to pay after he voluntarily took on additional financial obligations after entry of support order; failure to pay was willful), *review denied*, 311 N.C. 304, 317 S.E.2d 680 (1984).]

ii. An obligor who has willfully failed to pay court-ordered child support, who is cited for civil or criminal contempt, and who pays the child support arrearages in full before the date of the contempt hearing may be punished for criminal contempt even though he cannot be held in civil contempt. [*See Reynolds v. Reynolds*, 147 N.C. App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (trial court concluding that father's payment of arrearages after contempt motion was filed eliminated option of civil, but not criminal, contempt), *rev'd per curiam for reasons stated in dissenting opinion*, 356 N.C. 287, 569 S.E.2d 645 (2002).]

7. Standard of proof.

   a. The court in a criminal contempt proceeding must find, beyond a reasonable doubt, that the alleged contemnor willfully disobeyed a valid court order. [*See* G.S. 5A-15(f).]

8. Orders for criminal contempt.

   a. At the conclusion of a hearing for criminal contempt, the judge must enter a finding of guilty or not guilty. [G.S. 5A-15(f).]

   b. The implicit requirement in G.S. 5A-14(b), that in a summary proceeding the findings must indicate that the reasonable doubt standard was applied, has been required in an order for criminal contempt issued in a plenary hearing. [*State v. Ford*, 164 N.C. App. 566, 596 S.E.2d 846 (2004) (citing *State v. Verbal*, 41 N.C. App. 306, 254 S.E.2d 794 (1979)) (the import and consequences of the two hearings are substantially equivalent; holding an order of superior court, entered in a de novo plenary proceeding on appeal from a summary finding of contempt in district court, deficient for not indicating that the reasonable doubt standard had been applied).]

   c. When a district court judge holds an obligor in contempt for willfully failing to pay court-ordered child support, the judge should indicate clearly and unambiguously in the order whether the obligor is being held in civil contempt or criminal contempt. [*See Watkins v. Watkins*, 136 N.C. App. 844, 526 S.E.2d 485 (2000) (urging trial courts to identify whether contempt proceedings are in the nature of criminal or civil contempt).]

9. Punishment that may be imposed.

a. A person who commits criminal contempt by failing to comply with an order to pay child support is subject to censure, imprisonment for a **definite** and **fixed** term not to exceed 30 days, a fine not to exceed $500, or any combination of the three. [G.S. 5A-12(a)(3), *amended by* S.L. 2009-335, § 1, effective Dec. 1, 2009, and applicable to offenses committed on or after that date.]

   i. An order sentencing a defendant to six consecutive 30-day terms of imprisonment based on six findings of direct criminal contempt has been affirmed in a case of first impression. [*State v. Burrow*, 248 N.C. App. 663, 789 S.E.2d 923 (2016) (neither G.S. 5A-12 nor any other statute in G.S. Chapter 5A prohibit consecutive sentences for multiple findings of contempt; a criminal contempt adjudication is not a misdemeanor for which consecutive sentences may not be imposed).] Note that stacked sentences that exceed 180 days could trigger a defendant's Sixth Amendment right to a jury trial, as discussed in Jamie Markham, *Consecutive Sentences for Criminal Contempt*, UNC Sch. of Gov't: N.C. Crim. L. Blog (Aug. 11, 2016), http://nccriminallaw.sog.unc.edu/consecutive-sentences-criminal-contempt.

b. However, a sentence of imprisonment up to 120 days may be imposed for criminal contempt resulting from the failure to pay child support, provided the sentence is suspended upon conditions reasonably related to the contemnor's payment of child support. [G.S. 5A-12(a)(3), *amended by* S.L. 2009-335, § 1, effective Dec. 1, 2009, and applicable to offenses committed on or after that date.]

   i. When applying G.S. 5A-12(a)(3), a trial court "need not suspend the sentence if the sentence is thirty (30) days or less." [*Unger v. Unger*, 268 N.C. App. 142, 145 n.2, 834 S.E.2d 649, 651 n.2 (2019), *appeal dismissed*, 837 S.E.2d 721 (N.C.), *cert. denied*, 851 S.E.2d 610 (N.C. 2020).]

   ii. When, as in this case, a criminal contempt order imposed but suspended a 30-day sentence, any activation of the suspended sentence could not result in a suspension longer than the underlying sentence of 30 days. Moreover, the order of arrest issued for father's failure to comply with the child support payments required by the criminal contempt order violated due process when father was not given an opportunity to be heard before the suspended sentence was activated. [*Unger v. Unger*, 268 N.C. App. 142, 834 S.E.2d 649 (2019), *appeal dismissed*, 837 S.E.2d 721 (2020), *cert. denied*, 851 S.E.2d 610 (N.C. 2020).]

   iii. A judge who finds an obligor in criminal contempt also may remit or reduce the fine imposed on the obligor or terminate or reduce the obligor's sentence if warranted by the obligor's conduct and the ends of justice. [G.S. 5A-12(c).]

   iv. A fine imposed in a criminal contempt proceeding is payable to the state and may not be applied to satisfy child support arrearages owed by the contemnor. [*See In re Rhodes*, 65 N.C. 518 (1871) (per curiam) (stating that a fine for contempt is a punishment for a wrong to the state and goes to the state).]

   v. An obligor who is found in criminal contempt for willfully failing to pay court-ordered child support may not be sentenced to jail under an order that allows her to be released from jail upon **purging** the contempt (usually by paying all or part of the child support arrearages she owes) as in the case of

civil contempt. Purge conditions are imposed in civil, not criminal, contempt proceedings.

(a) An order for criminal contempt provided that if the contemnor's 30-day sentence for failure to pay child support was activated, he could shorten the sentence by purging himself of the contempt. The "purge" provision did not transform the order into one for civil contempt. Rather, the provision was construed to allow contemnor, upon activation of the suspended sentence for a future violation, to shorten the 30-day criminal sentence if contemnor cured the future violation. [*Unger v. Unger*, 268 N.C. App. 142, 834 S.E.2d 649 (2019), *appeal dismissed*, 837 S.E.2d 721 (N.C.), *cert. denied*, 851 S.E.2d 610 (N.C. 2020).]

vi. A court may, however, find an obligor in criminal contempt for willfully failing to pay court-ordered child support; sentence him to a definite period of incarceration; **suspend** the sentence for criminal contempt; and require the obligor to pay all or part of the child support arrearages or to continue to pay his court-ordered child support obligation as it becomes due as one of the conditions of his probation. [*See Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988); *Reynolds v. Reynolds*, 147 N.C. App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (defendant also required to post a cash bond or security to guarantee timely payment of future cash child support as well as other conditions), *rev'd per curiam for reasons stated in dissenting opinion*, 356 N.C. 287, 569 S.E.2d 645 (2002).]

vii. **Important note:** If a judge finds an obligor in criminal contempt, sentences the obligor, suspends the obligor's sentence, and the only conditions of probation require compliance with the underlying child support order, the order constitutes an order of civil, rather than criminal, contempt. [*See Reynolds v. Reynolds*, 147 N.C. App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (where court imposed a determinate 30-day term, suspended upon certain conditions—that obligor pay counsel fees and interest upon delinquent child support payments, that defendant post a cash bond as well as make each child support payment when due—order was for criminal contempt), *rev'd per curiam for reasons stated in dissenting opinion*, 356 N.C. 287, 569 S.E.2d 645 (2002); *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 108 S. Ct. 1423 (1988) (remand to determine whether father's payment of arrearages would purge his determinate jail sentence; if so, proceeding was civil in nature).]

10. Appeal of an order for criminal contempt.

a. A person who is found in criminal contempt by a judicial official inferior to a superior court judge may appeal to the superior court for hearing de novo. [G.S. 5A-17(a); 15A-1431(b); *Summerville v. Summerville*, 259 N.C. App. 228, 814 S.E.2d 887 (2018) (sole resource for person held in criminal contempt by district court judge is appeal to superior court); *Jones v. Jones*, 121 N.C. App. 529, 466 S.E.2d 344 (1996) (per curiam) (appeal from orders modifying child support and finding obligor in criminal contempt subject to dismissal for failure to file proposed record on appeal; court of appeals noted that even if record had been filed, it would only have had jurisdiction of the appeal of the modification order and not of the appeal of the criminal

contempt order, appeal of which was to superior court); *Michael v. Michael*, 77 N.C. App. 841, 336 S.E.2d 414 (1985) (G.S. 5A-17 vests exclusive jurisdiction in the superior court to hear appeals from district court criminal contempt order), *review denied*, 316 N.C. 195, 341 S.E.2d 577 (1986).]

b. There is no right to appeal a district court order that does not find a person in criminal contempt. [*Hardy v. Hardy*, 270 N.C. App. 687, 842 S.E.2d 148 (2020).]

c. Upon appeal in a case imposing confinement for criminal contempt, a bail hearing must be held within a reasonable time after imposition of the confinement, with the contemnor being retained in custody no more than twenty-four hours from the time of imposition of confinement without a bail determination being made by a superior court judge. If a superior court judge has not acted within twenty-four hours of the imposition of confinement, any judicial official shall hold a bail hearing. [G.S. 5A-17(b), (c), *added by* S.L. 2013-303, § 1, effective Dec. 1, 2013, and applicable to confinement imposed on or after that date.]

VIII. Other Judicial Remedies

A. Enforcement Orders [G.S. 50-13.9(d).]

1. Responsibility of the clerk.
   a. In non-IV-D cases the clerk maintains all official records and all case data concerning child support matters previously enforced by the clerk. [G.S. 50-13.9(b2)(2).]
   b. In IV-D cases the clerk maintains all official records in the case. [G.S. 50-13.9(b1)(2).]
   c. For the definition of a IV-D case and a non-IV-D case, see Section I.D.1.b, above.
2. Issuance of the enforcement order.
   a. Upon affidavit of an obligee, the clerk or a district court judge may order a delinquent child support obligor to appear and show cause why the obligor should not be held in contempt, subjected to income withholding, or both. [G.S. 50-13.9(d).] See Section VII.B.9, above.
   b. The clerk or a district court judge may sign the order. [G.S. 50-13.9(d).]
   c. The order must be served on the obligor pursuant to G.S. 1A-1, Rule 4. [G.S. 50-13.9(d).]
   d. Upon motion of the obligee, no order is to be issued if the district court judge finds that not issuing an enforcement order would be in the child's best interest. [G.S. 50-13.9(d).]
   e. If income withholding is not an available or appropriate remedy, the court may determine whether the obligor is in contempt or whether any other enforcement remedy is appropriate. [G.S. 50-13.9(d)(6).] See Section III.A.2, above, for more about income withholding in the contempt context.

B. Enforcing Unincorporated Separation Agreements

1. A parent's obligation to pay child support pursuant to an **unincorporated** separation agreement or property settlement is enforced in the same manner as any other contract. [*See Lasecki v. Lasecki*, 257 N.C. App. 24, 809 S.E.2d 296 (2017); *Herring v. Herring*, 231 N.C. App. 26, 752 S.E.2d 190 (2013) (citing *Gilmore*; *v. Garner*, 157 N.C. App. 664, 580 S.E.2d 15 (2003)) (unincorporated separation agreement is subject to the same rules pertaining to enforcement as any other contract); *Morrow v. Morrow*, 103 N.C. App. 787, 407 S.E.2d 286 (1991) (unincorporated separation agreement enforceable only as ordinary contract); *Rosen v. Rosen*, 105 N.C. App. 326, 413 S.E.2d 6 (1992) (applying contract principle of mutuality of agreement; defendant's obligation to provide for children's educational training beyond high school not enforceable; no meeting of the minds as to amount of his contribution).]
2. Unincorporated agreements are enforced through an action for breach of contract.
    a. A party may sue for breach of contract and seek money damages, or the party may elect to rescind the contract based on a substantial breach, and, if the statutory requirements are met, the party may seek other remedies, such as alimony [*Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).] or equitable distribution. [*See Lee v. Lee*, 93 N.C. App. 584, 378 S.E.2d 554 (1989).]
    b. A party may sue for breach of contract and seek specific performance when the legal remedy for breach of contract is inadequate. See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1, Section IV.I.2.g.
    c. A trial court can award both a money judgment for amounts past due under the contract and specific performance of future payments. [*Lasecki v. Lasecki*, 257 N.C. App. 24, 809 S.E.2d 296 (2017) (trial court did not err in entering money judgment for arrearages along with the order of specific performance, even though plaintiff's complaint requested only specific performance).]
3. Breach of the separation agreement.
    a. The elements of breach of contract are:
        i. The existence of a valid contract and
        ii. Breach of the terms of the contract. [*Long v. Long*, 160 N.C. App. 664, 588 S.E.2d 1 (2003) (citing *Poor v. Hill*, 138 N.C. App. 19, 530 S.E.2d 838 (2000)).]
    b. The statute of limitations for breach of an unincorporated agreement:
        i. Is generally three years; [G.S. 1-52(1).]
        ii. Under seal is ten years; [G.S. 1-47(2); *Crogan v. Crogan*, 236 N.C. App. 272, 763 S.E.2d 163 (2014).]
        iii. Begins to run when the claim accrues, and in a breach of contract action, the claim generally accrues upon breach. [*Scott & Jones, Inc. v. Carlton Ins. Agency, Inc.*, 196 N.C. App. 290, 677 S.E.2d 848 (2009); *Greene v. Colby*, 193 N.C. App. 454, 667 S.E.2d 340 (2008) (**unpublished**) (not paginated on Westlaw) (citing *Pearce v. Highway Patrol Volunteer Pledge Comm.*, 310 N.C. 445, 312 S.E.2d 421 (1984)) (ten-year statute of limitations for a separation agreement under seal had run when defendant, some eleven years prior to filing of complaint, committed an act indicating breach when she presented a deed for plaintiff's signature that contained "clear language" violating the terms of the parties' separation agreement).]

c. For a breach of contract to be actionable, "it must be a material breach, one that substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform." [*Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003) (citing *Fletcher v. Fletcher*, 123 N.C. App. 744, 474 S.E.2d 802 (1996)); *Lancaster v. Lancaster*, 138 N.C. App. 459, 466, 530 S.E.2d 82, 87 (2000) (noting that "[s]mall lapses or inconsequential breaches are not substantial breaches requiring rescission").] *See* Cheryl Howell, *Separation and Property Settlement Agreements: When Does Breach by One Party Excuse Performance by the Other?,* UNC Sch. of Gov't: On the Civil Side Blog (Apr. 11, 2018), https://civil.sog.unc.edu/separation-and-property-settlement-agreements-when-does-breach-by-one-party-excuse-performance-by-the-other.

i. Husband's deviation in the method of paying child support was not a substantial breach. [*Long v. Long*, 160 N.C. App. 664, 588 S.E.2d 1 (2003) (husband's payment of child support by check sometime after the first of the month was not a substantial breach of agreement that called for payment by direct deposit on the first of the month).]

4. Child support provisions included in an unincorporated separation agreement may not be enforced through civil or criminal contempt because there is no court **order** requiring the obligor to pay child support. [*See Jones v. Jones*, 144 N.C. App. 595, 601, 548 S.E.2d 565, 569 (2001) (alimony case stating that "[w]here a separation agreement is neither submitted, by one or both parties thereto, to the trial court for its approval, nor specifically incorporated into a court order or judgment, the separation agreement is preserved as a contract and remains enforceable and modifiable only under traditional contract principles").]

5. A court may, however, hold an obligor in civil or criminal contempt if the court has ordered the obligor to specifically perform the contractual child support requirements contained in an unincorporated separation agreement and the obligor willfully disobeys or fails to comply with the court's order requiring specific performance. [*Gen. Motors Acceptance Corp. v. Wright*, 154 N.C. App. 672, 573 S.E.2d 226 (2002) (wife in contempt of consent judgment that required her to specifically perform an obligation created under an unincorporated separation agreement); *Moore v. Moore*, 297 N.C. 14, 252 S.E.2d 735 (1979); *McDowell v. McDowell*, 55 N.C. App. 261, 284 S.E.2d 695 (1981) (noting that order for specific performance of an unincorporated separation agreement is enforceable through contempt proceedings).]

6. Reconciliation terminates executory child support obligations under an unincorporated separation agreement between a husband and wife. [*See Campbell v. Campbell*, 234 N.C. 188, 66 S.E.2d 672 (1951) (separation agreement annulled, avoided, and rescinded, at least as to future child support, when spouses resumed conjugal cohabitation); *Stegall v. Stegall*, 100 N.C. App. 398, 397 S.E.2d 306 (1990), *review denied*, 328 N.C. 274, 400 S.E.2d 461 (1991).] See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1, for more on the effect of reconciliation on the support provisions in a separation agreement.

7. Enforcement of provisions in an unincorporated separation agreement does not transform the unincorporated agreement into a court order. [*See Condellone v. Condellone*, 129 N.C. App. 675, 501 S.E.2d 690 (despite the fact that two money judgments had been entered against husband for unpaid alimony, one of which ordered specific performance

of the alimony provisions in the parties' separation agreement, the trial court had no authority under G.S. Chapter 50 to modify the alimony provisions based on changed circumstances because the agreement had not been incorporated), *review denied*, 349 N.C. 354, 517 S.E.2d 889 (1998); *Danai v. Danai*, 166 N.C. App. 279, 603 S.E.2d 168 (2004) (**unpublished**) (not paginated on Westlaw) (stating that "[w]ere we to find that a court's enforcement of a separation agreement by applying contract remedies acted as a *de facto* incorporation of an otherwise unincorporated agreement, we, in effect, would force a level of jurisdiction over separation agreements not desired or intended by the parties to the agreement and which would infringe on their freedom to contract"); *cf. Young v. Young*, 224 N.C. App. 388, 736 S.E.2d 538 (2012) (contempt order requiring husband to specifically perform an unincorporated provision of a separation agreement resulted in that provision being incorporated going forward).]

8. "To the extent an [unincorporated] agreement makes provision for the maintenance and support of a child *past his majority*, it is beyond the inherent power of the court to modify absent the consent of the parties," and agreement is "enforceable at law as any other contract." [*Shaffner v. Shaffner*, 36 N.C. App. 586, 588, 244 S.E.2d 444, 446 (1978) (emphasis added) (citing *Church v. Hancock*, 261 N.C. 764, 136 S.E.2d 81 (1964)) (father bound by contractual obligation in separation agreement to support son until age 21).] Enforcement of a provision in an unincorporated separation agreement after the child reaches majority is by a civil action and not a motion in the cause. [*Morrow v. Morrow*, 103 N.C. App. 787, 407 S.E.2d 286 (1991) (mother's motion in the cause, filed after son reached majority, for specific performance of a provision in an unincorporated agreement requiring father to support parties' son while he pursued postsecondary education did not provide jurisdiction; G.S. 1A-1, Rules 2 and 3 require a civil action and do not allow a motion in the cause under these circumstances).]

9. For more on the enforcement of an unincorporated separation agreement, see *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

C. Arrest and Bail [G.S. 1-410(5) (arrest); 1-420 *et seq.* (bail).]

1. Arrest and bail is available in child support actions to the same extent as in other cases. [G.S. 50-13.4(f)(3). *See also Earnhardt v. Earnhardt*, 9 N.C. App. 213, 175 S.E.2d 744 (1970) (order finding defendant in civil contempt for nonpayment of alimony and ordering his arrest remanded for findings on defendant's ability to comply).]

2. Arrest and bail under G.S. Chapter 1, Article 34 is a prejudgment remedy.

3. A defendant in a child support action may not be arrested and held for bail under G.S. Chapter 1, Article 34 unless the court finds, based on an affidavit filed by the plaintiff, that the defendant has removed or disposed of her property, or is about to do so, with the intent of defrauding a minor child for whom support is owed and the plaintiff posts an adequate, written undertaking, with sufficient surety, to pay damages incurred by the defendant if the order for arrest is vacated. [*See* G.S. 1-410(5), 1-411, 1-412, 1-417.]

4. An indigent defendant who is arrested under G.S. Chapter 1, Article 34 is entitled to court-appointed counsel. [*See* G.S. 1-413; 7A-451(a)(7).]

5. A defendant who is arrested under G.S. Chapter 1, Article 34 may be released by posting bail as provided under G.S. 1-420 or by making a deposit in lieu of bail under G.S. 1-426.

D. Attachment and Garnishment [G.S. 1-440.1 *et seq.* and 110-128 *et seq.*]

1. Nature of attachment.
   a. Attachment and garnishment are available as remedies in child support actions to the same extent as in other cases. [G.S. 50-13.4(f)(4); 1-440.2.]
      i. An attachment proceeding is ancillary to the pending child support action, not an independent civil action. [G.S. 1-440.1(a) (attachment ancillary to the pending principal action).]
      ii. A garnishment proceeding is ancillary to the pending attachment proceeding in a child support action, not an independent civil action. [G.S. 1-440.21(a) (garnishment ancillary to attachment).]
   b. Attachment and garnishment under G.S. Chapter 1, Article 35 are prejudgment remedies; they cannot be used after a child support order has been entered to collect past due child support owed under the order. [*See* G.S. 1-440.1, 1-440.6(b), 1-440.22(a)(2); *cf. Holt v. Holt*, 41 N.C. App. 344, 255 S.E.2d 407 (1979) (where wife obtained an order of attachment against husband's North Carolina real property after entry of divorce decree in Missouri).]
      i. Attachment and garnishment are in the nature of a preliminary execution against a defendant's property.
      ii. A levy on the defendant's property under an order for attachment or garnishment creates a lien on the property, which may be executed to satisfy a subsequent judgment entered against the defendant for child support.
2. Procedure to secure an order of attachment.
   a. An obligee requesting attachment and garnishment in a child support action must:
      i. File a verified complaint or an affidavit setting forth the factual basis for attachment and garnishment and
      ii. Post a secured bond. [*See* G.S. 1-440.8, 1-440.10, and 1-440.11.]
   b. An order of attachment and garnishment in a child support action may be issued ex parte and without hearing by a district court judge or clerk or assistant clerk of superior court. [*See* G.S. 1-440.5(a).]
3. Grounds for attachment. [G.S. 1-440.3.] An order of attachment may be issued if the defendant in a child support action is:
   a. Not a resident of North Carolina; [G.S. 1-440.3(1).]
   b. A North Carolina resident who, with intent to defraud his creditors or to avoid service of summons:
      i. Has left the state or is about to leave the state or
      ii. Is hiding, or is about to hide, in the state; [G.S. 1-440.3(4).]
   c. A person, who with intent to defraud creditors:
      i. Has removed, or is about to remove, her property from the state or
      ii. Has disposed of or hidden, or is about to dispose of or hide, his property. [G.S. 1-440.3(5).]

4. Property subject to attachment and garnishment includes:
    a. Real property (other than property owned as tenancy by the entirety); [G.S. 1-440.17.]
    b. Tangible personal property in the defendant's possession; [G.S. 1-440.18.]
    c. Stock certificates in the defendant's possession; [G.S. 1-440.19.]
    d. Goods delivered to a warehouse for storage; [G.S. 1-440.20.]
    e. Tangible personal property owned by the defendant but in the possession of others; [G.S. 1-440.21.]
    f. Intangible personal property owned by the defendant; [G.S. 1-440.21.] and
    g. Debts owed to the defendant. [G.S. 1-440.21.]
5. Certain earnings of the judgment debtor are not subject to attachment and garnishment.
    a. Garnishment proceedings cannot reach a defendant's earnings for the sixty-day period preceding service of a garnishment summons when it appears that those earnings are necessary for the use of a family supported wholly or partly by the defendant's labor. [G.S. 1-362.] The family for whose support the earnings are necessary can be defendant's second family. [*See Elmwood v. Elmwood*, 295 N.C. 168, 244 S.E.2d 668 (1978).]
    b. Garnishment proceedings cannot reach a defendant's future earnings. [*Harris v. Hinson*, 87 N.C. App. 148, 360 S.E.2d 118 (1987) (not permitting a supplemental proceeding as to future earnings); *Motor Fin. Co. v. Putnam*, 229 N.C. 555, 50 S.E.2d 670 (1948) (prospective earnings of a judgment debtor are neither property of the judgment debtor nor a debt due the judgment debtor from a third person; earnings not reachable in a supplemental proceeding).]
6. The sheriff may levy on the defendant's real property before levying against the defendant's personal property. [G.S. 1-440.15(b).]
    a. Levy on defendant's real property.
        i. After an order of attachment is issued, the plaintiff may request that the clerk file notice of lis pendens in any county in which the defendant owns real property. [*See* G.S. 1-440.33(a).]
        ii. The sheriff's levy on the defendant's real property constitutes a lien when it is docketed by the clerk. If notice of lis pendens was docketed, the lien attaches and relates back to the date the notice of lis pendens was docketed. [*See* G.S. 1-440.17 and 1-440.33(b).]
    b. Levy on defendant's personal property.
        i. The sheriff's levy on the defendant's tangible personal property is made by seizing the property and taking it into the sheriff's possession. [G.S. 1-440.18.]
        ii. The levy and seizure of the defendant's personal property constitutes a lien on the property. [*See* G.S. 1-440.33(c).]
7. Garnishment proceedings are used to levy upon tangible personal property owned by the defendant but in a third party's (garnishee's) hands or intangible personal property or indebtedness that a third party owes to the defendant. [*See* G.S. 1-440.21(a).]

a. Garnishment under an attachment is an entirely separate procedure from garnishment for child support set out in G.S. 110-136. [See Section III.D, above.]

b. Service on and answer by garnishee.

i. The levy on the defendant's property in garnishment proceedings is made by serving the order of attachment, a garnishment summons, and a notice of levy on the garnishee. [*See* G.S. 1-440.22 through 1-440.25.]

ii. If the garnishee admits that she has personal property belonging to the defendant, the clerk must enter judgment requiring the garnishee to deliver the property to the sheriff. [G.S. 1-440.28(b).]

iii. If the garnishee admits that he was indebted to the defendant at the time of service or thereafter, the clerk must enter judgment in favor of the plaintiff and against the garnishee in the amount of the debt or the amount of the plaintiff's claim, whichever is less. [G.S. 1-440.28(a).]

iv. If the garnishee's answer indicates that the garnishee does not have personal property belonging to the defendant and is not indebted to the defendant, the plaintiff may file a reply and either party may request that the garnishee's liability be determined by a jury. [*See* G.S. 1-440.29 *and* 1-440.30.]

v. If the garnishee fails to file a verified answer as required, the clerk must enter a conditional judgment against the garnishee for the amount claimed by the plaintiff, plus costs, and enter a final judgment against the garnishee if the garnishee fails to appear and show cause why final judgment should not be entered. [G.S. 1-440.27.]

vi. A garnishee who is properly served in a garnishment proceeding and thereafter delivers the defendant's personal property to the defendant or pays a debt owed to the defendant remains liable to the plaintiff. [*See* G.S. 1-440.31.]

c. A judgment against a garnishee may be executed, without notice or hearing, prior to entry of judgment against the defendant in the pending child support action, but all property seized pursuant to the execution must be held subject to court order pending judgment in the child support action. [*See* G.S. 1-440.32.]

8. A defendant whose property has been attached may file a motion with the clerk or judge to discharge the attachment through execution of a bond. [*See* G.S. 1-440.39 through 1-440.42.]

a. A defendant whose property has been attached may file a motion with the clerk or judge to dissolve or modify the order of attachment prior to entry of judgment in the pending child support action. [*See* G.S. 1-440.36 through 1-440.38.]

b. A person other than the defendant who claims an interest in attached property may request that the court dissolve or modify the attachment order or grant other relief. [*See* G.S. 1-440.43.]

9. When plaintiff prevails in the pending child support action. If judgment is entered in favor of the plaintiff in the prevailing child support action, the judgment may be satisfied from the defendant's property seized through attachment and garnishment. [*See* G.S. 1-440.46.]

10. When defendant prevails in the pending child support action.

a. If the defendant prevails in the pending child support action, if the order of attachment is dissolved, or if proper service "is not had on the defendant:"

i. The defendant is entitled to delivery of any property seized through attachment and garnishment [G.S. 1-440.45(a)(1).] and

ii. Any judgment against a garnishee must be vacated. [G.S. 1-440.45(a)(2).]

b. If the defendant prevails in the pending child support action, the defendant is entitled to recover, by motion in the cause or an independent action, damages against the plaintiff's bond. [G.S. 1-440.45(c).]

11. For more on attachment, see *Enforcement of Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 4 and Ann M. Anderson & Joan G. Brannon, "Attachments," *Civil*, ch. 5, *in* North Carolina Clerk of Superior Court Manual Series (Meredith Smith & Jan Simmons eds., 2022)

E. Compliance Bonds

1. Distinction between appearance bonds and compliance bonds in child support matters.

a. An **appearance** bond is a bond that is posted by or on behalf of a child support obligor to secure the obligor's appearance at a contempt hearing.

i. The posting of bond is a condition of the obligor's release from jail based on an order for arrest issued in connection with a contempt proceeding in a child support case.

ii. The sole purpose of the bond is to secure the obligor's appearance at the contempt hearing, not to secure the obligor's payment of court-ordered child support. [*See Mussallam v. Mussallam*, 321 N.C. 504, 364 S.E.2d 364 (1988) (bond in question determined to be an appearance bond given to guarantee father's appearance).]

b. On forfeiture of an appearance bond, the clerk must send the "clear proceeds" to the county finance officer for use in maintaining the public schools. [*See* N.C. Const. art. IX, § 7; G.S. 115C-452 (codification of constitutional provision).]

A **compliance** bond is a bond that is posted by a child support obligor to secure her **future** payment of court-ordered child support.

i. In other words, a compliance bond is a written undertaking that the obligor will pay child support as ordered by the court.

ii. On forfeiture of a compliance bond, proceeds go to the injured party. [*See Mussallam v. Mussallam*, 321 N.C. 504, 511, 364 S.E.2d 364, 368 (1988) (Frye, J., and Exum, C.J., dissenting).]

2. When an obligor may be required to post a compliance bond.

a. A court may, at the time it enters a child support order or after notice and hearing in a proceeding to enforce a child support order, require the obligor to post a compliance bond. [*See* G.S. 50-13.4(f)(1).]

b. If the obligor has not previously defaulted in paying court-ordered child support, the court should not require the obligor to execute a compliance bond unless the court finds there is good reason to believe that such security is required. [*See Gilbert v. Gilbert*, 71 N.C. App. 160, 321 S.E.2d 455 (1984) (error for trial judge to convey interest

in the marital home and other real estate as security for alimony award when there was no reason to suspect that payments would not be made in full).]

3. A compliance bond should be payable, in an amount not to exceed a sum certain, to or on behalf of the obligee on the condition of the obligor's subsequent default in paying court-ordered child support.
4. A compliance bond should specify clearly what constitutes default and the procedures through which the obligee may recover against the bond or sureties in the event of the obligor's default.

F. Transfer of Property

1. A court may order the obligor to transfer title to real property solely owned by the obligor (located anywhere within North Carolina or in another state) in payment of past due court-ordered child support as long as the net value of the property being transferred does not exceed the amount of the arrearage. [G.S. 50-13.4(e).]
2. A court may order an obligor to pay child support by transferring title or possession of personal property. [G.S. 50-13.4(e).]
3. If the court orders an obligor to transfer title to real or personal property under G.S. 50-13.4(e) and the obligor fails to execute the necessary documents, the court may enter an order transferring title to the property pursuant to G.S. 1A-1, Rule 70 and G.S. 1-228 or directing that the necessary documents be executed by another person on behalf of the obligor pursuant to G.S. 1A-1, Rule 70. [G.S. 50-13.4(f)(2).] G.S. 1A-1, Rule 70 allows a court in an order to "direct" another to execute on behalf of the party who failed to act, but the order must be written, signed, and filed to be effective. [*Dabbondanza v. Hansley*, 249 N.C. App. 18, 791 S.E.2d 116 (2016).]

G. Appointment of Receiver

1. A receiver may be appointed in an action for child support to the same extent as in other cases. [G.S. 50-13.4(f)(6).]
2. A district court judge may appoint a receiver to take possession of an obligor's property or income when necessary to enforce the obligor's court-ordered child support obligation. [*See* G.S. 1-502; *Lambeth v. Lambeth*, 249 N.C. 315, 106 S.E.2d 491 (1959) (court was authorized to order the sale of husband's non-income-producing real estate, and the investment of the proceeds thereof, so that sufficient income would be generated for the receiver to pay certain expenses and alimony awarded to plaintiff wife); *Murphy v. Murphy*, 261 N.C. 95, 134 S.E.2d 148 (1964) (receiver not warranted in child support case where property consisted of two small cash deposits that could be attached); *Harris v. Harris*, 257 N.C. 416, 126 S.E.2d 83 (1962) (in alimony case, appointment of receiver overturned where not requested and not necessary).]
3. After a child support order has been entered, the court may appoint a receiver in a child support case:
    a. To carry the judgment into effect,
    b. To dispose of property as required by the order,
    c. To preserve property pending appeal, or

d. When an execution has been returned unsatisfied and the obligor refuses to apply his property to satisfy the judgment. [G.S. 1-502(2) and (3).]

4. Bond requirements.
   a. The court may not appoint a receiver unless the **obligee** posts a bond. [G.S. 1-502.1 (person making application for a receiver furnishes bond).]
   b. The judge may refuse to appoint a receiver if the **obligor** posts a secured compliance bond. [G.S. 1-503 (party against whom relief is sought posts bond).]
   c. If the court appoints a receiver, the **receiver** must post a secured bond with the clerk of superior court. [G.S. 1-504.]
5. Sale of property held by the receiver.
   a. When a receiver has been appointed in a child support case, the chief district court judge, or any district court judge designated by the chief district court judge to hear motions and enter interlocutory orders, may order the sale of real or personal property held by the receiver. [G.S. 1-505.]
   b. The judicial sales procedure set forth in G.S. Chapter 1, Article 29A governs the sale of property held by the receiver. [G.S. 1-505.]

H. Setting Aside a Voidable Transaction

1. A district court may enforce a child support order pursuant to the Uniform Voidable Transactions Act (G.S. Chapter 39, Article 3A). [*See* G.S. 50-13.4(f)(7), *amended by* S.L. 2015-23, § 1, effective Oct. 1, 2015, and applicable to a transfer made or obligation incurred after that date.]
2. The minor child or other person for whose benefit a child support order was entered shall be a creditor within the meaning of the Uniform Voidable Transactions Act (G.S. 39-23.1 *et. seq*.). [G.S. 50-13.4(f)(7).]
3. When a transfer is voidable.
   a. If an obligor transfers property, or incurs an obligation, after the obligee's child support claim arises, the transfer or obligation is voidable if the obligee proves by a preponderance of the evidence that the obligor did not receive a reasonably equivalent value in exchange for the transfer or obligation and the obligor was insolvent at the time of the transfer or obligation or became insolvent as a result of the transfer or obligation. [G.S. 39-23.5(a), (c), *amended and added*, *respectively*, *by* S.L. 2015-23, § 1, effective Oct. 1, 2015, and applicable to a transfer made or obligation incurred after that date.]
   b. The transfer of property or obligation incurred by an obligor is also voidable, whether the obligee's claim arose before or after the transfer was made or the obligation was incurred, if the obligee proves by a preponderance of the evidence that the obligor made the transfer or incurred the obligation:
      i. With the intent to hinder, delay, or defraud the obligee with respect to a valid child support claim against the obligor or
      ii. Without receiving a reasonably equivalent value in exchange for the transfer (or obligation) and the obligor:

(a) Was engaged, or was about to engage, in a transaction for which the obligor's remaining assets were unreasonably small or

(b) Intended to incur, or believed that he or she would incur, debts beyond the obligor's ability to pay as they become due. [G.S. 39-23.4(a), *amended by* S.L. 2015-23, § 1, effective Oct. 1, 2015, and applicable to a transfer made or obligation incurred after that date.]

4. An obligee generally must bring a claim for relief based on an obligor's voidable transfer of property or incurring of an obligation not later than four years after the transfer was made or the obligation was incurred. [*See* G.S. 39-23.9(1), (2), *amended by* S.L. 2015-23, § 1, effective Oct. 1, 2015, and applicable to a transfer made or obligation incurred after that date.]

5. If an obligor has made a voidable transfer of property or incurred a voidable obligation, the court, subject to the limitations in G.S. 39-23.8, may avoid the transfer or obligation to the extent necessary to satisfy the obligee's claim for child support. [G.S. 39-23.7(a)(1).]

   a. If a transfer is voidable under G.S. 39-23.7(a)(1), the court may enter judgment (for the value of the property at the time of the transfer or the amount of the claim, whichever is less) against the first transferee, or an immediate or mediate transferee of the first transferee, as set out in G.S. 39-23.8(b)(1). [G.S. 39-23.8(b)(1), (c), *amended by* S.L. 2015-23, § 1, effective Oct. 1, 2015, and applicable to a transfer made or obligation incurred after that date.]

   b. If the obligee has obtained a judgment for child support arrearages, the court may allow the obligee to levy execution against the transferred property or its proceeds. [G.S. 39-23.7(b).]

   c. A court also may issue an injunction, appoint a receiver, order attachment or other provisional remedy against the property transferred or other property of the obligor if available under applicable law, or grant other appropriate relief. [G.S. 39-23.7(a)(2), (3), *amended by* S.L. 2015-23, § 1, effective Oct. 1, 2015, and applicable to a transfer made or obligation incurred after that date.]

I. Injunction [G.S. 1-494 and 1A-1, Rule 65.]

1. A district court judge may issue an injunction in a child support enforcement case. [G.S. 50-13.4(f)(5).]

2. A temporary restraining order or preliminary injunction must be issued in accordance with the requirements set forth in G.S. 1A-1, Rule 65 and G.S. Chapter 1, Article 37.

3. A judge may issue a preliminary injunction in a child support case when, during the pendency of the action, it appears by affidavit that the obligor threatens to, or is about to, remove or dispose of her property with the intent to defraud the obligee. [G.S. 1-485(3); *Hinnant v. Hinnant*, 258 N.C. 509, 128 S.E.2d 900 (1963) (injunction affirmed based on defendant's threats to remove his property from the state); *Spencer v. Spencer*, 70 N.C. App. 159, 319 S.E.2d 636 (1984) (trial court injunction against disposition of certain marital assets).]

J. Work Requirements

1. In a IV-D case in which the obligor owes past due child support and income withholding has been ordered but cannot be implemented against the obligor, the court may order an obligor (other than an obligor who is physically or mentally incapacitated) to participate in any or all of the following work and work-related activities:
   a. Unsubsidized employment,
   b. Subsidized public or private sector employment,
   c. Community service programs,
   d. A work experience program (if sufficient private sector employment is unavailable),
   e. On-the-job training,
   f. Job readiness activities,
   g. Job search activities,
   h. Vocational education or job skills training,
   i. Providing child care to persons engaged in community service programs, or
   j. Specified educational activities or programs (if the obligor has not received a high school diploma or GED). [G.S. 110-136.3(a1); 42 U.S.C. § 607(d).]
2. After a court enters a child support order or approves a voluntary support agreement in a IV-D case, the court may order the obligor (other than an obligor who is physically or mentally incapacitated) to participate in any or all of the work and work-related activities listed above, if appropriate. [G.S. 50-13.4(b); 110-132(b).]

K. Criminal Nonsupport

1. An obligor who willfully fails to pay child support as required by a court order may be prosecuted for criminal nonsupport under G.S. 14-322(d), 14-322.1, or 49-2. [See *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section IV, for more on specific offenses.]
2. A first offense under G.S. 14-322(d) is a Class 2 misdemeanor. [G.S. 14-322(f).] The maximum punishment under structured sentencing for a Class 2 misdemeanor is 60 days' incarceration and a fine of up to $1,000. [G.S. 15A-1340.23(b), (c).]
3. If an obligor is convicted of criminal nonsupport, the court may suspend the obligor's incarceration and place the obligor on probation. The court must require the obligor, as a condition of probation, to satisfy child support and other family obligations as required by the court. [G.S. 15A-1343(b)(4).]
   a. G.S. 15A-1343(b)(4), while providing for the possibility of early release, does not "transform probationary or suspended sentences into civil relief." [*Unger v. Unger*, 268 N.C. App. 142, 146, 834 S.E.2d 649, 651 (2019) (quoting *Bishop v. Bishop*, 90 N.C. App. 499, 506, 369 S.E.2d 106, 110 (1988)), *appeal dismissed*, 837 S.E.2d 721 (N.C.), *cert. denied*, 851 S.E.2d 610 (N.C. 2020).]
   b. In order to avoid the entry of multiple, inconsistent child support orders and to comply with the "one order" rules established by the Uniform Interstate Family Support Act and the federal Full Faith and Credit for Child Support Orders Act, the court

should not enter a new child support order in the criminal proceeding pursuant to G.S. 14-322(e) or 49-7 if the obligor is required to pay child support under an existing valid child support order.

c. If the obligor is required to pay child support under a prior valid order entered in a civil action, the court may not modify the child support order in the criminal proceeding.

4. If the court orders the obligor to pay child support as a condition of probation and the obligor willfully fails to do so, the court may revoke the obligor's probation or hold the obligor in contempt. [*See* G.S. 15A-1344, 15A-1344.1, *and* 15A-1345.]

5. An obligor who has been convicted or acquitted of criminal nonsupport may be charged and convicted based on his subsequent (or continued) failure to pay court-ordered child support. [*See Stephens v. Worley*, 51 N.C. App. 553, 277 S.E.2d 81 (1981) (previous acquittal on a charge of willful nonsupport not a bar to subsequent prosecution; G.S. 49-2 creates a continuing offense); *State v. Johnson*, 212 N.C. 566, 194 S.E. 319 (1937) (defendant's conviction for willfully failing to support his child did not bar prosecution for same offense committed after defendant served sentence imposed; offense was a continuing one).]

6. For more on criminal nonsupport under G.S. 49-2, see *Paternity*, Bench Book, Vol. 1, Chapter 10, Section V.

L. Federal Child Support Recovery Act (CSRA)

1. The federal Child Support Recovery Act (18 U.S.C. § 228) makes the willful failure to pay child support a federal crime if the obligor:

   a. Owes at least $5,000 in past due support (or has owed delinquent support for at least one year) for a child who lives in a state other than the state in which the obligor resides,

   b. Travels in interstate or foreign commerce with the intent to evade a support obligation in the amount of at least $5,000 (or an obligation owed for at least one year), or

   c. Owes at least $10,000 in past due support (or has owed delinquent support for at least two years) for a child who lives in a state other than the state in which the obligor resides. [18 U.S.C. § 228(a).]

2. State courts do not have jurisdiction over criminal prosecutions under the CSRA.

3. Referrals for prosecution under the CSRA may be made to United States Attorneys by individual obligees or their attorneys or by agencies involved in child support enforcement.

4. The United States Court of Appeals for the Fourth Circuit and other federal courts have upheld the constitutionality of the CSRA. [*See United States v. Johnson*, 114 F.3d 476 (4th Cir.) (CSRA is valid exercise of Commerce Clause powers and does not violate Tenth Amendment), *cert. denied*, 522 U.S. 904, 118 S. Ct. 258 (1997).]

IX. Non-judicial Remedies

A. Administrative Subpoena

1. In IV-D cases, a IV-D agency may issue an administrative subpoena requiring the production of documents, records, or other information relevant to a child support enforcement proceeding. [G.S. 110-129.1(a)(1).] A "IV-D case" is a case in which services have been applied for or are being provided by a child support enforcement agency established pursuant to Title IV-D of the federal Social Security Act, as amended, and Article 9 of G.S. Chapter 110. [G.S. 110-129(7).]
    a. If a person refuses to comply with an administrative subpoena issued under G.S. 110-129.1(a)(1), the IV-D agency may request that a district court judge order the person to comply with the subpoena. [G.S. 110-129.1(a)(1).]
    b. The court may hold an individual in contempt or revoke the individual's licensing privileges under G.S. 50-13.12 or 110-142.2 if she willfully fails to comply with a court order requiring compliance with an administrative subpoena. [G.S. 50-13.12(b); 110-142.2(b).]

B. Enforcing Orders for Medical Support

1. When a court order requires a parent to provide health benefit plan coverage for a child, state law requires the parent's employer or health insurer to allow the parent to enroll the child for family coverage and to enroll the child for family coverage upon the request of the child's other parent (or a IV-D agency representing the other parent) if the parent fails to do so. [*See* G.S. 58-51-120(b); 108A-69(b); 42 U.S.C. § 1396g-1.]
    a. State law also requires a parent's employer to withhold from the parent's compensation the parent's share of the cost of health insurance for a child when the court has ordered the parent to provide health insurance for the child. [G.S. 108A-69(b)(4).]
    b. When a noncustodial parent has been ordered to provide health benefit plan coverage, state law requires the parent's health insurer to allow the custodial parent to submit claims and receive payments for covered medical care provided to the child. [G.S. 58-51-120(c)(2) and (3).]
    c. If the health insurer is a group health plan covered by the federal Employee Retirement Income Security Act (ERISA), the order requiring health insurance must be a "qualified medical child support order" (QMCSO) that creates or recognizes a child's right as an alternate recipient to receive benefits under the plan and indicates the names and mailing addresses of the parent and child, the period to which the order applies, the plan to which the order applies, and the type of coverage that must be provided. [*See* 29 U.S.C. § 1169.]
2. A IV-D agency may send a medical support notice to a parent's employer or health insurer to enforce the parent's obligation to provide health benefit plan coverage to a child. [*See* G.S. 110-136.11 through 110-136.14.]
3. An employer or health insurer who fails to comply with the requirements of G.S. 110-136.13 and 110-136.14 may be held liable for damages in a civil action. [G.S. 110-136.13(j); 110-136.14(e).]

C. Federal Income Tax Refund Offset

1. In a IV-D case, a IV-D agency may request that the Internal Revenue Service (IRS), via the federal Office of Child Support Enforcement, withhold from the federal income tax refund due an obligor the amount of child support arrearages owed by the obligor if the obligor owes at least $500 in past due child support (or at least $150 in past due child support if the child support arrearage has been assigned to the state or county as a condition of public assistance paid on behalf of the child). [*See* 42 U.S.C. § 664; 45 C.F.R. §§ 303.72(a)(2) and (3).]
    a. For more on the topic of tax intercept policy, see N.C. Dep't of Health & Human Servs., *DHHS On-Line Manuals*, *Child Support Services Enforcement*, "Tax Intercept /Administrative Offset: General Information," https://policies.ncdhhs.gov/divisional/social-services/child-support/policy-manual/csecp.pdf.
    b. An obligor is "delinquent" under 42 U.S.C. § 664 if he has failed to pay currently due court-ordered support or reimbursement payments. [*See Davis v. Dep't of Human Res.*, 349 N.C. 208, 505 S.E.2d 77 (1998) (no intercept of obligor's federal income tax refund when he was current in his court-ordered repayment plan, even though he had not completely extinguished his child support arrearage).]
2. Before an obligor's federal income tax refund is attached, the IV-D agency must notify the obligor that her federal income tax refund will be attached to pay past due child support. [42 U.S.C. § 664(a)(3)(A); 45 C.F.R. § 303.72(e)(1).] The obligor may request an administrative hearing pursuant to the state Administrative Procedure Act (G.S. Chapter 150B, Article 3 to contest attachment of her federal income tax refund to pay past due child support and may request judicial review, in superior court, of the agency's final decision. [*See Davis v. Dep't of Human Res.*, 349 N.C. 208, 505 S.E.2d 77 (1998).]
3. If the obligor has filed a joint income tax return with his current spouse, the IRS will notify the obligor's spouse of the steps to take to secure or protect his or her proper share of the refund. [42 U.S.C. § 664(a); 45 C.F.R. § 303.72(e)(1)(iv).]

D. State Income Tax Refund Offset

1. In a IV-D case, a IV-D agency may request that the state Department of Revenue withhold from the state income tax refund due an obligor the amount of child support arrearages owed by the obligor if that amount is at least $50. [*See* G.S. Ch. 105A; see G.S. 105A-4 for minimum debt).]
2. After an obligor's state income tax refund is attached, the IV-D agency must notify the obligor, in writing, that the agency has received the obligor's refund and that the agency intends to apply her state income tax refund against the child support arrearages owed by the obligor, unless the obligor makes a timely request for a hearing. [G.S. 105A-8(a).]
3. The obligor may request an administrative hearing pursuant to the state Administrative Procedure Act (G.S. Chapter 150B, Article 3) to contest attachment of his state income tax refund to pay past-due child support and may request judicial review, in superior court, of the agency's final decision. [G.S. 105A-8 and 105A-9. *See also Davis v. Dep't. of Human Res.*, 126 N.C. App. 383, 485 S.E.2d 342 (1997) (contested case hearing before an administrative law judge, followed by final agency decision, then appeal taken to superior court), *aff'd in part and rev'd in part*, 349 N.C. 208, 505 S.E.2d 77 (1998).]

E. License Revocation

1. In IV-D cases, the state Department of Health and Human Services may notify any state board that an obligor is "not in compliance" with a child support order or with a subpoena issued pursuant to a support proceeding. [G.S. 110-142.1(a).] "Board" in this context means any department, division, agency, officer, board, or other unit of state government that issues licenses. [G.S. 110-142(2).]
2. After notifying the obligor, each board is required to deny, suspend, or revoke the state business, occupational, or professional license of an obligor who is "not in compliance" with a child support order until such time as it receives notice from a IV-D agency that the obligor's licensing privileges may be reinstated. [G.S. 110-142.1(d), (e), (l).]
3. An obligor may not request an administrative hearing to consider a board's denial or failure to issue or renew the obligor's licensing privileges pursuant to G.S. 110-142.1. [G.S. 110-142.1(n).]
4. An obligor may, by motion in the pending child support action, request that a district court judge review the IV-D agency's actions with respect to revocation of the obligor's state business, occupational, or professional licensing privileges or to determine whether the obligor is "not in compliance" with a child support order. [G.S. 110-142.1(i), (j), (k).]

F. Administrative Liens on Bank Accounts

1. G.S. 110-139.2(b1) authorizes a IV-D agency to impose an administrative lien on the bank account of an obligor who owes unpaid child support equal to at least six months of support or $1,000, whichever is less.
   a. The administrative lien procedure under G.S. 110-139.2(b1) may be used only in IV-D cases.
   b. The administrative lien procedure under G.S. 110-139.2(b1) may be used to enforce child support orders entered by administrative agencies or courts of other states as well as child support orders entered by North Carolina courts. [G.S. 110-139.2(b1).]
2. Notice of the attachment.
   a. The IV-D agency must serve the obligor and any nonliable account owner of a joint account pursuant to G.S. 1A-1, Rule 4. [G.S. 110-139.2(b1).]
   b. The IV-D agency must serve the financial institution pursuant to G.S. 1A-1, Rule 5. [G.S. 110-139.2(b1).]
3. Contesting the attachment.
   a. An obligor or joint account owner may contest the imposition of an administrative lien against her bank account by requesting a hearing before the district court in the county in which the child support order was entered within ten days after service of the notice of lien. [G.S. 110-139.2(b1).]
   b. An obligor or joint account owner may contest the imposition of an administrative lien against his bank account based on the fact that the amount owed is less than six months of support or $1,000, whichever is less, or that he is not the person subject to the child support order being enforced. [G.S. 110-139.2(b1).]

c. If the obligor or joint account owner contests the imposition of an administrative lien against her bank account, the district court may award court costs against the non-prevailing party. [G.S. 110-139.2(b1).]

4. A bank or financial institution that complies, in good faith, with the administrative lien procedure under G.S. 110-139.2(b1) is not liable to any person with respect to such compliance. [G.S. 110-139.2(b1).]

5. Use of the administrative lien procedure under G.S. 110-139.2(b1) does not preclude the use of other child support enforcement remedies. [G.S. 110-139.2(b1).]

G. Credit Reporting

1. In IV-D cases, IV-D agencies are required to report the names of obligors who are delinquent in paying child support and the amount of past due child support they owe. [*See* 42 U.S.C. § 666(a)(7).]

2. An obligor is "delinquent" in paying child support if he (1) owes past due child support and (2) is not in compliance with a court order or agreement specifying the manner in which the obligor may satisfy his obligation to pay the arrearage (usually, by making regular payments on the arrearage in addition to the obligor's payments for current or ongoing child support). [*See Davis v. Dep't of Human Res.*, 126 N.C. App. 383, 485 S.E.2d 342 (1997) (considering delinquency for purposes of federal income tax refund intercept), *aff'd in part and rev'd in part*, 349 N.C. 208, 505 S.E.2d 77 (1998).]

3. A IV-D agency may not report an obligor's child support arrearage to a consumer reporting agency unless it has given the obligor adequate, advance notice and a reasonable opportunity to contest the accuracy of the reported information. [*See* 42 U.S.C. § 666(a)(7)(B).]

H. Administrative Authority of IV-D Agencies

1. Federal law [42 U.S.C. §§ 666(c)(1)(G), (H).] requires that IV-D agencies have the legal authority to take the following administrative actions to enforce an obligor's child support obligation **without prior judicial approval** when the obligor owes past due child support arrearages:

   a. Intercept or seize lump sum payments from state or local agencies (including workers' compensation benefits), judgments, settlements, and lotteries; [42 U.S.C. § 666(c)(1)(G)(i).]

   b. Attach and seize the obligor's assets held by financial institutions; [42 U.S.C. § 666(c)(1)(G)(ii).]

   c. Attach public and private retirement funds; [42 U.S.C. § 666(c)(1)(G)(iii).]

   d. Impose liens for past due child support and enforce those liens by forcing the sale of property and distribution of proceeds; [42 U.S.C. § 666(c)(1)(G)(iv).] and

   e. Increase the amount of the obligor's monthly support payment to include a payment toward the child support arrearage. [42 U.S.C. § 666(c)(1)(H).]

2. Most of the federal requirements outlined above have not yet been implemented through state law. [*But see* G.S. 44-86(d)(2) (creating lien on real and personal property of a delinquent obligor in a non-IV-D case); 58-3-185 (creating lien on insurance proceeds due

a beneficiary who is delinquent in child support); 110-129.1(a)(8)c (administratively increasing amount of monthly support payments); 110-136.2 (voluntary assignment by a responsible parent of unemployment compensation benefits to satisfy a child support obligation); 110-139.2 (providing for agreements between DHHS and financial institutions to facilitate enforcement of child support).]

I. Passport Denial

1. In IV-D cases, a IV-D agency, after providing notice to the obligor, may request that the U.S. Department of State, via the federal Office of Child Support Enforcement, deny an obligor's application for **issuance or renewal** of a U.S. passport or revoke, restrict, or limit a passport issued previously to the obligor, if the obligor owes at least $2,500 in past due child support. [*See* 42 U.S.C. §§ 652(k) and 654(31).]

J. Allotment of Military Pay and Pensions

1. A IV-D agency or IV-D attorney in a IV-D case, or the court (but not the obligee or obligee's attorney) in a non-IV-D case, may request that the Army, Air Force, Navy, or Marine Corps enforce a child support order against an obligor who is on active military duty if the obligor owes child support arrearages in an amount that is at least twice the amount of her monthly obligation for current support. [*See* 42 U.S.C. § 665.]
2. The procedures for requesting an involuntary military allotment to enforce an obligor's court-ordered child support obligation are set forth in 32 C.F.R. § 54.6. See also, on the use of involuntary allotments, N.C. Dep't of Health & Human Servs., *DHHS On-Line Manuals*, *Child Support Services*, *MILITARY POLICY/PROCEDURES*, https://policies.ncdhhs.gov/divisional/social-services/child-support/policy-manual/csecs.pdf.
3. In many cases, requesting an involuntary allotment under 42 U.S.C. § 665 may be easier and faster than using income withholding to collect child support from an obligor who is on active military duty.
4. If an obligor receives disposable retired pay and is subject to a child support obligation contained in a divorce decree or an incorporated separation agreement (regardless of whether the obligor owes past due child support), the obligor's former spouse to whom child support is owed may request "direct payment" of the obligor's child support obligation from the obligor's military pension pursuant to the Uniformed Services Former Spouses' Protection Act. [*See* 10 U.S.C. § 1408(d).]

X. Enforcing a Claim for Child Support after the Death of the Obligor

A. Support Claims That May Be Asserted against a Decedent's Estate

1. Even though a parent's obligation to support a minor unemancipated child terminates upon the parent's death, the parent's estate may be liable for child support arrearages that accrued before the parent's death. [*See Larsen v. Sedberry*, 54 N.C. App. 166, 282 S.E.2d 551 (1981) (order awarding payment of past due child support from father's estate to the extent not barred by the ten-year statute of limitations affirmed), *review denied*, 304 N.C. 728, 288 S.E.2d 381 (1982).]

2. A parent may by contract or agreement create a support obligation that survives the parent's death and becomes an obligation of the parent's estate. [*See In re N.C. Inheritance Taxes*, 303 N.C. 102, 277 S.E.2d 403 (1981) (support obligation constitutes a charge against the spouse's estate if the intention that the obligation survive the spouse's death is clearly expressed); *Bradshaw v. Smith*, 48 N.C. App. 701, 269 S.E.2d 750 (1980) (recognizing that father's common law duty to support his children terminated on his death but finding that father had by separation agreement obligated himself to pay support, which obligation survived his death and for which his estate was liable).]

B. Enforcing a Support Claim against the Estate of the Obligor

1. For arrearages.
   a. No action pending upon death of the obligor. The surviving parent may file:
      i. A claim with the personal representative as set out in G.S. 28A-19-1 or
      ii. A complaint to recover past due child support. [*See Larsen v. Sedberry*, 54 N.C. App. 166, 282 S.E.2d 551 (1981) (mother awarded summary judgment against father's estate for unpaid child support for ten-year period prior to father's death), *review denied*, 304 N.C. 728, 288 S.E.2d 381 (1982).]
   b. For action pending, see Section X.B.3, below.
2. For support due pursuant to an unincorporated separation agreement.
   a. No action pending upon death of the obligor. The surviving parent or children may file:
      i. A claim with the personal representative as set out in G.S. 28A-19-1 for the amount claimed under the separation agreement or
      ii. A complaint against the personal representative of the decedent's estate to enforce the decedent's obligation to provide support pursuant to the separation agreement. [*See Bradshaw v. Smith*, 48 N.C. App. 701, 269 S.E.2d 750 (1980) (children commenced an action against father's estate that sought to enforce father's support obligation, as set out in an unincorporated agreement).]
   b. For action pending, see Section X.B.3, immediately below.
3. If an action is pending upon death of the obligor, a motion to substitute the personal representative of the estate of the deceased parent must be made within the time specified in the notice to creditors set out in G.S. 28A-19-3. [G.S. 1-1A, Rule 25(a).]
4. For claims filed against the decedent's estate.
   a. The claim must be filed within the time specified in the personal representative's letter to creditors or it is barred. [G.S. 28A-19-3.]
   b. If the personal representative rejects the claim, the claimant has three months after written notice of the rejection to commence an action to recover the sums sought or be forever barred. [G.S. 28A-19-16.]
   c. To trigger the three-month statute of limitation in G.S. 28A-19-16, there must be a rejection of the claim and the rejection must be absolute and unequivocal. [*Elliott v. Estate of Elliott*, 163 N.C. App. 577, 596 S.E.2d 819 (rejection of claim form accompanied by a letter inviting negotiations did not constitute an unequivocal rejection,

so wife's claim for unpaid alimony was not barred by G.S. 28A-19-16), *review denied*, 358 N.C. 731, 601 S.E.2d 530 (2004).]

C. Enforcing a Support Claim against Beneficiaries of a Decedent's Estate

1. Trial court properly imposed a constructive trust on proceeds received by sons 1 and 2 upon father's death, based on a consent order that required father to name son 3 as a beneficiary, with at least a 33 percent interest, of any life insurance policies and any other death benefits to which father was entitled through his employment. Father's failure to name son 3 as beneficiary of the relevant plans, as required by the consent order, constituted inequitable conduct that unjustly enriched sons 1 and 2. [*Myers v. Myers*, 213 N.C. App 171, 714 S.E.2d 194 (2011).]
2. The term "any other death benefits to which [father] is entitled through his employment" was not ambiguous and included proceeds, paid upon father's death, of a retirement plan and an investment plan in which father was a participant. [*Myers v. Myers*, 213 N.C. App. 171, 178, 714 S.E.2d 194, 200 (2011).]
3. While the proceeds of father's retirement and investment plans were payable under the Employee Retirement Income Security Act (ERISA) to the named beneficiaries, which were sons 1 and 2, once the funds were paid out, they were no longer governed by ERISA and became subject to a consent order that provided son 3 an interest in the funds. [*Myers v. Myers*, 213 N.C. App. 171, 714 S.E.2d 194 (2011) (trial court had concluded that, though ERISA dictated that the plan benefits be paid to the named beneficiaries, once paid, the proceeds were no longer governed by ERISA but were subject to the consent order).]

D. Servicemembers Group Life Insurance Death Benefits

1. Despite provision in Hawaii divorce decree (1) requiring father to maintain life insurance in the amount of $50,000 with his child as the primary and irrevocable beneficiary as long as father was subject to a child support obligation and (2) further providing that if father died without doing so, father's estate would be liable, father's change of beneficiary on his Servicemembers Group Life Insurance (SGLI) policy to second wife was upheld. U.S. Supreme Court precedent holds that a servicemember's designation of beneficiary under the SGLI Act prevails over a state child support order requiring the servicemember to maintain life insurance for his child. Further support found in the anti-attachment provisions of the SGLI Act. [*Lewis v. Estate of Lewis*, 137 N.C. App. 112, 527 S.E.2d 340 (2000) (dismissal of claim for constructive trust and claims for specific performance and enforcement of the Hawaiian decree per summary judgment upheld).]

XI. Bankruptcy and Child Support Enforcement

Important Note: Except as noted, this section describes provisions of the federal bankruptcy law effective Oct. 17, 2005.

A. Bankruptcy Reform Legislation

1. On Apr. 20, 2005, the federal Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [Pub. L. No. 109-8, 119 Stat. 23 (2005) (hereinafter Bankruptcy Reform Act).] was

signed into law. It amended certain provisions of the Bankruptcy Code. The amendments relating to family law were effective Oct. 17, 2005, and apply to bankruptcy cases commenced on or after that date.

2. This legislation made several changes with respect to the treatment of child support claims in bankruptcy cases.
   a. Unsecured claims for child support arrearages owed as of the date a bankruptcy case is filed are given first priority for payment in Chapter 7 cases in which assets are to be distributed to creditors.
   b. The automatic stay (see Section XI.C, below) does not apply to the withholding of child support obligations from income that is property of the debtor or the bankruptcy estate.
   c. Confirmation of a debtor's Chapter 13 plan is conditioned on the debtor's payment of all court-ordered child support obligations that have accrued since the bankruptcy case was filed.
   d. A debtor's Chapter 13 case may be dismissed if the debtor fails to pay any child support obligation that first becomes payable after the bankruptcy case is filed.
   e. Discharge in a Chapter 13 case is contingent on the debtor's payment of all prebankruptcy child support arrearages (to the extent provided in the plan) and all court-ordered child support obligations that accrued while the bankruptcy was pending.
   f. Bona fide prebankruptcy payments of child support are not avoidable by the bankruptcy trustee.
3. For an overview of the Bankruptcy Reform Act in the area of family law, see John L. Saxon, *Impact of the New Bankruptcy Reform Act on Family Law in North Carolina*, Fam. L. Bull. No. 20 (UNC School of Government, June 2005) (hereinafter 2005 Saxon Bulletin).
4. The provisions of the Bankruptcy Code in effect before passage of the Bankruptcy Reform Act relating to child support and other family law matters will continue to apply in bankruptcy cases filed before Oct. 17, 2005, and pending on or after that date.
5. Additionally, provisions of the Bankruptcy Code in effect before passage of the Bankruptcy Reform Act that were not amended or repealed will continue to apply in bankruptcy cases that are filed on or after Oct. 17, 2005.

B. Definitions

1. Domestic support obligation.
   a. A "domestic support obligation" is a debt that:
      i. Accrues before, on, or after the date of the order for relief in the bankruptcy case, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of Title 11 of the U.S. Code; [11 U.S.C. § 101(14A).]
      ii. Is owed to or recoverable by the debtor's spouse, former spouse, or child, the child's parent, legal guardian, or responsible relative, or a governmental unit; [11 U.S.C. § 101(14A)(A).]

iii. Is in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) for a debtor's spouse, former spouse, or child, or for the child's parent; [11 U.S.C. § 101(14A)(B).]

iv. Has been established or is subject to establishment before, on, or after the date of the order for relief by a court order, divorce decree, separation agreement, property settlement agreement, or a determination by a governmental unit in accordance with applicable nonbankruptcy law; [11 U.S.C. § 101(14A)(C).] and

v. Has not been assigned to a nongovernmental entity, unless the assignment is voluntary and for the purpose of collecting the debt. [11 U.S.C. § 101(14A)(D).]

b. A "domestic support obligation" includes:

i. Payments for public assistance or foster care provided on behalf of a debtor's child;

ii. Child support permanently or temporarily assigned to a state or local government as a condition of receiving public assistance or assigned to public child support enforcement agencies for the purpose of collection; and

iii. Child support that is owed or payable to the debtor's child or the parent, legal guardian, or responsible relative of the debtor's child. [11 U.S.C. § 101(14A); 2005 Saxon Bulletin.]

2. Debts arising from a separation or divorce other than those that qualify as domestic support obligations (DSOs).

a. 11 U.S.C. § 523(a)(15) identifies a second type of divorce-related debt, that is, a debt to a spouse, former spouse, or child of the debtor that is not a DSO and is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree, or other order of a court of record.

b. Debts under 11 U.S.C. § 523(a)(15) commonly are referred to as being in the form of a property settlement, while debts under § 523(a)(5) commonly are referred to as alimony or support. [*See In re Zeitchik*, 369 B.R. 900 (Bankr. E.D.N.C. 2007) (not subject to the Bankruptcy Reform Act).] A § 523(a)(15) debt is generally referred to herein as "a divorce-related debt that that does not qualify as a domestic support obligation" or as "a divorce-related debt that is not a domestic support obligation"

c. Whether debts are classified under § 523(a)(5) as DSOs or under § 523(a)(15) as divorce-related debts that do not qualify as DSOs is significant because DSOs generally receive preferential treatment under the Bankruptcy Code. [*See* 2005 Saxon Bulletin and Sections XI.C, D and E, below.]

d. Case law: Determining whether a claim is a domestic support obligation or a property settlement.

i. If a party asserts a claim for unpaid child support arising from an agreement between the parties, in considering whether the claim constitutes a domestic support obligation, the bankruptcy court must determine whether the parties intended for the obligation to be in the nature of support at the time they executed the agreement. If the claim arose from a court order, the issue is whether the court issuing the order intended for the obligation to be in the nature of support. [*In re Peterson*, No. 12-00793-8-SWH, 2012 WL 5985269 (Bankr. E.D.N.C.

Nov. 29, 2012) (citing *Tilley v. Jessee*, 789 F.2d 1074 (4th Cir. 1986)) (case sets out other relevant factors for court to consider when making determination and notes that whether an obligation is in the nature of support focuses on the parties' mutual intent, making evidence of a party's unilateral intent insufficient to rebut the intent of the parties reflected in a separation agreement).]

ii. To distinguish a domestic support obligation from property division obligations, a court may consider the labels in the agreement or court order, the income and needs of the parties at the time the obligation became fixed, the amount and outcome of property division, whether the obligation terminates on the obligee's death or remarriage or on emancipation of children, the number and frequency of payments, the waiver of alimony or support rights in the agreement, the availability of state court procedures to modify or enforce the obligation through contempt, and the tax treatment of the obligation. [*In re Miller*, 501 B.R. 266 (Bankr. E.D. Pa. 2013) (citing *In re Gianakas*, 917 F.2d 759 (3d. Cir. 1990), and 4 Collier on Bankruptcy §§ 523.11[6][a]–[h] (16th ed. 2013)); *In re Baker*, No. 12-01090-8-SWH, 2012 WL 6186683 (Bankr. E.D.N.C. Dec. 12, 2012) (factors to consider include nature of the obligation, whether there are dependent children, the relative earning power of the spouses and an indication that the obligation was an attempt to balance it, the adequacy of the dependent spouse's support without the assumption of the obligation, the dependent spouse's receipt of inadequate assets in settlement, status of the obligation upon death or remarriage, timing of payments (lump sum or periodic), the payee (direct vs. indirect), waivers of maintenance, whether the obligation is modifiable, location of the paragraph containing the obligation within the agreement (whether or not it is located within the property distribution section), and the tax treatment of the obligation).]

e. Case law: obligations that qualified as domestic support obligations (DSOs).

i. Chapter 13 father/debtor's ongoing obligation in a separation agreement that required him to pay $680/month in child support was a DSO when it terminated when the child turned 18, left high school, or left his mother's home. Agreement by the parties to defer father's payments until the sale of the marital residence, which had not occurred four years after execution of the separation agreement, did not change the nature of the obligation into a division of marital assets. [*In re Miller*, 501 B.R. 266, 284, n.21 (Bankr. E.D. Pa. 2013) (DSO determination made in the context of the nondebtor spouse's motion for relief of the automatic stay, which is a summary proceeding conducted within thirty days of filing of a motion for relief from the stay, rather than in the context of a dischargeability proceeding, which the bankruptcy judge noted as more common and as having the "formal characteristics of full, civil litigation").]

ii. Chapter 13 father/debtor's obligation in a separation agreement to repay son $8,000 that debtor took from son's account was a DSO. Predominant purpose in requiring reimbursement was to provide for son's education, thus making obligation in the nature of support. [*In re Miller*, 501 B.R. 266 (Bankr. E.D. Pa. 2013).]

iii. Wake County district court judge's prepetition determination that husband owed a child support arrearage in excess of $41,000, along with language in the separation agreement, was basis for bankruptcy court's determination that child support arrearage, was a domestic support obligation. [*In re Peterson*, No. 12-00793-8-SWH, 2012 WL 5985269 (Bankr. E.D.N.C. Nov. 29, 2012); *In re Miller*, 501 B.R. 266 (Bankr. E.D. Pa. 2013) (a prepetition determination in a state court contempt proceeding that father owed $18,000+ in past due child support was a DSO).]

iv. Interest that accrued pursuant to nonbankruptcy law on unpaid child support was itself a DSO. [*In re Wright*, 438 B.R. 550 (Bankr. M.D.N.C. 2010) (per the definition in 11 U.S.C. § 101(14A), a domestic support obligation based on unpaid child support includes the interest that accrues pursuant to applicable nonbankruptcy law; under Alabama law, court-ordered child support payments become final judgments as of the date due and accrue interest at the 12 percent statutory rate from that date; accrued interest of $7,325 on arrearages of $3,143 was a DSO).]

f. Case law: overpayments of child support or orders for reimbursement of wrongly paid child support as domestic support obligations (DSOs).

i. Whether overpayment of child support or an order for reimbursement of wrongly paid child support constitutes a DSO depends on the facts of the case. [*See In re Kloeppner*, 460 B.R. 759 (D. Minn. 2011) (individual who paid support for child he believed he fathered was awarded in state court $10,622 for amount of support paid and costs of genetic testing; claim was discharged in debtor/mother's bankruptcy proceeding as not being a DSO; individual was not a spouse or former spouse of the debtor when parties never married, award was not for the child and was not in the nature of support but was, rather, return of money that should never have been paid), and *In re Knott*, 482 B.R. 852 (Bankr. N.D. Ga. 2012) (final order of Florida court determined husband had overpaid child support during five-year period of shared custody and also after he obtained full custody; overpayment in excess of $41,000, the majority of which was the result of wife's improper actions, was in the nature of support and was a nondischargeable DSO).] Both cases cite decisions that have reached different results.]

g. Case law: attorney fees as domestic support obligations (DSOs).

i. Award in district court of $35,000 in attorney fees pursuant to G.S. 50-13.6 in proceeding for child custody and child support was a DSO. [*In re Peterson*, No. 12-00793-8-SWH, 2012 WL 5985269 (Bankr. E.D.N.C. Nov. 29, 2012) (even if all the attorney fees did not directly relate to the enforcement of child support, the bankruptcy court found the entire fee award was in the nature of support, interpreting the district court finding that mother had insufficient means to pay the fees to mean that the district court judge intended for the fees themselves to be for support; bankruptcy court also rejected father's argument that because district court ordered child support arrearages to be paid in $100 monthly installments and attorney fees to be paid in $3,000 quarterly payments, that those claims should be treated in the debtor's Chapter 13 plan as a long-term debt

obligation under 11 U.S.C. § 1322(b)(5); as a priority claim, a DSO must be paid in full through the plan unless holder of claim agrees to other treatment); *In re Pennington*, No. 10-31642, 2011 WL 6210729 (Bankr. W.D.N.C. Dec. 14, 2011) (attorney fees that father incurred in a custody case, which state court ordered mother to pay, was a nondischargeable DSO in mother's Chapter 7 bankruptcy proceeding; general rule is that award of attorney fees in domestic cases generally deemed to be in the nature of support for purposes of 11 U.S.C. § 523(a)(5); 11 U.S.C. § 523(a)(15) was alternate basis for finding attorney fees award nondischargeable); *In re Baker*, No. 12-01090-8-SWH, 2012 WL 6186683 (Bankr. E.D.N.C. Dec. 12, 2012) (entire amount of attorney fees awarded in divorce and related proceedings was a DSO, even if a portion of the fees may have been unrelated to support payments).]

ii. Even though the statutory definition of a DSO provides that it is a debt that is "owed to or recoverable by" a spouse, former spouse, or child of the debtor, a debt owed or payable to an attorney arising out of a domestic case may be a DSO because it is the nature of the debt that controls, not the identity of the payee. [*McNeil v. Drazin*, 499 B.R. 484, 491 (D. Md. 2013) (citing *In re Pennington*, No. 10-31642, 2011 WL 6210729 (Bankr. W.D.N.C. Dec. 14, 2011)) (fees of attorney appointed to represent children of the divorcing couple were a DSO in debtor/father's Chapter 13 proceeding; as long as debt is "in the nature of support," it does not have to be directly payable to a spouse or a minor child), *aff'd per curiam*, 562 F. App'x 179 (4th Cir. 2014) (**unpublished**); *Pennington* (it is the nature of the debt, not the identity of the creditor, that controls; it was irrelevant that family members had paid a portion of fees father had incurred and that debtor mother was ordered to pay).]

3. Property of the bankruptcy estate.

a. Chapter 7.

i. In a Chapter 7 bankruptcy case, the bankruptcy estate generally includes property that the debtor owned at the time he filed for bankruptcy (as well as certain property previously owned by the debtor) and excludes most, **but not all**, income and property acquired by the debtor **after** he filed for bankruptcy. [*See* 11 U.S.C. § 541.]

ii. Property of the estate does not include property that the debtor is allowed to keep as exempt from bankruptcy. [See 11 U.S.C. § 522 on exemptions.] For other property that is not included as property of the estate, including but not limited to funds placed in education individual retirement accounts, 529 college savings plans, and amounts withheld or placed in certain pension or retirement plans, see 11 U.S.C. § 541(b).

b. In a Chapter 13 bankruptcy case, the bankruptcy estate includes the property included in the estate of a Chapter 7 debtor described above, as well as property (including wages and income) acquired by the Chapter 13 debtor **after** she files for bankruptcy. [*See* 11 U.S.C. § 1306(a); *In re Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007) (when the debtor's postconfirmation wages are provided for in, and used to fund, his Chapter 13 plan, they are considered property of the estate).]

C. Automatic Stay

1. When a debtor files a bankruptcy petition, federal law automatically and immediately imposes a stay precluding the debtor's creditors (including child support obligees and IV-D agencies) and others (including state courts) from taking certain actions against the debtor, the debtor's property, or property of the bankruptcy estate. [*See* 11 U.S.C. § 362(a).] *See* Cheryl Howell, *Bankruptcy and the Application of the Automatic Stay to Family Law Cases*, UNC Sch. of Gov't: On the Civil Side Blog (May 12, 2017), https://civil.sog.unc.edu/bankruptcy-and-the-application-of-the-automatic-stay-to-family-law-cases.
    a. The automatic stay applies to:
        i. Any act to collect, assess, or recover a claim against the debtor that arose before the debtor filed for bankruptcy; [11 U.S.C. § 362(a)(6).]
        ii. The setoff of any prebankruptcy debt owed to the debtor against any claim against the debtor (regardless of whether the claim against the debtor arose before or after the debtor's bankruptcy); [11 U.S.C. § 362(a)(7).] and
        iii. The commencement or continuation of any legal proceeding to recover a claim against the debtor that arose before the debtor's bankruptcy. [11 U.S.C. § 362(a)(1).] This provision stays:
            (a) The commencement or continuation of a civil contempt proceeding against a debtor for failure to pay a prepetition domestic support obligation (DSO), even if the proceeding does not involve property of the bankruptcy estate; 2005 Saxon Bulletin.]
            (b) A proceeding to attach or garnish a debtor's bank account or other property to collect a prepetition DSO. [2005 Saxon Bulletin.]
        iv. The enforcement against the debtor or against property of the estate of a judgment obtained before the debtor's bankruptcy. [11 U.S.C. § 362(a)(2).] This provision stays:
            (a) The issuance or execution of a writ of execution or the commencement or continuation of supplemental proceedings to enforce a judgment for a prepetition domestic support obligation (DSO); [2005 Saxon Bulletin.]
            (b) The commencement of a civil contempt proceeding against a debtor for failure to pay a postpetition DSO **unless** the support will be paid from property that is not property of the estate. [2005 Saxon Bulletin.]
        v. Any act to create, perfect, or enforce any lien against property of the estate. [11 U.S.C. § 362(a)(4).] This provision stays:
            (a) The enforcement or collection of a postpetition DSO through the creation, perfection, or enforcement of a lien on property of the estate. [2005 Saxon Bulletin.]
        vi. Any act to create, perfect, or enforce against property of the debtor any lien to the extent the lien secures a claim that arose before the commencement of the case. [11 U.S.C. § 362(a)(5).] This provision stays:

(a) The creation, perfection, or enforcement of a lien against the debtor's property or property of the estate that secures a prepetition DSO. [2005 Saxon Bulletin.]

b. Any action taken in violation of the automatic stay is void, and a creditor who willfully violates the automatic stay may be liable for actual damages, including costs and attorney fees, and, in appropriate circumstances, may recover punitive damages. [11 U.S.C. § 362(k); *In re Gruntz*, 202 F.3d 1074, 1082 n.6 (9th Cir. 2000) (because judicial proceedings in violation of the stay are void ab initio, the bankruptcy court is not obligated to extend full faith and credit to such judgments).]

2. Actions to which the automatic stay is not applicable or that do not violate the automatic stay. The automatic stay does not apply to:

a. "[T]he commencement or continuation of a civil action or proceeding . . . for the establishment or modification of an order for [a] domestic support obligation[.]" [11 U.S.C. § 362(b)(2)(A)(ii).]

i. Relief from the stay is not needed to seek an order in state court establishing or modifying the amount of the debtor's permanent child support obligation. [11 U.S.C. § 362(b)(2)(A)(ii); *In re Miller*, 501 B.R. 266 (Bankr. E.D.Pa. 2013) (under 11 U.S.C. § 362(b)(2)(A)(ii), determinations as to the existence and amount of a DSO are not subject to the automatic stay); *In re Forkish*, No. 09-06373-8-SWH, 2010 WL 468092 (Bankr. E.D.N.C. Feb. 2, 2010) (noting that if debtor's ex-spouse had taken action to establish or modify child support in state court after debtor filed his bankruptcy petition, that action would be excepted from the automatic stay); *In re Diaz*, No. 03-14091C-7G, 2004 WL 252049 (Bankr. M.D.N.C. Feb. 11, 2004) (**unpublished**) (movant free to seek in state court an order establishing the amount of debtor's permanent child support obligation without obtaining relief from the stay).]

ii. Appearing in state court to establish the amount of attorney fees related to the nonpayment of child support did not violate the automatic stay. [*In re Forkish*, No. 09-06373-8-SWH, 2010 WL 468092 (Bankr. E.D.N.C. Feb. 2, 2010) (no attempt after the bankruptcy filing to collect the attorney fees or to have the debtor incarcerated for nonpayment).]

b. The collection of a domestic support obligation (DSO) from property that is not property of the bankruptcy estate. [11 U.S.C. § 362(b)(2)(B); see Section XI.B.3, above, for definition of property of the estate.] Conversely, the collection of a DSO from property of the bankruptcy estate **is** subject to the automatic stay.

i. Under 11 U.S.C. § 362(b)(2)(B), the actual collection of a DSO may proceed when collection is from a source other than property of the bankruptcy estate. [*In re Miller*, 501 B.R. 266 (Bankr. E.D. Pa. 2013).]

c. The continuation or commencement of income withholding against property of the bankruptcy estate or property of the debtor for payment of a DSO under a judicial or administrative order or statute. [11 U.S.C. § 362(b)(2)(C).] This authorizes income withholding against a debtor's postpetition wages for current and past due child support after a debtor files a Chapter 13 bankruptcy case. [2005 Saxon Bulletin.]

i. This exception is broader than the exception in 11 U.S.C. § 362(b)(2)(B), set out above, in that it allows for withholding of income that is property of the estate and therefore, includes postpetition property such as the postpetition earnings of a Chapter 13 debtor. [*In re Miller*, 501 B.R. 266, 279 n.15 (Bankr. E.D. Pa. 2013) (calling the revision by the Bankruptcy Reform Act of this provision to allow withholding from property of the estate "significant" but noting in footnote 15 a division regarding the scope of this exception to the automatic stay; some courts have construed the exception broadly to allow "virtually any creditor action to enforce a DSO," including effectuating withholding through contempt, while other courts have construed the provision more narrowly, allowing only actions to withhold income in order to collect on a DSO).]

ii. The state of Florida's continued collection through wage garnishment of a prepetition DSO did not violate the automatic stay. [*In re Fort*, 412 B.R. 840 (Bankr. W.D. Va. 2009) (however, Florida's postconfirmation continuation of a wage deduction order, in excess of the amount provided in the debtor's confirmed plan, violated 11 U.S.C. § 1327(a), which makes the provisions in a confirmed plan binding upon each creditor).] .

d. The withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, in accordance with applicable state and federal law. [11 U.S.C. § 362(b)(2)(D).] This allows a debtor's child support obligation to be enforced postpetition through license revocation proceedings. [2005 Saxon Bulletin.]

e. Reporting of overdue child support to consumer reporting agencies. [11 U.S.C. § 362(b)(2)(E).]

f. The collection or enforcement of a DSO through the interception of a tax refund in accordance with federal and state law. [11 U.S.C. § 362(b)(2)(F).] A child support agency is authorized to attach a debtor's state or federal tax refund to enforce a debtor's child support obligation. [2005 Saxon Bulletin.]

g. The enforcement of a debtor's medical support obligation, as specified under title IV of the Social Security Act. [11 U.S.C. § 362(b)(2)(G).]

h. The commencement or continuation of a criminal action or proceeding against the debtor. [11 U.S.C. § 362(b)(1).]

i. Notwithstanding the language of the statute, some courts have determined that if the actual purpose of the criminal proceeding is to collect a debt, then the automatic stay is applicable. [*See In re Bibbs*, 282 B.R. 876 (Bankr. E.D. Ark. 2002) (finding that stay did not apply to criminal proceedings relating to debtor's hot check offenses, including enforcement of orders to pay fines and restitution; opinion includes lengthy review of cases finding stay applicable).]

ii. Other courts have found the automatic stay not applicable to any criminal proceeding.

(a) Automatic stay did not apply to preclude state court criminal proceedings against Chapter 11 debtor for failure to pay child support. [*In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000) (state criminal action not enjoined by

automatic stay even if the prosecution was motivated by the complaining witness's desire to collect a debt).]

(b) Automatic stay not applicable to government's enforcement of criminal fine and costs imposed on a debtor in a prepetition criminal proceeding. [*United States v. Troxler Hosiery Co.*, 41 B.R. 457 (M.D.N.C. 1984), *aff'd*, 796 F.2d 723 (4th Cir. 1986), *cert. denied*, 480 U.S. 930, 107 S. Ct. 1566 (1987).]

(c) Automatic stay did not preclude the holding of a probation violation hearing based on debtor's failure to repay restitution and fees as set out in a prepetition schedule. [*In re Coulter*, 305 B.R. 748 (Bankr. D.S.C. 2003) (review of unpublished Fourth Circuit Court of Appeals opinions on the subject included).]

(d) Automatic stay did not apply to action of the state to revoke probation for failure to make restitution payments arising from a felony theft conviction, regardless of the motive behind the state's actions. [*Bryan v. Rainwater*, 254 B.R. 273 (N.D. Ala. 2000) (stating that continuation of a criminal proceeding is not subject to the automatic stay, notwithstanding the fact that the proceedings might involve an attempt to collect, assess, or recover a claim).]

(e) Government prosecutors could initiate and continue criminal prosecution of debtor without violating automatic stay, even if the primary purpose of the prosecution was to collect a dischargeable debt. [*In re Byrd*, 256 B.R. 246 (Bankr. E.D.N.C. 2000) (prepetition criminal proceedings for larceny based on bad checks issued by debtor to Las Vegas casinos did not violate automatic stay or discharge injunction).]

(f) Criminal proceeding to revoke probation for debtor's failure to pay child support not stayed by a bankruptcy filing, regardless of motivation. [*In re Rollins*, 243 B.R. 540 (N.D. Ga. 1997) (noting that most courts that have construed 11 U.S.C. § 362(b)(1) have concluded that the plain meaning of the term "criminal action" includes all criminal actions, regardless of the motivation or purpose behind the criminal action), *aff'd in unpublished opinion*, 140 F.3d 1043 (11th Cir. 1998).]

3. Duration of the stay.

a. The automatic stay against actions against the debtor or the debtor's property remains in effect until:

i. The bankruptcy court grants relief from the stay for cause; [11 U.S.C. § 362(d)(1).]

ii. The debtor's bankruptcy case is closed or dismissed; [11 U.S.C. § 362(c)(2).] or

iii. The debtor is denied or granted a discharge (usually about sixty days after the creditors meeting in a Chapter 7 case or, in a Chapter 13 case, after the debtor completes her Chapter 13 plan, generally within three to five years of the debtor's bankruptcy). [11 U.S.C. § 362(c)(2).]

b. The automatic stay against actions against property of the bankruptcy estate remains in effect until the bankruptcy court grants relief from the stay or the property is no longer property of the bankruptcy estate. [*See* 11 U.S.C. § 362(c)(1); see Section XI.B.3, above, for definition of property of the estate.]

c. The duration of the stay is limited in cases where the debtor has multiple filings. [*See* 11 U.S.C. § 362(c)(3).]

4. Effect of confirmation of a Chapter 13 plan on the automatic stay.

a. A debtor's Chapter 13 plan generally (but not always) provides that property of the bankruptcy estate becomes the debtor's property upon confirmation of the plan, except to the extent necessary to fund the plan. [*See* 11 U.S.C. § 1327(b).]

b. When the property of the bankruptcy estate becomes the debtor's property following confirmation of the debtor's Chapter 13 plan, it is no longer subject to the automatic stay as it applies to property of the bankruptcy estate but remains subject to the automatic stay under 11 U.S.C. § 362(a)(5) and, notwithstanding 11 U.S.C. § 362(b)(2)(B), is held by the debtor free and clear of the interest of a child support creditor to the extent that the child support claim is provided for in the debtor's Chapter 13 plan. [*See* 11 U.S.C. § 1327(c); *In re McGrahan*, 459 B.R. 869, 874 (B.A.P. 1st Cir. 2011) (upon confirmation, "a creditor's rights and interests are defined within the boundaries of the plan, and proceedings that are inconsistent with the confirmed plan are improper, even if they fall within an exception to the automatic stay").]

5. Relief from the stay.

a. A North Carolina district court lacks jurisdiction to grant relief from the automatic stay. Only the federal bankruptcy court can grant relief from the automatic stay. [*See* 11 U.S.C. § 362(d); see Section XI.C.6, below, for state court's authority to determine applicability of the automatic stay to a state court proceeding.]

b. An obligee may file a motion with the federal bankruptcy court seeking relief from the automatic stay. [*See* Fed. R. Bankr. P. 4001(a).]

c. A motion for relief from the automatic stay is automatically granted thirty days after the motion is filed unless the bankruptcy court, after hearing, orders that it be continued. [11 U.S.C § 362(e).]

d. A bankruptcy court generally will grant relief from the automatic stay to allow collection of child support obligations that accrue **after** an obligor files for bankruptcy.

e. An obligor generally may stipulate to relief from the automatic stay with respect to child support enforcement if it is approved by the bankruptcy court on the debtor's motion after notice to creditors. [Fed. R. Bankr. P. 4001(d).]

f. A nondebtor spouse's motion for relief from the automatic stay, filed in former husband's Chapter 13 proceeding, was granted as to the following obligations of the debtor spouse, allowing the nondebtor spouse to proceed on all of her state court remedies: ongoing child support pursuant to a separation agreement, past due prepetition child support as ordered in a state court contempt proceeding, and repayment of $8,000 that debtor took from son's account, all of which were found to be domestic support obligations. [*In re Miller*, 501 B.R. 266 (Bankr. E.D. Pa. 2013) (stay not lifted

on the debtor's obligation in the separation agreement to cooperate in the sale of the marital residence).]

6. A state district court judge may determine whether a matter pending before the court is stayed by a party's bankruptcy.
    a. If an obligor asserts the automatic stay as a defense in a child support enforcement proceeding in state court, the district court judge in the pending child support action may determine whether enforcement of the child support order violates the automatic stay, and the state court's decision regarding the applicability of the automatic stay is res judicata in the pending bankruptcy case. [*See In re Singleton*, 230 B.R. 533 (B.A.P. 6th Cir. 1999) (stating that the debtor confused jurisdiction to grant relief from the stay under 11 U.S.C. § 362(d), over which the bankruptcy court has exclusive jurisdiction, with jurisdiction to determine whether the stay applies in the first place, which a nonbankruptcy court may determine).]
    b. In *In re Singleton*, 230 B.R. 533 (B.A.P. 6th Cir. 1999), the state court determined that the debtor's personal Chapter 13 bankruptcy did not stay the foreclosure sale of property owned by the debtor's corporation, a decision which the Bankruptcy Appellate Panel determined was within the jurisdiction of the state court.

D. Status, Priority, and Payment of Child Support Claims

1. Priority of domestic support obligations (DSOs).
    a. An unsecured claim for a DSO, including one assigned to a government agency or owed directly to a governmental unit, is entitled to payment as a first priority claim. [11 U.S.C. § 507(a)(1); *In re Smith*, Case No. 07-01509-8-JRL (E.D.N.C. Sept. 13, 2007) (under § 507(a)(1), a DSO is elevated ahead of all administrative costs, including attorney fees).]
    b. A divorce-related debt that does not qualify as a DSO is a general unsecured claim with no priority. [11 U.S.C. § 507(a) (no priority for § 523(a)(15) debt in the general priority provision). *See also In re Bornemann*, No. 07-cv-528-JPG, 2008 WL 818314 (S.D. Ill. Mar. 21, 2008) (noting that a debt that results from a property settlement is a general unsecured claim with no priority).]
    c. Language in an incorporated separation agreement that specifically assigned certain marital debt to each party for payment and waived child support and spousal support was an equitable division of property and was not a DSO entitled to priority. [*In re Ludwig*, 502 B.R. 466 (Bankr. W.D. Va. 2013).]
2. Treatment of domestic support obligations (DSOs) in a Chapter 13 plan.
    a. Prebankruptcy DSOs (arrearages).
        i. With two exceptions, a Chapter 13 plan must provide for full payment of all claims entitled to priority under Section 507 of the Bankruptcy Code, which includes prebankruptcy DSOs. [11 U.S.C. § 507(a)(1); 11 U.S.C. § 1322(a)(2).] Full payment is required unless:
            (a) The claim holder consents to different treatment [11 U.S.C. § 1322(a)(2).] or
            (b) The unsecured claim for a DSO has been assigned to a government agency for collection purposes only and the debtor's plan commits all the debtor's

disposable income to plan payments required for the five-year period allowed to complete the plan. [11 U.S.C. § 1322(a)(4); 11 U.S.C. § 507(a)(1)(B).]

ii. A Chapter 13 plan may provide for payment of secured or unsecured prebankruptcy child support arrearages through the bankruptcy trustee regardless of whether the claim is entitled to priority under 11 U.S.C. § 507(a).

iii. To the extent that an obligor's Chapter 13 plan provides for payment of prebankruptcy child support arrearages, an obligee may not take any action to enforce the arrearage against the obligor's income or property following confirmation of the Chapter 13 plan. [*See* 11 U.S.C. § 1327(c).]

b. Postbankruptcy DSOs (current support obligations).

i. In a Chapter 13 case, child support payments that become due after an obligor files for bankruptcy must be paid "outside" the obligor's Chapter 13 plan rather than through the bankruptcy trustee.

ii. An obligee, however, may object to confirmation of the obligor's Chapter 13 plan if the obligor's disposable income is insufficient to pay the obligor's current child support obligation plus the obligor's necessary living expenses and payments under the Chapter 13 plan. [*See* 11 U.S.C. § 1325(a)(6); *In re Dorf*, 219 B.R. 498 (Bankr. N.D. Ill. (1998) (debtor's Chapter 13 plan not feasible when, after paying for personal needs, funds were sufficient to pay only the prebankruptcy support arrearage, leaving nothing to make the postbankruptcy monthly spousal support obligation).]

c. Safeguards to ensure payment of pre- and postbankruptcy DSOs.

i. A Chapter 13 plan may not be confirmed if the debtor has not paid all DSOs that have accrued after the filing of the petition if the debtor is required to do so by a judicial or administrative order. [11 U.S.C. § 1325(a)(8).]

ii. A Chapter 13 plan may be dismissed if the debtor fails to pay any DSOs that have accrued after the filing of the petition. [11 U.S.C. § 1307(c)(11).]

iii. A court may refuse to grant a discharge if the debtor has failed to pay all prebankruptcy and postbankruptcy DSOs in accordance with a judicial or administrative order and, with respect to prebankruptcy DSOs, in accordance with the Chapter 13 plan. [11 U.S.C. § 1328(a).]

3. Jurisdiction to determine amount, status, and priority of a claim.

a. If the obligor or trustee files an objection to the obligee's claim for child support, the bankruptcy court has jurisdiction to determine the amount, status, and priority of the claim. [*See* 11 U.S.C. § 502; Fed. R. Bankr. P. 3007.]

b. A prior decision by a state court determining the validity of a child support claim or the amount of child support arrearages owed by an obligor who files for bankruptcy is res judicata and may not be collaterally attacked by the obligor in the pending bankruptcy case. [*See In re Sullivan*, 122 B.R. 720 (Bankr. D. Minn. 1991) (res judicata precluded Chapter 7 debtor from contesting the existence, validity, and amount of debt arising from default judgment of $20,000 for unlawful battery); *see also In re Audre, Inc.*, 202 B.R. 490 (Bankr. S.D. Cal. 1996) (federal district court lacks

jurisdiction to review final determinations of state court decisions), *aff'd*, 216 B.R. 19 (B.A.P. 9th Cir. 1997).]

c. A bankruptcy court may abstain from determining the amount of a child support claim in the pending bankruptcy case and allow a state court to determine the amount of the arrearage. [28 U.S.C. § 1334(c). *See In re Kriss*, 217 B.R. 147 (Bankr. S.D.N.Y. 1998) (listing seven factors used to determine whether to remand matter to state court), and *In re Franklin*, 179 B.R. 913 (Bankr. E.D. Cal. 1995) (balancing twelve factors when considering discretionary abstention).]

E. Dischargeability of Domestic Support Obligations and Other Divorce-Related Claims

1. Nondischargeable debts under 11 U.S.C. § 523(a)(5) include:
   a. Debts for a DSO owed directly to a governmental unit; [11 U.S.C. § 101(14A)(A)(ii).]
   b. Debts for child support that have been voluntarily assigned to a nongovernmental entity or individual for the purpose of collection only; [11 U.S.C. § 101(14A)(D).]
   c. Debts owed to the debtor's child or to the parent, legal guardian, or responsible relative of the debtor's child; [11 U.S.C. § 101(14A)(A)(i).] and
   d. Debts that are in the nature of support established pursuant to provisions in a separation agreement or property settlement agreement. [11 U.S.C. §§ 101(14A)(B) and (C)(i). *See In re Crosby*, 229 B.R. 679 (Bankr. E.D. Va. 1998) (agreement to pay college expenses was in nature of additional "support," and thus was not dischargeable in bankruptcy); *In re Johnson*, 397 B.R. 289 (Bankr. M.D.N.C. 2008) (husband's agreement in a separation agreement to pay second deed of trust on marital residence was obligation in the nature of support for wife and child, was not dischargeable, and had to be paid in full under husband's Chapter 13 plan).]
2. Procedure and jurisdiction to determine the dischargeability of a claim.
   a. The debtor or any creditor may file an adversary proceeding in bankruptcy court at any time to determine the dischargeability of a child support claim. [Fed. R. Bankr. P. 4007(a) and (b).]
   b. If an adversary proceeding regarding the dischargeability of a child support claim has not been filed and decided by the bankruptcy court, a state court has concurrent jurisdiction with the federal bankruptcy court to determine the dischargeability of the support claim, and its decision regarding dischargeability is res judicata. [*See In re McGregor*, 233 B.R. 406 (Bankr. S.D. Ohio 1999) (finding that a state court has jurisdiction to decide that a debt is nondischargeable for the debtor's failure to list the creditor in its schedules); *see also In re Franklin*, 179 B.R. 913 (Bankr. E.D. Cal. 1995) (discussing "poorly understood" question regarding the concurrent jurisdiction of state and federal courts to determine whether particular debts are discharged in a bankruptcy case).]
   c. A debtor has the right to remove a case involving the dischargeability of a child support claim from state court to the federal bankruptcy court. [28 U.S.C. § 1334(b) and 28 U.S.C. § 1452(a).]

3. Discharge in a Chapter 7 case commenced on or after Oct. 17, 2005.
    a. A debt for a domestic support obligation (DSO) is nondischargeable in a Chapter 7 case. [11 U.S.C. § 523(a)(5); 2005 Saxon Bulletin.]
    b. A divorce-related debt that is not a DSO is nondischargeable in a Chapter 7 case. [11 U.S.C. § 727(b); 11 U.S.C. § 523(a)(15); 2005 Saxon Bulletin.]
    c. Thus, in Chapter 7 cases commenced on or after Oct. 17, 2005, distinctions between a DSO, governed by 11 U.S.C. § 523(a)(5), and other types of divorce-related debts, governed by 11 U.S.C. § 523(15), are immaterial, as both types of debts are nondischargeable. [*In re Johnson*, 397 B.R. 289 (Bankr. M.D.N.C. 2008) (citing *In re Douglas*, 369 B.R. 462 (Bankr. E.D. Ark. 2007)).]
4. Discharge in a Chapter 13 case commenced on or after Oct. 17, 2005.
    a. A debt for a domestic support obligation (DSO) is nondischargeable in a Chapter 13 case. [11 U.S.C. § 523(a)(5); 11 U.S.C. § 1328(a)(2); *In re Hutchens*, 480 B.R. 374 (Bankr. M.D. Fla. 2012) (a Chapter 13 discharge has no impact on unpaid back child support and alimony arrearages and does not discharge those debts).]
    b. A divorce-related debt that is not a DSO is dischargeable in a Chapter 13 case. [11 U.S.C. § 1328(a)(2) (no exception for § 523(a)(15) debt); *In re Hutchens*, 480 B.R. 374, 386 (Bankr. M.D. Fla. 2012) (noting that "the law is now well-settled that a claim for a property settlement arising from divorce proceedings can . . . be discharged in a Chapter 13 case if a debtor makes all the required payments under a plan and receives a full compliance discharge under [11 U.S.C.] § 1328(a)."] Thus, a Chapter 13 debtor will be discharged from a § 523(a)(15) divorce-related debt that was not paid in full under the plan provided the debtor made all payments required by the Chapter 13 plan. A full compliance discharge does not mean that the creditor spouse's divorce-related debt that was not a DSO was paid in full. [*See In re Siegel*, 414 B.R. 79 (Bankr. E.D.N.C. 2009) (Chapter 13 debtor's obligation to indemnify and hold his former spouse harmless with respect to the parties' home equity line of credit debt was not a DSO entitled to priority; rather, the hold-harmless agreement was part of the parties' property settlement and, as such, was not a priority claim that had to be paid in full).] A full compliance discharge means that the debtor spouse made all payments required under the plan and any balance due the creditor spouse after completion of the plan is discharged.
    c. Since a divorce-related debt that is not a DSO is dischargeable in a Chapter 13 case under 11 U.S.C. § 1328(a), the end result is that a debtor who receives a discharge under 11 U.S.C. § 1328(a) may discharge a debt that cannot be discharged in a Chapter 7 case. Thus, whether a debt is determined to be a DSO or a divorce-related debt that is not a DSO is important in a Chapter 13 case.
    d. **EXCEPTION**: A divorce-related debt that is not a DSO is not discharged in a Chapter 13 case when the debtor applies for and is granted a discharge pursuant to 11 U.S.C. § 1328(b), referred to sometimes as a hardship or best efforts discharge. [11 U.S.C. § 523(a).]
        i. In some cases, a debtor is unable to complete the payments required by a Chapter 13 plan. If the debtor's failure to complete all plan payments is due to circumstances for which the debtor should not justly be held accountable,

unsecured creditors received at least the amount that they would have received in a Chapter 7 proceeding, and modification of the debtor's Chapter 13 plan is not practicable, the bankruptcy court may grant the debtor a discharge under 11 U.S.C. § 1328(b). [11 U.S.C. § 1328(b).]

ii. The discharge the debtor receives pursuant to 11 U.S.C. § 1328(b) is more limited than a full compliance discharge under 11 U.S.C. § 1328(a) and does not discharge a divorce-related debt that does not qualify as a DSO. [*See* 11 U.S.C. § 1328(c) (a discharge under § 1328(b) does not discharge any debt specified in 11 U.S.C. § 523(a)); *In re Hutchens*, 480 B.R. 374, 386 n.11 (Bankr. M.D. Fla. 2012) (under a § 1328(b) discharge, "none of the debts incurred in the course of a divorce proceeding would be dischargeable, including a property division.").]

Chapter 3: **Child Support**

Checklists

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Checklists

Findings for Initial Child Support

- ☐ 1. Personal jurisdiction
  - ☐ Notice or service of process
  - ☐ Relationship of defendant to the State (for due process, "minimum contacts")
- ☐ 2. Names and birth dates of all children covered by the order
- ☐ 3. Names and birth dates of both parties
- ☐ 4. Relationship of parties and relationship of each party to the child(ren)
  - ☐ If someone other than a parent is ordered to pay support, need findings to establish that the person has undertaken to pay support in a written agreement or that the person is a grandparent obligated to pay support pursuant to G.S. 50-13.4 for a grandchild born to a minor child
- ☐ 5. If parties have an unincorporated separation agreement addressing child support, see paragraph 17, below, for additional required findings
- ☐ 6. Present actual income of both parents
- ☐ 7. If imputing income rather than using actual present income to set support, see paragraph 18, below, for additional required findings
- ☐ 8. Custodial arrangement
- ☐ 9. For N.C. Child Support Guidelines cases, identify appropriate worksheet and attach completed child support worksheet to child support order
  - ☐ When income level exceeds the Guidelines and worksheets are not used, see paragraph 19, below, for additional required findings
  - ☐ When requested to deviate from the Guidelines, when deviating upon the court's own motion, or when evidence has been presented as to the factors in G.S. 50-13.4(c), even though no request for deviation was made, see paragraph 20, below, for additional required findings
- ☐ 10. Work-related child care expenses, if any
- ☐ 11. Health care premiums; portion attributable to child(ren) if family policy
- ☐ 12. Amount of support ordered to be paid
- ☐ 13. Date from which support is to be paid
  - ☐ Presumption is that support is payable from date action is filed
    - ☐ Payment from time after filing needs findings to support a deviation. See paragraph 20, below, for additional required findings.
  - ☐ If support is ordered for time before complaint was filed (retroactive support), see paragraph 21, below, for additional required findings
- ☐ 14. Manner of payment
  - ☐ IV-D cases: payable only to the State Child Support Collection and Disbursement Unit
  - ☐ Non-IV-D cases: payable to custodial parent, other person, or to the State Child Support Collection and Disbursement Unit
  - ☐ Lump sum, periodic monthly payment, and/or transfer of property

- ☐ 15. Income withholding
  - ☐ Must order withholding in all IV-D cases unless court finds that:
    - ☐ Obligor is unemployed; or
    - ☐ The amount of obligor's disposable income is unknown; or
    - ☐ Both parties agree to an alternative method of payment
  - ☐ Must order income withholding in all non-IV-D cases unless court finds that:
    - ☐ Parties agree in writing to an alternative method; or
    - ☐ Considering obligor's employment history and record of meeting financial obligations in a timely manner, there is a reasonable and workable plan that ensures consistent and timely payments by an alternative method of payment; or
    - ☐ Good cause exists not to require withholding
- ☐ 16. Allocation of unreimbursed medical and dental expenses
- ☐ 17. When parties have an unincorporated separation agreement regarding child support
  - ☐ Amount provided for support in the agreement
  - ☐ The needs of the child(ren) at the time of the hearing and all factors listed in G.S. 50-13.4(c) about which evidence is presented
    - ☐ G.S. 50-13.4(c) factors: 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
  - ☐ Considering the findings listed in the first two checkboxes under paragraph 17 above, a conclusion regarding whether party has rebutted presumption that amount provided in agreement is just and reasonable, by the greater weight of the evidence
  - ☐ If presumption is not rebutted, support must be set in amount provided in agreement; finding that application of the Guidelines would be inappropriate
  - ☐ If presumption rebutted, set initial support with all findings set out above for initial support
  - ☐ No retroactive support can be set for time period when the parties had an unincorporated separation agreement unless there is a finding that expenses were incurred on behalf of a child by the parent seeking support due to an emergency
- ☐ 18. Imputing income
  - ☐ Current actual income of parties
  - ☐ Actions that cause parent's income to be lower than it should be
  - ☐ Findings to support conclusion that parent has suppressed income in bad faith:
    - ☐ Deliberately depressing income to avoid family responsibilities
    - ☐ Acting in deliberate, careless, or reckless disregard of obligation to pay support
    - ☐ Acting with naïve indifference to the needs of the child(ren) for support
  - ☐ Amount of income to be imputed
  - ☐ Basis for amount imputed
    - ☐ Work history
    - ☐ Minimum wage if no work history
    - ☐ Ability to earn more income, to include prevailing job opportunities and earning levels in the community

- ☐ 19. High-Income Case
  - ☐ Parent's combined income exceeds Guideline maximum ($30,000 per month or $360,000 per year)
  - ☐ Reasonable needs of the child, considering the income and expenses of the parents and the accustomed standard of living of the family
    - ☐ List of child-related expenses
  - ☐ Parents' relative ability to provide support
    - ☐ List of income and reasonable expenses
  - ☐ Amount of support ordered
- ☐ 20. Deviating from the Guidelines
  - ☐ Guideline amount of support
  - ☐ Child's reasonable needs and ability of each parent to provide support
    - ☐ Findings regarding 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
  - ☐ Reason why the Guideline amount of support would not meet or would exceed the reasonable needs of the child, or reason why the application of the Guidelines would be otherwise inappropriate or unjust
  - ☐ Basis for the amount ordered
  - ☐ If deny request to deviate, still make findings required above and explain why deviation is denied
- ☐ 21. Retroactive support (support for time before child support complaint was filed)
  - ☐ Ordered as reimbursement to custodial parent for expenses incurred on behalf of child for up to three years before complaint filed
  - ☐ Amount determined by Guidelines (requires all findings set out in initial support order set out above) or based on parent's fair share of actual expenditures relating to the child during the time period for which support is sought
  - ☐ If amount based on actual expenditures, findings need to show expenses incurred by person seeking support, that expenses were reasonably necessary, that plaintiff paid defendant's share of the expenses, and that defendant had the ability to pay his or her fair share during time period in the past when expenses were incurred, as opposed to when matter heard
  - ☐ If award based on Guidelines, need findings to apply Guidelines based on information at beginning of period for which support is sought
  - ☐ If reimbursement is denied, order must explain why no reimbursement
- ☐ 22. If terminating support, effective date or date obligation ends

Findings for Modification of Child Support

- ☐ 1. Personal and subject matter jurisdiction
  - ☐ If it is a support order of another state or a foreign support order (*see* G.S. 52C-1-101(21)), Uniform Interstate Family Support Act (UIFSA) (G.S. Chapter 52C) grounds for modification jurisdiction and facts to show due process requirements are met ("minimum contacts")
  - ☐ If it is an order entered by N.C. court, need to show basis for North Carolina's jurisdiction to modify the order pursuant to UIFSA
  - ☐ Notice or service of process
- ☐ 2. Retroactive increase in support (modification of obligation for time period prior to filing of motion to modify)
  - ☐ Requires emergency situation,
  - ☐ Findings to support the amount of retroactive support, and
  - ☐ Findings as to parent's ability to pay
- ☐ 3. Prospective modification of support (from date of filing forward in time)—must conclude there has been a substantial change in circumstances since entry of the last support order (or, if incorporated separation agreement, substantial change in circumstances since date of incorporation)
  - ☐ Support order is more than three years old and there is a 15 percent disparity between support ordered and current Guideline support;
  - ☐ Substantial involuntary decrease in the income of one or both of the parties;
  - ☐ Substantial change in the needs of the child(en); or
  - ☐ Significant change in visitation or custody
- ☐ 4. If court finds substantial change in circumstances, new order must be entered with same findings as those required in setting an initial order for support. See Checklist: Findings for Initial Child Support, above.

Findings for Attorney Fees

- ☐ 1. Fees awarded
  - ☐ Party seeking fees is an interested party acting in good faith
  - ☐ Party has insufficient means to defray expenses of suit
  - ☐ In support-only case, additional finding that obligor refused to provide adequate support
  - ☐ Reasonableness of fees, including
    - ☐ Nature and scope of services rendered
    - ☐ Attorney's skill and time required
    - ☐ Attorney's hourly rate
    - ☐ Reasonableness of that rate compared to other lawyers in community
  - ☐ If support claim is combined with other claims for which fees not statutorily authorized (such as equitable distribution or termination of parental rights), findings must show that the fees awarded are based only on time attributed to the claims for which fees authorized by statute
- ☐ 2. Fees denied
  - ☐ Findings as to reason(s) for denial