



Family Law Update

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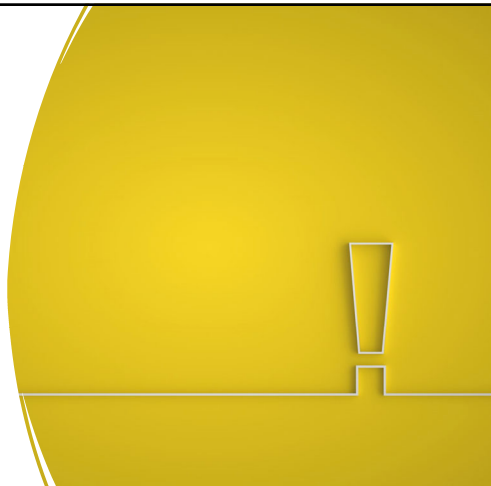
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Custody

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Jurisdiction

- *Sulier v. Veneskey* (p. 2)
 - “Person acting as a parent”
 - GS 50A-102(13)
 - Jurisdiction by necessity
 - GS 50A-201(a)(4)



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Sulier v. Veneskey (p. 2)

- Child, mom and step-father in NC 2017-2020
- Father in SC
- May 10, 2020: mom dies
- May 18, 2020: Maternal grandmother takes child to Michigan with consent of step-father; step-father stays in NC
- July 2020: Father files for custody in NC
- Does NC have jurisdiction?

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GS 50A-201(a): initial custody jurisdiction

- (a) Except as otherwise provided in G.S. 50A-204, a court of this State has jurisdiction to make an initial child-custody determination only if:
 - (1) This State is the **home state** of the child on the date of the commencement of the proceeding, **or was the home state** of the child within six months before the commencement of the proceeding, and the child is absent from this State but **a parent or person acting as a parent continues to live in this State**;
 - (2) **A court of another state does not have jurisdiction under subdivision (1)**, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:
 - a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a **significant connection** with this State other than mere physical presence; and
 - b. **Substantial evidence** is available in this State concerning the child's care, protection, training, and personal relationships;
 - (3) All courts having jurisdiction under subdivision (1) or (2) have **declined** to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or
 - (4) **No court of any other state** would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

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GS 50A-102

- (7) **"Home state"** means the state in which a child **lived with a parent or a person acting as a parent** for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.
- (13) **"Person acting as a parent"** means a person, other than a parent, who:
 - a. Has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child-custody proceeding; and
 - b. Has been awarded legal custody by a court or claims a right to legal custody under the law of this State.

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Sulier v. Veneskey (p. 2)

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Hosch v. Hosch-Carroll (p. 5)

Child born in NC; lived in NC with mother until March 2020

Child and mother moved to Texas in March 2020

Child came to NC to visit May 2020 until August 2020

Child returned to mother in Texas in August 2020

Mother sent child to live with grandmother in NC in December 2020

Grandmother filed for custody in NC in April 2021

Does NC have jurisdiction?

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- The court of appeals has adopted a "totality of the circumstances" approach to determine whether an absence from a state is a temporary absence or whether it is a change of residence sufficient to lose home state status. [Chick v. Chick, 164 N.C. App. 444, 596 S.E.2d 303 (2004); Halili v. Ramnishta, 273 N.C. App. 235, 848 S.E.2d 542 (2020).]

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3rd Party
Custody

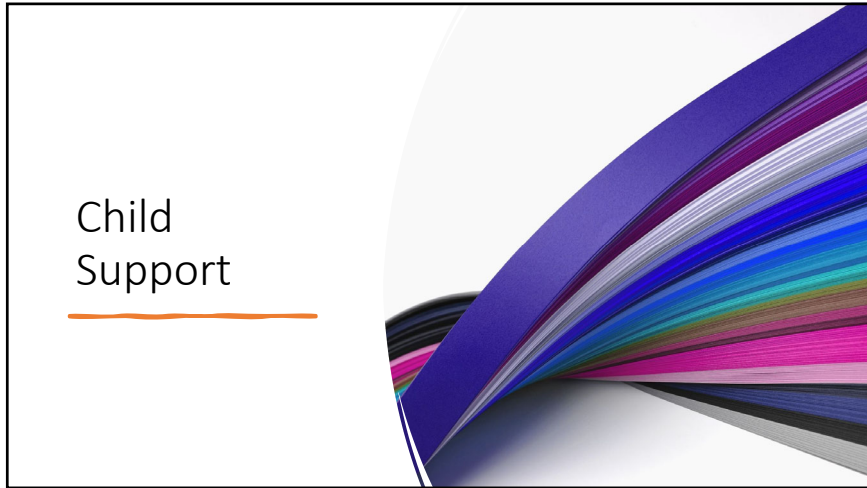
- Duncan v. Transeau and Duncan, unpublished opinion (p.7)
 - For permanent custody determination, trial court erred by relying on determination in a temporary custody order that parents had waived their constitutional right to custody.
 - "On a fundamental level, a temporary custody hearing differs significantly from a permanent custody hearing in terms of the due process afforded the parties."

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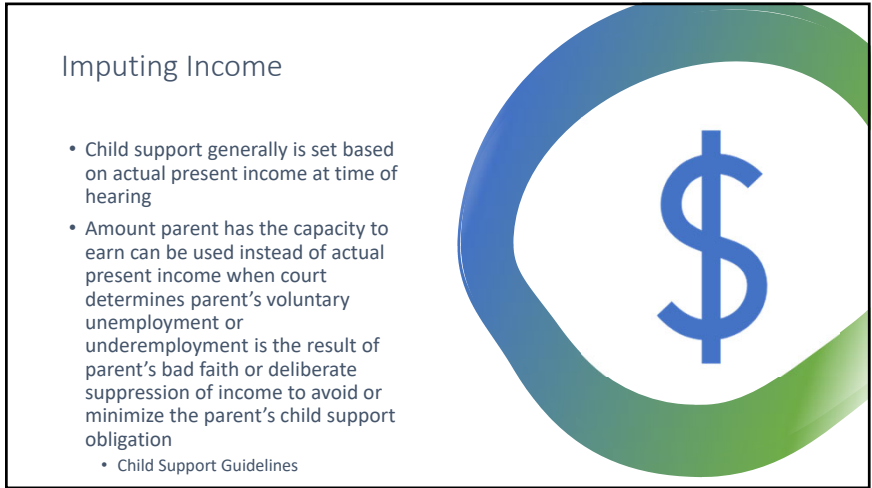
Mandatory disclosure
of experts

- Experts must be disclosed before trial, even if not requested in discovery
- Rule 26 does not provide a time frame for disclosure, so party must disclose within reasonable time before trial
- Trial court has discretion to determine appropriate sanction for failure to disclose within reasonable time
- Sanction can be exclusion of expert testimony when the failure to disclose gives party an unfair technical advantage
 - *Aman v. Nicholson*, 885 SE2d 100 (2023)(p. 8)
 - See also *Myers v. Myers*, 269 NC App 237 (2020)

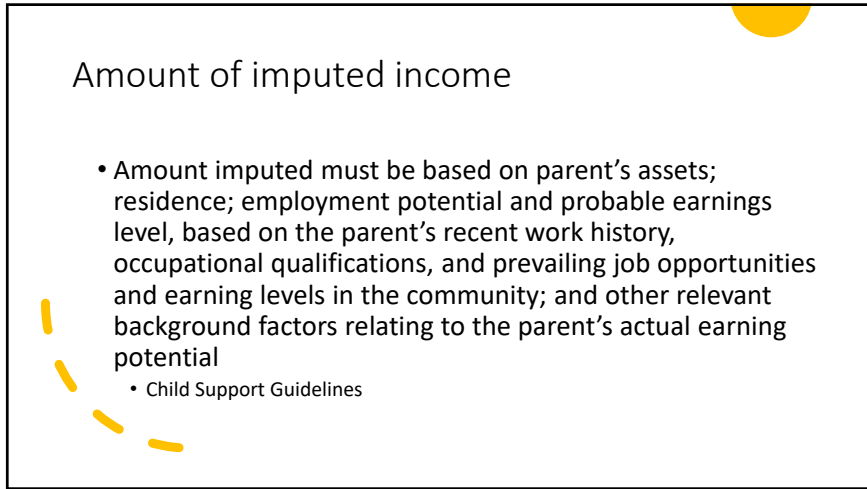
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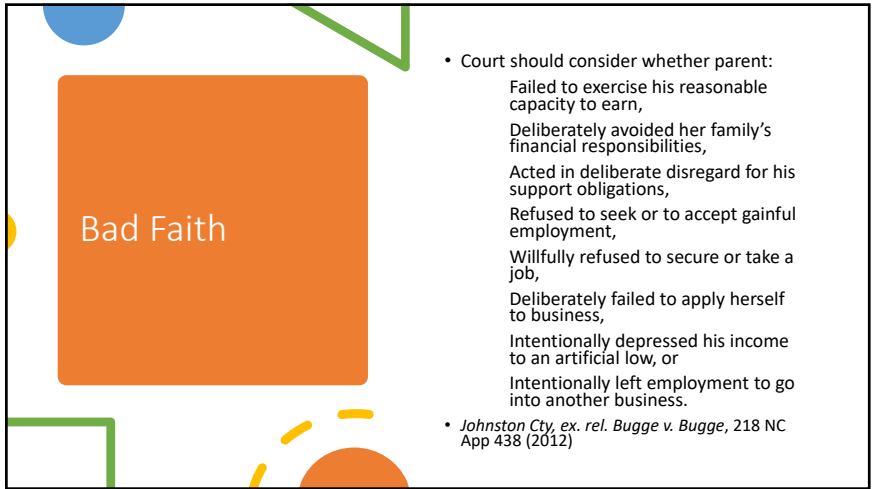
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Cash v. Cash,

286 NC App 196 (2022)(p. 10)

- Father's failure to provide income verification as required by the Child Support Guidelines and by local rules was evidence that he was willfully attempting to suppress his income to avoid paying support
- Failure to provide income verification, along with finding that his evidence regarding the loss of his job was not credible, supported the trial court's conclusion that he acted in bad faith



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Koonce v. Koonce, unpublished, 286 NC App 380 (2022)(p. 11)

Was father's motion to modify sufficient?

- Cited GS 50-13.7
- Stated there had been "a substantial change in circumstances", and
- Stated that he "no longer has access to funds to support his previous level of spending."

Assuming it was sufficient, can father introduce evidence of his struggle with depression that was not specifically mentioned in the motion?

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Rule 7(b)(1), Rules of Civil Procedure

"An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion."

Purpose of the Rule is to assure that the opposing party can comprehend the basis for the motion and have a fair opportunity to respond.

- Koonce (p. 11)

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Can father offer evidence of depression?

- "Mother could expect the trial court to consider evidence of father's current finances, as well as the effect that father's depression could have on his earning potential because father's motions to modify child support and postseparation support were based on a change in his financial circumstances."

- Koonce (p. 11)

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Barham v. Barham,
286 NC App 764 (2022)(p. 13)

- Support order required father to pay \$716 per month
- January 2020, father began paying one cent per month
- February 2020, father filed motion asking court to establish he was entitled to a credit for overpayment of support
- Mother filed motion for contempt and Rule 11 sanctions
- Trial court held father in contempt and ordered sanctions

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Barham:
credit for
overpayment of
support

- Trial court can award a credit when court concludes that “an injustice would exist if no credit is given.”
 - Rule 11 sanction was improper
- A parent cannot unilaterally withhold support; must apply to court for modification
 - Contempt was proper

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Attorney fees

50-13.6. Counsel fees in actions for custody and support of minor children.

- “In an action or proceeding for the custody or support, or both, of a minor child, ...the court may in its discretion order payment of reasonable attorney’s fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact 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; ...”

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Limerick v. Rojo-Limerick
885 SE2d 96 (2023)(p. 14)

Plaintiff father ordered to pay support in support only action

- Custody resolved by consent order 9 months before support hearing

Defendant mother ordered to pay attorney fees of father

- Trial court found father acted in good faith, had insufficient means, and had paid reasonable support since separation

Court of appeals reversed

- GS 50-13.6 requires court to find person responsible for paying support had not paid reasonable support before hearing

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Domestic Violence

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§ 50B-1. Domestic violence; definition.

(a) Domestic violence means the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:

- (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
- (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
- (3) Committing any act defined in G.S. 14-27.21 through G.S. 14-27.33.

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Act of Domestic Violence

• *Rollings v. Shelton*, 286 NC App 693 (2022)(p. 15)

- Rule 12(b)(6) dismissal inappropriate where plaintiff alleged defendant had choked her 5 days before she filed the complaint

• *Chociej v. Richburg*, 883 SE2d 649 (2023)(p. 15)

- Issuance of DVPO was mandatory where trial court found defendant assaulted plaintiff on two occasions

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Equitable Distribution

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Delay in entry of DRO (QDRO)

- *Bracey v. Murdock*, 286 NC App 191 (2022)(p. 17)
 - Motion filed 16 years after entry of consent order
 - Trial court denied, citing statute of limitations
 - COA affirmed on different grounds
 - Request was actually an untimely Rule 59 motion to amend judgment
- *Welch v. Welch*, COA May 2, 2023 (p. 20)
 - Motion filed 11 years after entry of judgment
 - Contempt and Rule 70 requests barred by statute of limitations
 - Entry of DRO effectuates and completes the judgment; is not an “action on a judgment” and is not barred by statute of limitations

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Dillree v. Dillree, 882 SE2d 354 (2022)(p. 18)

- An ED claim cannot be filed until the parties separate
- Separation for ED is defined the same as separation for divorce
 - Parties physically separate with at least one having the intention to permanently end marital cohabitation
- An incompetent spouse cannot form the required intent to separate
- A guardian cannot cause a separation for an incompetent spouse

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Read v. Read, COA April 18, 2023 (p. 19)



Statutes of limitation do not apply to claims for equitable distribution



Claim accrues when parties separate and expires upon entry of divorce if not asserted before divorce



Claim filed 17 years after separation was timely when filed before divorce

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Brown v. Brown, COA May 2, 2023 (p. 22)

- Chapter 13 bankruptcy discharge did not bar wife's ED claim for share of marital portion of former husband's military pension
- State and federal law give a spouse a “fixed proprietary interest” in a military pension that is not subject to discharge in bankruptcy

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Distributive Awards

- *Crowell v. Crowell*, COA June 6, 2023 (p. 23)
 - Court cannot order that separate property be sold to pay award
- Trial court can consider separate property when determining how party will pay award
- Trial court cannot reduce distributive award to judgment until some amount is past due

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Alimony

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§ 50-16.3A. Alimony.

(a) Entitlement. - If the court finds that the dependent spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, the court shall not award alimony.

If the court finds that the supporting spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, then the court shall order that alimony be paid to a dependent spouse.

If the court finds that the dependent and the supporting spouse each participated in an act of illicit sexual behavior during the marriage and prior to or on the date of separation, then alimony shall be denied or awarded in the discretion of the court after consideration of all of the circumstances.

Any act of illicit sexual behavior by either party that has been condoned by the other party shall not be considered by the court.

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Watson v. Watson,
885 SE2d 858 (2023)(p. 24)

- Summary judgment denying wife alimony was “premature” where wife admitted she engaged in illicit sexual behavior before separation, but discovery was outstanding regarding whether husband also engaged in illicit sexual behavior before separation

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Was this okay?

Wife filed for alimony, PSS, attorney fees, custody, child support and equitable distribution

Wife took a voluntary dismissal of her PSS claim

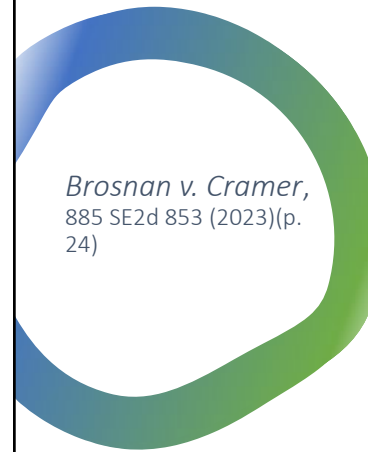
Husband filed separate action for divorce

Divorce granted

Wife files motion for PSS

Trial court orders PSS paid to wife

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Brosnan v. Cramer,
885 SE2d 853 (2023)(p.
24)

- **§ 50-11. Effects of absolute divorce.**

....
(c) A divorce obtained pursuant to G.S. 50-5.1 or G.S. 50-6 shall not affect the rights of either spouse with respect to any action for alimony or postseparation support pending at the time the judgment for divorce is granted.

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Civil No-Contact Orders

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Haidar v. Moore

286 NC App 415 (2022)(p. 27)

“Rule 52. Findings by the court.

(a) Findings -

(1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.”

Findings are required even when court determines plaintiff has failed to prove grounds for a civil no-contact order.

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