

Family Law Update

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When can one judge sign an order/judgment for another judge?

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Rule 63, Rules of Civil Procedure

Disability of a judge.

• If by reason of death, sickness or other disability, resignation, retirement, expiration of term, removal from office, or other reason, a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, **including entry of judgment**, may be performed:

- (1) In actions in the superior court by the judge senior in point of continuous service on the superior court regularly holding the courts of the district. ...
- (2) In actions in the district court, **by the chief judge of the district**, or if the chief judge is disabled, by any judge of the district court designated by the Director of the Administrative Office of the Courts.

• If the substituted judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or hearing or for any other reason, the judge may, in the judge's discretion, grant a new trial or hearing.



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Rule 63

• Chief judge cannot make findings of fact or enter conclusions of law based on evidence he/she did not hear

- *In the Matter of E.D.H.*, 381 N.C. 395 (2022)
 - TPR signed by chief judge was valid because findings of fact, conclusions of law, and decretal announcement made "in chambers by [the trial judge]"
- *In the Matter of K.N.*, 874 SE2d 594 (N.C. 2022)
 - TPR signed by chief judge was invalid where all findings made by trial judge were vacated on appeal and chief judge heard no evidence on remand.
 - New trial required



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Child Custody



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Modification

- Three conclusions of law are required to support a modification:
 - That there has been a substantial change in circumstances;
 - That the substantial change affected the welfare of the child; and
 - That a modification is in the best interest of the child.
- Burdens of proof:
 - The moving party must demonstrate that there has been a substantial change that affects the welfare of the child.
 - "The court bears the responsibility of requiring production of evidence" regarding whether modification is in the best interest of the child.
 - *Cash v. Cash*, 874 SE2d 653 (2022)



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Cash v. Cash (p. 4)

- Trial court abused its discretion by strictly bifurcating the hearing on the motion to modify to prevent father from presenting evidence regarding his contentions regarding the best interests of the child.
- On remand, both parties must be allowed to present evidence on the motion to modify, “including evidence regarding their contentions as to how the changes in circumstances may affect the best interests of the child, either negatively or positively ...”.
- “It is impossible to consider whether a change is a substantial change affecting the child without considering if that change has an effect on the best interest of the child.”

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Davidson v. Tuttle (p. 6)

- Custody order entered August 2019
- Mother filed motion to modify in November 2019
- Evidence of immediate and drastically negative change in behavior of children after entry of August order was sufficient to support the conclusion that there had been a substantial change in circumstances affecting the welfare of the children

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“Relative” vs Parent Custody

- Relatives have standing to seek custody (including visitation) when they allege parents have waived their constitutional right to custody
 - GS 50-13.1(a)
 - “Any parent, **relative**, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided.”
 - **No other relationship need be established**
 - *Rodriguez v. Rodriguez*, 211 NC App 267 (2011) (grandparent)
 - *Yurek v. Shaffer*, 198 NC App 67 (2009)(aunt and uncle)

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Drum v. Drum (p. 4)

- Grandmother had standing to seek custody
- Clear, cogent and convincing evidence supported trial court conclusion that both parents waived their constitutional right to custody
- Mother
 - Unfit due to substance abuse
- Father
 - “withheld his presence, his love, his care, the opportunity to display filial affection, and willfully neglected to lend support and maintenance” despite his ability to do so.
 - “knowingly ceded daily care and support of his child” to grandmother for most of the child’s life
 - “failed to check on the child and took few steps as a parent to ensure her upbringing and welfare until the commencement of these proceedings”

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Webb v. Jarvis (p. 5)

- Maternal aunt v. father
- Clear, cogent and convincing evidence supported trial court conclusion that father waived his constitutional right to custody
 - Allowed aunt to assume all responsibility for the child
 - Made no attempt to set aside aunt’s legal ‘guardianship’ of child
 - Engaged in criminal behavior that resulted in his long-term incarceration

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Child Support

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High Income cases

- “In cases in which the parents’ combined income is above [the Guideline limit] per month, 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, as provided in the first sentence of G.S. 50-13.4(c). The schedule of basic child support may be of assistance to the court in determining a minimal level of child support.”
 - 2020 Child Support Guidelines, p. 2

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High Income Cases

- Amount of support determined on a case-by-case basis
- Findings of fact must support amount ordered
 - Must find actual present income of parents
 - Must “itemize” expenses of child
 - *Jain v. Jain* (p. 8)
 - Must establish the accustomed standard of living to show expenses are reasonable

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Contempt: *Bossian v. Bossian* (p.9)

- Trial court entered an order finding father in civil contempt for failure to pay child support and ED distributive award
- Purge: Pay amount set by court within 42 days following entry of contempt order
- Father filed Rule 59 motion; mother filed Rule 60 motion
- Six months after entry of contempt order, trial court held hearing
- Granted mother’s Rule 60 motion; denied father’s Rule 59 motion
- Ordered father immediately incarcerated for failure to comply with purge
 - Set new purge amount based on father’s testimony at second hearing

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Bossian v. Bossian

- Trial court has discretion to stay incarceration for civil contempt to give party time to pay
- Pending Rule 59 and Rule 60 motions did not extend the stay of incarceration
- Trial court properly denied father’s Rule 59 motion
 - Mother’s evidence of his financial circumstances was sufficient to support findings regarding his ability to pay
 - Father was required to pay full amount of support even when one child resided with him

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GS 50-13.10

- (d) For purposes of this section, a child support payment or the relevant portion thereof, is not past due, and **no arrearage accrues:**
- (1) From and after the date of the death of the minor child for whose support the payment, or relevant portion, is made;
 - (2) From and after the date of the death of the supporting party;
 - (3) **During any period when the child is living with the supporting party pursuant to a valid court order or to an express or implied written or oral agreement transferring primary custody to the supporting party;**
 - (4) During any period when the supporting party is incarcerated, is not on work release, and has no resources with which to make the payment.

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Guidelines: Income from self-employment

- “Gross income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, is defined as **gross receipts minus ordinary and necessary expenses required for self-employment or business operation.**
- 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.**
- **In general, income and expenses from self-employment or operation of a business should be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support obligation.**
- In most cases, this amount will differ from a determination of business income for tax purposes.
- Expense reimbursements or in-kind payments (for example, use of a company car, free housing, 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 personal living expenses.”

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Burden of Proof

Income Verification. Child support calculations under the guidelines are based on the parents' current incomes at the time the order is entered.

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) includes pay stubs, employer statements, or business receipts and expenses, if self-employed.

Documentation of current income must be supplemented with copies of the most recent tax return to provide verification of earnings over a longer period.

Sanctions may be imposed for failure to comply with this provision on the motion of a party or by the court on its own motion.

- 2020 Guidelines

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Britt v. Britt (p. 10)

- Where parent's testimony regarding business expenses was not credible and "was largely evasive with the purpose of misleading the court," the trial court properly declined to deduct any expenses from his business income.
- Trial court properly used amounts deposited into business accounts to determine the parent's income from his business interests.
- Parent was not entitled to deduct from his income amounts paid for ED distributive award and temporary child support

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Retroactive Modification of Support

G.S. 50-13.10

(a) Each past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, or otherwise modified in any way for any reason, in this State or any other state, except that a child support obligation may be modified as otherwise provided by law, and a vested past due payment is to that extent subject to divestment, if, but only if, a written motion is filed, and due notice is given to all parties either:

- (1) Before the payment is due or
- (2) If the moving party is precluded by physical disability, mental incapacity, indigency, misrepresentation of another party, or other compelling reason from filing a motion before the payment is due, then promptly after the moving party is no longer so precluded.

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Berens v. Berens (p. 12)

- Support order for three children entered in July 2018
- Motion to modify filed September 2020 based on one child reaching majority before the motion to modify was filed
- Trial court modified support and ordered mother to repay amounts father paid pursuant to the court order after child reached majority
- Mother argued that trial judge violated GS 50-13.10 by ordering repayment of amounts due before motion to modify was filed

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Retroactive Modification: *Berens*

- GS 50-13.10 prohibits the retroactive modification of "past due" support payments
- Support payments in this case were not "past due" because father paid all payments required by the court order
- Trial court can retroactively modify support that is not past due if equitable circumstances exist which would create an injustice if modification is not allowed
- In this case, fact that mother knew child had reached majority and that father sought a modification of the order supported trial court's decision to order repayment of amounts paid by father after the child reached majority

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Domestic Violence

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Definition of Domestic Violence

- *Keenan v. Keenan*, 877 SE2d 97 (2022) (p. 13)
- GS 50B-1(a)(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”

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GS 14-277.3A Stalking

- (b) Definitions. - The following definitions apply in this section:
- (1) Course of conduct. - **Two or more acts**, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, is in the presence of, or follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.
 - (2) Harasses or harassment. - Knowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and **that serves no legitimate purpose**.

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Legislation

- S.L. 2022-47
 - Magistrates authorized to issue ex parte DVPOs and Civil No-Contact orders can take a complaint and issue a summons
 - Effective December 1, 2022
- S.L. 2022-48
 - Effective December 1, 2022
 - When motion to renew is filed before expiration of DVPO but hearing on motion is set after expiration, court can temporarily renew DVPO upon the ex parte request of plaintiff
 - Temporary renewal is for a fixed period of time until the date of renewal hearing or 30 days from date current order is set to expire, whichever occurs first.

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Equitable Distribution

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What do you do?.....

- You preside over an equitable distribution trial
- At the end of the evidence, you take the matter under advisement
- While working on the judgment, you realize you’re missing critical evidence
 - For example, the date of separation value of the most significant piece of marital property
- Options?

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Shropshire (p. 16)

- Trial court has the discretion to reopen the evidence *sua sponte*, after the end of trial and before the entry of judgment, when the ends of justice require it.

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Valuation

- Marital property must be valued as of the date of separation
 - GS 50-21(b)
- Divisible property must be valued as of the date of distribution
 - GS 50-21(b)
- If no value is established by the evidence, the property cannot be distributed in equitable distribution
 - *Grasty v. Grasty*, 125 NC App 736 (1997)(court can appoint an expert but is not required to do so)
 - GS 50-20.1(d): exception for defined benefit retirement accounts when marital portion is divided equally by deferred distribution

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Valuation methodologies

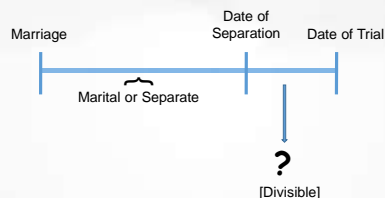
- Trial court is required to 'reasonably approximate' the net value of an asset
 - GS 50-20(c)
 - Net value is fair market value minus encumbrances
 - *Pellom v. Pellom*, 194 NC App 57 (2008)
- A nonexpert property owner may give an opinion as to the value of that property
 - *Finney v. Finney*, 225 NC App 13 (2013)
- The trial court must identify a reliable methodology used to establish the value of an asset, except when valuing personal effects or household property
 - *Roberson v. Robertson*, 174 NC App 784 (2005)
 - *Lawing v. Lawing*, 81 NC App 159 (1986)

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- *Logue v. Logue* (p. 16)
 - Fair market value methodology was sufficiently reliable
 - Price wife paid for her interest in a dental practice two years prior to separation was determined using the fair market value methodology
 - Methodology properly considered the value of the goodwill of the practice
 - Trial court findings established that value had not changed in intervening time
- *Mosiello v. Mosiello* (p. 17)
 - Value of marital residence was established by wife's testimony regarding the tax value of the residence, the balance of the mortgage on the residence, and her opinion as to the value of the home
 - Value of marital automobiles was established by evidence of the Kelly Blue Book value and wife's opinion as to the value of the cars

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Divisible Property: G.S. 50-20(b)(4)



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Divisible Property: Post Separation

- *Passive* changes in value of marital property
 - Changes in value are presumed to be passive
- *Passive* income from marital property
- Property/cash earned as result of marital effort
- *Passive* increases/decreases in marital debt



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- *Mosiello v. Mosiello* (p.17)
 - Change in net value of the marital residence after separation was not divisible property because the change was caused by wife's actions
 - Increase in net value caused by one party paying down encumbrance is an active increase in value
- *Asare v. Asare* (p.19)
 - Passive appreciation in value after the date of separation is divisible only to the extent it is passive appreciation of the marital component of a mixed asset

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Marital debt

- Debt incurred during the marriage by either or both spouses
- Owed on the date of separation
- Incurred for the joint benefit of the parties

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Student loans

- *Purvis v. Purvis* (p.18)

"Here, the parties do not dispute that there was a joint agreement to incur the debt. Nor do the parties dispute that [wife] actively participated in obtaining the loans. The parties' affidavits demonstrate there was a joint benefit, in that their daughter's tuition, books, and living expenses were covered by the loan rather than out-of-pocket expenses. Further, providing [their] daughter with a formal education was something that [they] both wanted and agreed, to do."

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Student Loans

- *Purvis v. Purvis* (p. 18)
 - "Although this is not a tangible benefit in that the [student] loans were not deposited in the parties' account, a tangible benefit is not required under North Carolina law."
- *Cf. Warren v. Warren*, 241 NC App 634 (2015)
 - "In order for the court to classify student loan debt [of a spouse] as marital debt, the parties must present evidence regarding whether the marriage lasted long enough after incurring the debt and receiving the degree for the married couple to substantially enjoy the benefits of the degree or higher earnings."

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Distributive Awards

- There is a presumption that an in-kind distribution is equitable
 - GS 50-20(e)
 - Judgment ordering distributive award must find that presumption has been rebutted
- Presumption is rebutted by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind
 - GS 50-20(e)
- Also rebutted by evidence that an in-kind distribution is not practical
 - *Wirth v. Wirth*, 193 NC App 657 (2008)

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Distributive Awards

- When there are no obvious liquid assets, the judgment must identify assets from which the distributive award may be paid, and if there are none, the court must determine the means by which the party is to pay the award and must adjust the award to offset any adverse financial consequences of using nonliquid assets
 - *Embler v. Embler*, 159 NC App 186 (2003)

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Brady v. Brady (p. 19)

- Presumption rebutted by fact that marital dental practice and office suite needed to be distributed to husband and there were not sufficient other assets to offset that distribution
- Trial court ordered husband to refinance mortgage on the dental office suite to pay the distributive award. Is that okay?
- *Cf. Crowell v. Crowell*, 372 NC 362 (2018)(trial court has no authority to order party to sell property to pay a distributive award)

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Alimony

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Wadsworth v. Wadsworth (p. 21)

- Trial court ordered husband to pay alimony of \$1,900 per month for 20 years and to pay an \$18,026.75 child support arrearage
- Also ordered that he maintain a life insurance policy with a \$550,000 death benefit payable to wife as “security for” the alimony and the child support arrearage
- Is this okay?

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§ 50-16.7

(a) Alimony or postseparation support shall be paid by lump sum payment, periodic payments, income withholding, or by transfer of title or possession of personal property or any interest therein, or a security interest in or possession of real property, as the court may order.

The court may order the transfer of title to real property solely owned by the obligor in payment of lump-sum payments of alimony or postseparation support or in payment of arrearages of alimony or postseparation support so long as the net value of the interest in the property being transferred does not exceed the amount of the arrearage being satisfied.

(b) The court may require the supporting spouse to secure the payment of alimony or postseparation support so ordered by means of a bond, mortgage, or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the supporting spouse to execute an assignment of wages, salary, or other income due or to become due.

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Wadsworth

- Life insurance policy was not ‘security’ for the order because:
- It violated the statutory requirement that a person’s obligation to pay alimony ends upon their death, and
- \$550,000 was more than husband would ever owe, and
- The amount of the policy remained static throughout the 20-year term of alimony

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Asare v. Asare (p. 22)

- “Alimony is ordinarily determined by a party’s *actual* income, from all sources, at the time of the order.”
- “To base an alimony obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed [their] income in bad faith.”
- Finding that husband’s “lack of employment and lack of candor with the trial court was a strategy designed to minimize potential ramifications and obligations pertaining to alimony and equitable distribution” was sufficient to support imputation of income to husband

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Asare

- “[a]limony or postseparation support shall be paid by lump sum payment, periodic payments, income withholding, or by transfer of title or possession of personal property or any interest therein, or a security interest in or possession of real property, as the court may order.”
 - GS 50-16.7(a)
- The trial court must make findings of fact supporting its determination of the “manner of payment” of the alimony, as well as the amount and duration.
 - GS 50-16.3A(c)

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