Family Law Update
Cases Decided and Legislation Enacted Between June 4, 2013 and October 1, 2013

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Postseparation Support and Alimony

Cases Decided and Legislation Enacted Between June 4, 2013 and October 1, 2013

Appeal is not interlocutory because attorney fee claim remains pending

- Supreme Court reversed Court of Appeals decision that appeal of alimony order was an inappropriate interlocutory appeal because an attorney fee claim remained pending in the trial court.
- "Bright-line rule" now is that a trial court order or judgment in any civil case resolving all substantive issues is a final judgment and can be appealed even if a claim for attorney fees remains pending.

Duncan v. Duncan, 749 S.E.2d 799 (N.C., June 13, 2013), ***reversing,*** **732 S.E.2d 390 (NC App, Oct. 2, 2012).** Defendant appealed a trial court order for alimony before the trial court resolved plaintiff's pending claim for attorney fees. The court of appeals dismissed the appeal as an inappropriate interlocutory appeal because of the unresolved claim for attorney fees. The Supreme Court reversed, deciding to adopt a "bright-line rule" to promote clarity and uniformity. According to the Supreme Court, a party may appeal a civil case when all substantive issues have been resolved even when there is a remaining unresolved claim for attorney fees. The court clarified that a trial court can hear the claim for attorney fees contemporaneously with the substantive issues but is not required to do so.

Hearing on remand; adequate explanation of amount and duration of alimony award

- Where court of appeals remanded alimony order to trial court for further explanation of amount and duration of alimony award, trial court had discretion to determine whether an additional hearing was necessary and did not err by not allowing parties to be heard before entering the new order.
- Trial court properly considered child support obligation of supporting spouse and caretaking responsibilities of dependent spouse when setting alimony award.
- Amended order by trial court was sufficient to explain amount and duration of alimony award.

Ritchie v. Ritchie, ***unpublished opinion,*** **_ N.C. App._, _ S.E.2d _ (July 2, 2013).** Trial court ordered plaintiff husband to pay alimony to defendant wife in the amount of $650 per month for 14 years and 11 months. Following an appeal by plaintiff, the court of appeals remanded the matter to trial court for further findings to explain reason for amount and duration of the award. The trial court amended the order, adding new findings without holding an additional hearing for the parties. On appeal of the amended order, plaintiff first argued that the trial court was required to hear from the parties before entering the new alimony order but the court of appeals disagreed. According to the court of appeals, it is within the discretion of the trial judge to determine on remand whether additional evidence or additional hearing is necessary before entry of a new

order. Plaintiff also argued that the trial court failed to properly explain amount and duration in the amended order and that the trial court improperly considered the child support obligations of the parties in setting the alimony award. The court of appeals rejected both arguments, holding that a judge setting alimony should consider child support obligations of a supporting spouse and the child caretaking responsibilities of the dependent spouse. In addition, the court of appeals pointed to the trial court's amended findings regarding the reasonable expenses of the dependent spouse, the income and unreasonable expenses of the supporting spouse, and the ages of the children as sufficient explanation for the amount and duration of the award. The court of appeals held that the findings showed wife's need and husband's ability to pay, and showed that the duration of the award was linked directly to the age of the children and the length of time until the youngest reached the age of 18.

Modification

- Moving party must show substantial change in financial needs of dependent spouse or in the ability of the supporting spouse to pay.
- Where income fluctuations were normal for supporting spouse at time original order was entered, income fluctuations at time of modification motion did not constitute changed circumstances.
- While supporting spouse's income for two years before motion to modify was filed was lower than it was the year the original support order was entered, the supporting spouse's average income for last 6 years before modification motion was filed was actually higher than his average income was for the six years prior to the entry of the original order.
- Trial court asked to modify an alimony order must consider all factors considered pursuant to GS 50-16.2A when setting an original order, but trial court considering modification must consider only those factors raised by the evidence.

Kelly v. Kelly, 747 S.E.2d 268 (N.C. App., August 2013). Original consent order entered in 2004 order defendant to pay $12,000 month in alimony. In 2011, defendant filed a motion to modify, arguing that his financial circumstances and the financial circumstances of his law firm had changed significantly since time of original order and that plaintiff was spending much more than reasonable. The trial court denied defendant's motion to modify after concluding that he failed to show a substantial change in his ability to pay or in the financial circumstances of plaintiff. The court of appeals affirmed, agreeing that the trial court findings of fact established that defendant's overall financial circumstances had not changed significantly since the entry of the original order. While accepting defendant's arguments that the US economy had suffered a down turn, the practice of law had become less lucrative in general, and that he was older and had more health related issues than he had at the time the original order was entered, the findings of fact by the trial court established that defendant's ability to pay alimony had not changed significantly. The court found that at the time the original order was entered, defendant's income from his law practiced fluctuated from year to year. According to the court of appeals, because

the trial court anticipated fluctuations at the time of the original order, the fact that defendant experienced those fluctuations could not be the basis for a finding of changed circumstances. While defendant's income for the two years immediately preceding the modification motion was significantly lower than his income the year the original order was entered, the court found that the average income for the six years preceding the modification motion was significantly higher than it was the six years before entry of the original order. In addition, the trial court findings established that defendant's standard of living had not changed and that his discretionary spending had actually increased, and while his evidence showed he was experiencing some health issues that he was not experiencing at the time of the original order, there was no evidence that his health issues impacted his income earning ability. The court of appeals also rejected defendant's arguments that plaintiff's needs should have decreased by the time of the modification hearing. The court of appeals upheld the trial court's finding that plaintiff's needs had not changed where evidence showed her actual expenses had increased slightly and there was no evidence that any of the expenses were unreasonable.

Legislation

S.L. 2013-140. **(H 763) Waiver of Alimony.** The act amends GS 52-10 to provide that any provision in a valid separation agreement waiving, releasing, or establishing rights and obligations to postseparation support, alimony, or spousal support is valid and will remain valid following a period of reconciliation and subsequent separation as long as the waiver is clearly stated in the contract. The amendment was effective June 13, 2013.

Custody

Cases Decided and Legislation Enacted Between June 4, 2013 and October 1, 2013

Temporary Emergency Jurisdiction

- Trial court exercising temporary emergency jurisdiction is not required to contact state with home state jurisdiction unless the state with home state jurisdiction has made a custody determination regarding the child in the past or a custody proceeding is initiated in that state before the child has been in North Carolina for 6 months.
- Pursuant to GS 50A-204, emergency jurisdiction becomes home state jurisdiction after a child has been in North Carolina for 6 months if the state which was home state of the child at the time the North Carolina proceeding was filed has not acted and does not act with regard to that child.

In re K.M and J.H.*, unpublished opinion*, _N.C. App. _, _S.E.2d_ (July 2, 2013). Children had been in North Carolina for only 30 days when the juvenile petition was filed. Maryland was the home state of the children at that time. The North Carolina court exercised temporary emergency jurisdiction based on the fact that the children were present in North Carolina and threatened with abuse at the time the petition was filed. When the matter came on for adjudication, the trial court concluded that North Carolina had home state jurisdiction pursuant to GS 50A-204 because, at the time of the adjudication hearing, the children had lived in North Carolina in excess of 9 months and no action had been initiated in the state of Maryland. The court of appeals affirmed, rejecting mother's arguments that the trial court was required to contact Maryland when the petition was filed and that the North Carolina court did not have subject matter jurisdiction pursuant to the UCCJEA to adjudicate the petition. The court of appeals held that because Maryland had not acted with regard to the children in the past and did not act with regard to the children before the adjudication hearing, there was no requirement that the North Carolina judge contact the Maryland court as part of exercising emergency jurisdiction. A court exercising emergency jurisdiction pursuant to GS 50A-204 must immediately contact the state with home state jurisdiction only if the state with home state jurisdiction had entered a custody determination with regard to the child in the past, or if a custody proceeding is pending in that state or is filed in the state before the state exercising emergency jurisdiction becomes the home state. In this case, North Carolina had become the home state of the children by the time the matter came on for adjudication and no action had been initiated in Maryland.

Adoption and custody pending at same time

- When putative father filed custody action after adoption petition regarding child had been filed with the clerk of court, custody action should not have been dismissed for lack of subject matter jurisdiction but should have been stayed pending the outcome of the adoption proceeding.

Johns v. Welker v. Jones vs. Christian Adoption Services, 744 S.E.2d 486 (N.C. App., July 2, 2013). Petitioners filed adoption petition seeking to adopt minor child claiming putative father's consent to adopt was not required. Putative father filed a motion to intervene in the adoption proceeding and also filed an action for custody in district court. The district court dismissed the custody proceeding after concluding that district court did not have subject matter jurisdiction due to the adoption proceeding pending before the clerk. The court of appeals reversed the trial court dismissal, concluding that the prior pending claim doctrine did not apply in this situation to require dismissal of the custody claim. Although the adoption proceeding involved the same child as the custody proceeding, the parties to the two actions were not the same because putative father was not a party to the adoption proceeding and the relief requested was different in each action as well. However, because the actions both involve the legal and physical custody of the same minor child and the result of each action would significantly impact the other action, the court of appeals held that the trial court must decline to exercise its jurisdiction in the custody action while the previously filed adoption petition remains pending.

Expert witness fees; attorney fees for appeals

- Where remand instruction from court of appeals to trial court authorized trial court to award expert witness fee only for amount of time expert actually testified in court, trial court erred in including compensation for time expert spent in the courtroom waiting to testify.
- Following remand after appeal, trial court can award attorney fees for the appeal of the child support and custody order.

McKinney v. McKinney, 745 S.E.2d 356 (N.C. App., July 16, 2013). Trial court entered custody and child support order and included an order for expert witness fees. On appeal, the court of appeals held that the trial court had erred in the computation of expert fees by including time other than the time the expert actually testified in court. On remand, the trial court recalculated fees and included all the time the expert spent in the courtroom rather than just the time the expert spent testifying. In addition, the trial court ordered defendant to pay plaintiff for attorney fees incurred for the first appeal. On the second appeal, the court of appeals held that the trial court was required to follow the strict terms of the mandate from the first appeal regarding the expert witness fees. Because the mandate allowed the expert to be compensated only for actual testimony, the trial court should not have awarded compensation for the other time expert was in court. However, court of appeals rejected defendant's argument that the trial court did not have authority to award plaintiff attorney fees for the first appeal, holding that the trial court can award such fees after the appeal is concluded and that there is no requirement that a party ask the appellate court to order fees.

Grandparent requests for custody and visitation; contempt

- Grandparents have standing to seek custody of a grandchild against parents if grandparents allege parents are unfit or otherwise have waived the parental constitutional right to custody.

- Complaint alleging mother was mentally ill and that father "has not yet exercised visitation with the child alone" and "is not currently able to provide a stable home environment" was sufficient to give grandparents standing to seek custody.
- To request only visitation, grandparents have standing whenever there is an on-going dispute between the parents.
- Grandparents had standing to change their request for custody to a request for visitation when trial court created an on-going dispute between the parents by entering a temporary order granting father sole custody of the child.
- Father was prohibited by law of the case doctrine from attacking constitutionality of grandparent visitation statutes in his contempt hearing for violation of the visitation order.
- Trial court civil contempt order was reversed because purge provision that father "continue to abide by previous orders of the court" was impermissibly vague.

Wellons v. White v. Wellons, _N.C.App._ , _ S.E.2d_ (August 20, 2013). Procedurally complicated case but facts relevant to appeal are that in Dec. 2007, trial court granted grandparents visitation as part of custody order between mom and dad. In July 2012, trial court entered an order holding dad in civil contempt for failing to abide by terms of the Dec. 2007 order. Dad appealed, arguing grandparents had no standing to seek visitation with the child in the first place, that the grandparent visitation statutes contained in GS 50-13 are unconstitutional, and that the trial court erred in holding defendant in civil contempt. The court of appeals held that grandparents have standing to seek custody pursuant to GS 50-13.1 in cases against natural parents when they allege parents are unfit or otherwise have waived their constitutionally protected right to exclusive care, custody and control of their children. In this case, grandparents' initial claim for custody alleged that mom was mentally ill and dad had not exercised visitation alone with child and did not have a stable home environment for the child. The court of appeals held these allegations sufficient to support grandparent standing because if proven, they could support a finding that dad was unfit. The grandparents later amended their claim to dismiss the claim for custody and assert a claim for visitation pursuant to GS 50-13.2(b1) or 50-13.5(j). Dad argued they had no standing to assert the visitation claim because the custody claim between the parents had been resolved at the time grandparents amended their claim. The court of appeals held that GS 50-13.2(a1) and 50-13.5(j) grant standing to grandparents to seek visitation when there is an on-going custody dispute between the parents. In this case, the court of appeals ruled that the trial court "created a dispute between the parents" when it changed custody to dad from mom when grandparents filed the request for visitation. In response to dad's argument that the grandparent visitation statutes are unconstitutional, the court of appeals held that dad was prohibited by the law of the case doctrine from raising the constitutional issue in response to the contempt charge. According to the court of appeals, defendant was required to challenge the constitutionality of the statutes in response to the December 2007 order granting grandparents visitation.

Finally, the court of appeals agreed with dad's argument that the trial court civil contempt order was entered in error. The contempt order concluded dad was in contempt for violating the custody order but suspended his incarceration provided he comply with the terms of all prior orders of the court. The court of appeals held that this purge condition was "impermissibly vague" because it did not inform dad of precisely what he can and cannot do to purge himself of contempt.

Modification of custody order; contempt for denial of visitation

- Trial court had no authority to modify custody order to require dad to attend anger management counseling or to "clarify" ambiguities in visitation provisions without first concluding there had been a substantial change in circumstances since entry of custody order.
- Conflicts over custody and visitation between the parents do not alone constitute a change in circumstances with a self-evident connection to the welfare of the children.
- Trial court findings of fact supported conclusion that mom did not act willfully when she refused to allow dad visitation as provided in custody order because she had concerns for the safety of the children while in dad's care. However, court of appeals stresses that 'self-help' is not an appropriate way to address safety concerns for children during court ordered visitation and notes that GS 50-13.5 allows the court to consider ex parte and temporary custody orders to address such concerns.

Davis v. Davis, _N.C. App. _, _S.E.2d_ (September 17, 2013). Custody order gave mom primary custody of two children and dad visitation. Mom decided to withhold dad's visitation after she concluded dad had inappropriately physically disciplined one of the children during visitation. Mom filed motion to modify or suspend visitation, to require dad to attend anger management therapy and to "clarify" visitation provisions provided under the current order. Dad requested that mom be held in contempt for failing to abide by visitation provisions in original order. The trial court specifically concluded there had been no change in circumstances since entry of original order but nevertheless made changes to the visitation provisions of the order to clarify the provisions mom claimed to be ambiguous and entered an order requiring dad to attend anger management counseling. Court of appeals reversed, holding that without a conclusion that there had been a substantial change in circumstances affecting the welfare of the minor child, the trial court had no authority to clarify or change visitation or to order defendant to attend anger management counseling. The court commented that conflict between parents over custody and visitation schedules without some showing of impact on the welfare of the children will not support a conclusion of changed circumstances and stated that such conflicts do not have a 'self-evident' impact on the children. However, while the court of appeals stated that it did not agree with trial court determination that mother did not act willfully when she refused to allow dad to exercise his visitation, the court of appeals nevertheless held that the trial court's findings of fact were sufficient to support the trial court decision that wife should not be held in contempt because she did not violate the visitation provisions 'willfully' because she did it out of concern

for the safety of her children. The court of appeals noted that a parent should not unilaterally withhold visitation when concerned about children (court of appeals refers to this as 'self-help'), but rather should use the provisions in GS 50-13.5 allowing the court to consider entry of emergency temporary orders to address such situations.

Legislation

S.L. 2013-27 (H 139). **Adopting the Uniform Deployed Parents Custody and Visitation Act; GS 50A-350 through 376. Effective October 1, 2013, but does not affect validity of any temporary custody order entered before that date. *Repeals GS 50-13.7A*, the existing statute dealing with custody cases wherein one or both parents is subject to military deployment and replaces it with new Uniform Act, creating new Article 3 of Chapter 50A.**

In addition to adopting the Uniform Act, the session law amends G.S. 50-13.2 to add new section (f) to state that "[i]n a proceeding for custody of a minor child of a service member, a court may not consider a parent's past deployment or possible future deployment as the only basis in determining the best interest of the child. The court may consider any significant impact on the best interest of the child regarding the parent's past or possible future deployment."

The new Uniform Act provides that a deploying parent must provide notice of pending deployment to the other parent no later than 7 days after receiving notice of the deployment, unless circumstances of the service prohibit deploying parent from doing so. As soon as reasonably possible after receiving notice of deployment, both parents are required to share with the other their plan for fulfilling that parent's share of custodial responsibility during deployment. The act allows the parties to enter into temporary custodial agreements to provide for custodial responsibilities during deployment. If a court has entered a custody order relating to the parties, the temporary agreement must be filed in the court action. The agreement is enforceable but terminates following the return of the parent from deployment. The Act allows agreements to delegate caretaking responsibilities to nonparents and specifies that the parties cannot modify court ordered child support obligations by the agreement.

The Act also provides for an expedited court proceeding to address deployment in situations where parties are unable to reach a voluntary agreement. Trial court is authorized to enter temporary orders only; permanent custody orders may not be entered in the absence of a deployed parent without the consent of the deployed parent. In these temporary orders, the court may address custody during deployment and is specifically authorized to grant "caretaking authority" to nonparents. Authority granted to nonparents is limited to only that which is authorized to the deploying parent under an existing custody order or, if there is no custody order, is limited to the amount of time the deploying parent "habitually cared for the minor child" before deployment. A court entering a temporary deployment order also may enter a temporary order for child support.

S.L. 2013-42. (S 369) **Name Change for Minor Child.** The act amends provisions of GS 101-2 to allow the name of a minor child to be changed upon the consent of only one parent when the other parent has been convicted of committing one of the listed criminal offenses against the child or a sibling of the child. Applies to applications for name changes filed on or after October 1, 2013.

S.L. 2013-304. (H 462) **Fees for Supervised Visitation Centers.** For services provided on or after July 1, 2013, the act allows the Administrative Office of the Courts to charge $50 (was $30) per hour to persons receiving services from a supervised visitation and exchange center through a family court program.

Child Support

Cases Decided and Legislation Enacted Between June 4, 2013 and October 1, 2013

Modification of consent judgment; 3 year 15% change rule

- Trial court properly modified child support order when evidence showed existing consent order setting support had been entered more than 3 years earlier and present application of the guidelines resulted in more than a 15% change in amount of support.
- Fact that existing support order had been entered by consent of the parties did not change the rule that a party seeking modification can establish substantial change in circumstances by showing consent order is at least 3 years old and present application of guidelines would result in support order at least 15% different from existing support obligation.
- Trial court did not commit prejudicial error when it failed to attach guideline worksheet to the child support modification order.

Hess v. Hermann-Hess, *unpublished opinion*, _ N.C. App._ , _S.E.2d_ (July 2, 2013). Parties entered into consent order providing defendant father would pay $2,000 per month for child support. Almost three years after entry (about 3 months short of three years), defendant filed motion to modify child support. By the time the trial court held the modification hearing, the existing child support consent order was over 3-years old. Trial court determined that application of the guidelines at the time of the modification hearing required a child support order in the amount of $437 – more than a 15% difference from the existing amount of required support. The trial court modified the consent judgment and set plaintiff's support obligation at $437. On appeal, mom argued trial court had no authority to modify the agreement between the parties as set out in the consent judgment because it was a contract between the parties. The court of appeals disagreed, citing the published opinion in *Lewis v. Lewis*, 181 NC App 114 (2007), which held that the 3 year/15% rule applies even if the original support order was not entered pursuant to the guidelines. The court of appeals noted that, unlike in other civil cases, consent judgments entered in domestic relations cases are treated the same as all other orders for all purposes, such as contempt and modification. In addition, the court of appeals rejected mom's argument that the trial court committed prejudicial error by failing to attach the child support worksheet to the modification order after finding that the record on appeal contained a copy of the worksheet.

Expert witness fees; attorney fees for appeals

- Where remand instruction from court of appeals to trial court authorized trial court to award expert witness fee only for amount of time expert actually testified in court, trial court erred in including compensation for time expert spent in the courtroom waiting to testify.
- Following remand after appeal, trial court can award attorney fees for the appeal of the child support and custody order.

McKinney v. McKinney, 745 S.E.2d 356 (N.C. App., July 16, 2013). Trial court entered custody and child support order and included an order for expert witness fees. On appeal, the court of appeals held that the trial court had erred in the computation of expert fees by including time other than the time the expert actually testified in court. On remand, the trial court recalculated fees and included all the time the expert spent in the courtroom rather than just the time the expert spent testifying. In addition, the trial court ordered defendant to pay plaintiff for attorney fees incurred for the first appeal. On the second appeal, the court of appeals held that the trial court was required to follow the strict terms of the mandate from the first appeal regarding the expert witness fees. Because the mandate allowed the expert to be compensated only for actual testimony, the trial court should not have awarded compensation for the other time expert was in court. However, court of appeals rejected defendant's argument that the trial court did not have authority to award plaintiff attorney fees for the first appeal, holding that the trial court can award such fees after the appeal is concluded and that there is no requirement that a party ask the appellate court to order fees.

Contempt; failure to pay college expenses

- Where father agreed to pay child's college expenses as long as she diligently applied herself towards an education, trial court properly held him in civil contempt when he stopped paying the expenses based on fact daughter had a 1.68 GPA at the end of her third semester of college.

Barker v. Barker, 745 S.E.2d 910 (N.C. App., August 6, 2013). Parties entered into agreement providing defendant father would pay 90% of college expenses for the children "as long as [the children] diligently applied themselves to the pursuit of education." At the end of daughter's third semester in college, she had a cumulative GPA of 1.68 and father notified daughter and mother that he would no longer pay college expenses. Trial court held father in civil contempt, concluding the daughter was diligently pursuing her education and ordering father to pay his share of the college expenses. The court of appeals affirmed, holding that the trial court finding of facts supported the conclusion that the daughter was applying herself "diligently". As the agreement between the parties did not define "diligently applying", the court of appeals looked to Blacks' Law Dictionary for a definition of 'diligent' and held that the trial court findings were sufficient where they established daughter had suffered from depression as the result of the sudden death of her best friend, that she continued to work towards improving her grades and had in fact improved her GPA each semester. The court of appeals also rejected father's argument that the trial court order failed to find he acted willfully and that he had the ability to pay the expenses. The court of appeals held that the trial court findings that father intentionally stopped paying as "leverage" to force his daughter to improve her grades and that father admitted he was willing to pay in the future because her grades had improved established both intent and his ability to pay. Dissent argued agreement regarding college expenses was too vague to support trial court conclusion defendant acted willfully when he refused to pay based on child's academic performance.

Personal jurisdiction: service of process and minimum contacts

- Service of process was insufficient where plaintiff used delivery service and delivery receipt was not signed personally by defendant.
- Defendant had insufficient contacts with North Carolina for personal jurisdiction where child resided here with mother, defendant visited child in NC on three occasions, and defendant had personal and business accounts at Wells Fargo which listed defendant's address as Charlotte, NC.

Hamilton v. Johnson, 747 S.E.2d 158 (N.C. App., August 6, 2013). Defendant resides in Texas and plaintiff served the complaint and summons in this child support case by delivery service. The receipt supplied by the delivery service indicated a person other than defendant signed indicating the documents had been received. The North Carolina trial court entered a temporary child support order and subsequently issued a show cause order when defendant failed to pay support and then ordered extradition of defendant from Texas to NC when defendant failed to appear at the contempt hearing. The trial court denied defendant's motion to dismiss for lack of personal jurisdiction and defendant appealed. The court of appeals dismissed plaintiff's claim after concluding plaintiff had not proved defendant had been served with process or that defendant had sufficient contacts with the state to allow NC courts to exercise personal jurisdiction over him. According to the court of appeals, a return receipt from a delivery service must show that the person being sued actually signed for the delivery. The court rejected plaintiff's argument that a signature by another person on the receipt raises a presumption that service was proper and that the person signing the receipt was acting as an agent of the defendant. According to the court of appeals, the law about this presumption was changed in 2001 when the language of Rule 4 was amended by the General Assembly. *But cf. Carpenter v. Agee*, 171 N.C. App. 98 (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 and service was presumed valid). In addition, the court of appeals held as a matter of law that the trial court findings as to defendant's contacts with North Carolina were insufficient to meet due process requirements.

Legislation

S.L. 2013-198. (H 219) **Children Born Out of Wedlock.** The act amends numerous provisions in the General Statutes to remove the terms "illegitimate" and "bastard" when used in reference to children born out of wedlock. The act also amends GS Chapter 29 to allow a child born out of wedlock to inherit from a person who died before or within one year of the birth of the child if paternity is established by DNA testing. Amendments were effective June 19, 2003.

Equitable Distribution

Cases Decided and Legislation Enacted Between June 4, 2013 and October 1, 2013

Classification of IRA; application of coverture fraction; classification of rental property and gift from employer

- Coverture fraction in GS 50-20.1 applies only to pensions and retirement accounts which are 'deferred compensation'.
- To the extent an employee can access funds in an account, the account is not 'deferred compensation' and the account should not be classified using the coverture fraction.
- Husband could access funds in 401K plan that was used to fund IRA opened during marriage, so IRA was not required to be classified using the coverture fraction.
- Husband could not access funds in defined benefit pension plan which was rolled over during marriage to fund an IRA. Therefore, the IRA funded by the defined benefit plan must be classified using the coverture fraction.
- Expert witness methodology for valuing account that did not meet definition of 'deferred compensation' was not reviewed on appeal as neither party objected to the methodology on appeal.
- IRA opened during the marriage and funded from husband's 401K plan was separate property to extent the DOS value was traced to the portion of husband's 401K earned before the date of marriage. Value earned during the marriage was marital.
- IRA opened during the marriage and funded from a rollover of funds in husband's pension was 23.9 percent marital based on application of the coverture fraction; the pension was earned during husband's 272 months of employment, of which 65 months were during the marriage.
- Loss in value of wife's marital 401K plan after the date of separation was properly classified as divisible property based on wife's testimony that the loss was the result of market forces.
- Trial court did not err in classifying real properties as entirely separate property where wife acquired the property before the date of marriage or during the marriage with separate funds and all mortgage payments made during the marriage were paid from rent generated from the property.
- Trial court did not err in concluding Rolex watch given to wife by employer was a gift to her rather than compensation.

Watkins v. Watkins, 746 S.E.2d 394 (N.C. App., August 6, 2013). In ED case, trial court classified and valued 2 IRAs owned by husband on the date of separation based on testimony from expert witness who separated out the total contributions of funds by husband to both accounts before the date of marriage, applied a return rate based on the S&P 500 index for the years of the marriage, and valued that amount as husband's separate property. The remaining value in both accounts was classified as marital property. Both IRAs were acquired during the

marriage; one was funded from a rollover of husband's 401K account associated with his employment both before the date of marriage and after the date of marriage and the other was funded from a rollover of husband's pension fund earned from employment both before and after the date of marriage. The trial court expressly rejected husband's argument that the IRA accounts were required to be classified using the coverture fraction in GS 50-20.1 (that statute states that the coverture fraction must be used to classify "pension, retirement, or other deferred compensation"). The court of appeals held that GS 50-20.1 applies only to accounts that are 'deferred' compensation, meaning the owner has no access to the funds until the time of retirement. Without discussing tax penalties and other consequences of withdrawal of funds, the court of appeals held that the 401K plan used to fund the 401K IRA was not deferred compensation because the husband had access to the funds in the account. Therefore, the court of appeals held that the trial court did not err in accepting the methodology used by the expert that traced out the separate funds in the account as of the date of separation rather than using the coverture fraction. However, the court of appeals held that the husband did not have access to funds held in the IRA funded from the pension plan (although there is no indication in the opinion that either party presented evidence about the accessibility of funds in either account; court of appeals simply states that pension – defined benefit plans – contain funds not accessible to employees.) Because husband has no access to the funds, this IRA is 'deferred compensation' and therefore is required to be classified using the coverture fraction in GS 50-20.1. The court of appeals did note that some defined contribution plans like husband's 401K plan in this case, may contain unvested employer contributions not immediately accessible to an employee, suggesting but expressly not deciding that such portions of a plan would be required to be classified using the coverture fraction.

Wife also had a 401K on the date of separation but the entire account appears to have been acquired during the marriage. Husband argued on appeal that the trial court erred in classifying the decrease in the value of that account after the date of separation as divisible property because there was no credible evidence that the loss occurred or that it occurred as the result of passive market forces. The court of appeals rejected the argument, holding that wife's testimony alone was sufficient to establish these facts if trial court concluded the testimony was credible and sufficient.

Court of appeals also rejected husband's argument that trial court erred in classifying real properties owned by wife before the marriage and held in her name alone on the date of separation as entirely separate property. Husband argued that the mortgage payments made on the properties during the marriage created a marital interest, but the court of appeals held that evidence was sufficient to support trial court's finding that all payments made during the marriage were from rents earned from the property.

Finally, court of appeals rejected husband's contention that trial court erred in classifying Rolex watch owned by wife as her separate property after finding the watch was a gift to her from her

employer. Husband argued the watch actually was compensation to wife but court of appeals held that evidence supported trial court's finding that the employer gifted the watch to wife.

Failure to value military retirement plan; retirement falls out of ED

- Trial court is required to find date of separation value of all pension and retirement accounts before distributing the account as a marital asset.
- Where neither party offered evidence during trial of date of separation value of military pension, trial court erred in distributing pension by specifying percentage of pay to be distributed to wife when husband begins to receive retirement pay in the future.
- Where wife failed to offer any evidence of value of military pension during original trial, court of appeals refused to allow wife opportunity to prove value on remand. Instead, court of appeals held that pension fell out of ED entirely.
- Trial court erred by failing to address evidence offered showing plaintiff spent money after the date of separation to pay marital debt and to maintain marital property.

Washburn v. Washburn*, unpublished opinion*, _N.C. App. _, _S.E.2d_(August 6, 2013). Trial court concluded plaintiff's military pension was marital property to the extent earned during the marriage and entered an order providing for a percentage of defendant's future retirement pay be distributed to defendant. On appeal, plaintiff argued that the trial court erred in classifying and distributing the pension without finding a date of separation value of the pension and the court of appeals agreed. All retirement accounts, including defined benefit pensions, must be valued as of the date of separation in order for the trial court to classify the pension as marital property. In addition, because defendant failed to offer any evidence of value during the initial trial, the court of appeals held that she could not offer such evidence on remand. Instead, the court of appeals held that on remand the pension "be removed and excluded from equitable distribution." The court of appeals also held the trial court erred by not addressing in the ED judgment evidence offered by plaintiff that he made postseparation payments on marital debt and spent money maintaining and repairing marital property. Court of appeals remanded with instructions that the trial court identify payments made by plaintiff, determine the source of the funds from which the payments were made, and determine the appropriate way to address the payments in the final distribution. Court of appeals noted that options for trial court include "ordering one spouse to reimburse the other for post-separation payments made toward marital debt, considering the post-separation payments as a distribution factor, and crediting a spouse in an appropriate manner for post-separation payments."

Classification; valuation; distribution factors

ED case remanded to trial court because trial court judgment did not address all classification issues raised by the evidence, failed to correctly identify net value of property on date of separation, and incorrectly considered as a distribution factor a finding of fact from an earlier entered PSS order as to amount of defendant's income.

"It is ultimately the responsibility of the trial judge to insure that any judgment or order is properly drafted, and disposes of all issues presented to the court before the judge affixes his or her signature to the judgment or order. This is especially trial in a complex case, such as one involving the equitable distribution of marital property."

Party claiming prejudice as the result of a delay between the conclusion of the ED trial and entry of the ED judgment has the burden of showing actual prejudice incurred as the result of the delay. Court of appeals noted that when case is remanded, trial court can address any changes that may have occurred during the time between the end of trial and remand.

Hill v. Hill, _N.C. App. _, _S.E.2d_ (September 17, 2013). Trial court ED judgment vacated and remanded, with instruction that trial judge on remand must consider additional evidence as to any matter that is considered as of the date of distribution of marital property. Specifically, the court of appeals held that the trial court erred by:

Failing to classify and value a corporation formed by the parties during the marriage and distributed to husband in the ED judgment;

Finding that distributions to husband from the corporation during the marriage was salary to husband. Court of appeals held that retained earnings of a marital Subchapter corporation become marital property when distributed to the shareholder spouse/spouses;

Classifying husband's postseparation payments of the mortgage on the marital home as divisible debt when the payments were made pursuant to a PSS order;

Failing to classify an equity line debt owed by husband on date of separation that had a balance incurred to some extent for husband's separate purpose before marriage and to some extent for the joint benefit of the parties during the marriage. On remand, trial court instructed to clarify what portion of the date of separation value of the debt the trial court found to be separate debt and what portion marital;

Distributing several vehicles and bank accounts owned by one or both parties on the date of separation without classifying or valuing the vehicles and accounts;

Finding as a distribution factor that husband "earned about twice the income of wife" based on a finding of fact in the PSS order entered earlier in the case when there was no evidence of husband's income introduced in the ED case. Because of this inappropriate finding as to a

distribution factor, the trial court was instructed on remand to completely reconsider distribution after receiving all required evidence on distribution factors;

Using the listing price for two tracts of marital real property as the date of separation value of the real property. According to the court of appeals, listing price "is nothing more than the amount for which the parties would like to sell the property. It has no bearing upon the fair market value of the property, which is the amount the trial court is required to determine for equitable distribution."

Determining net value of marital residence by subtracting not only encumbrances from the fair market value of the house but also subtracting costs associated with a future sale of the property, such as the real estate commission. Court of appeals held that net value is determined by subtracting only the amount of all encumbrances from the fair market value of the property and stated that the trial court's "consideration of expenses of sale went beyond what was permitted."

Classification of mixed real property

Trial court properly used source of funds doctrine to classify marital and separate interests in house built on a lot acquired by husband before the date of marriage with a down payment and a mortgage that was paid off during the marriage. Trial court was not required to classify and value the lot separate and apart from the house.

Where mortgage incurred by husband before the date of marriage was paid off during the marriage and husband failed to show balance of loan due on date of marriage, entire amount of mortgage was presumed to be a marital contribution to the acquisition of the real property.

Postseparation increase in equity in real property that is a mixed asset including both marital and separate interests should be classified using the percentages reflected in the date of separation classification of interests. If, as in this case, 13.5% of the date of separation value is separate property, then 13.5% of the postseparation increase also will be separate property. And, if 86.5% of the date of separation equity is marital property, 86.5% of the postseparation appreciation in value is divisible property.

Ross v. Ross, _N.C. App. _, _S.E.2d_ (October 1, 2013). Husband purchased a lot before the date of marriage, paying a down payment and taking out a mortgage in the amount of $65,000. During the marriage, the parties built a house on the lot. The $65,000 loan was repaid in full during the marriage and the parties paid additional amounts on a second mortgage incurred when the house was built. Husband did not show the balance owed on the first mortgage at the time of marriage. In the ED judgment, the trial court used the source of funds doctrine to classify the equity in the home on the date of separation, classifying husband's separate interest based on the amount he paid as a down payment for the lot before marriage plus a portion of the amounts paid to satisfy the original mortgage he incurred when he purchased the lot – the portion determined by the trial court making an assumption about how much of the mortgage was paid before the

date of marriage based on information concerning the amount of the monthly payment and the length of time it took for the debt to be paid in full. The marital interest was identified by determining the amount of marital funds used to reduce the principles on both the first and second mortgage during the marriage, again with the trial court assuming how much of the first mortgage was paid during the marriage based on the amount of the monthly payment and the time it took for the loan to be paid in full.

On appeal, husband argued the trial court should have classified the lot separate and apart from the house. The court of appeals disagreed, holding that the trial court method of classifying the date of separation equity by tracing out the separate and marital contributions to the total value of the asset (the house and the lot) on the date of separation was consistent with previous case law. However, the court of appeals held that the trial court erred in determining that husband's separate contribution included a portion of the payoff of the first mortgage because husband failed to show the amount of that mortgage principle he actually paid before the date of marriage. According to the court of appeals, because evidence showed only that the $65,000 debt had been satisfied during the marriage, it is presumed the entire amount of the payoff was made with marital funds. The burden was on husband to trace out the separate part of the payoff by showing how much he paid toward the principle before marriage.

In addition, the court of appeals disagreed with the trial court's method of determining the classification of the postseparation appreciation in the equity in the property. The trial court classified the separate, marital and divisible property interests in the total date of distribution net value of the house by comparing the contributions within each category to the total amount of contributions made to acquire the property from the time defendant purchased the lot before the date of marriage up to the *date of distribution*. Acknowledging that it would make very little actual difference in this particular case but explaining why it could made a substantial difference in other cases, the court of appeals held that the trial court erred in classifying all interests by comparing the amounts paid at different times to the total amount of contributions up to the date of *distribution*. Instead, the court of appeals held that the appropriate way to classify the divisible interest in postseparation appreciation is to classify the marital and separate interests by considering total contributions to equity made up *to the date separation* and use the ratio of marital to separate interest in the property to classify the postseparation appreciation in the equity. So, in this case, because the trial court determined the date of *separation* equity was 86.5% marital property, the trial court was required to classify 86.5% of the postseparation increase in the equity as divisible property. The trial court erred, according to the court of appeals, by determining the ratio used to identify the divisible property by including postseparation contributions in the form of the payments each made on the debt after the date of separation.

Legislation

S.L. 2013-103. (H 384) **Changes to Equitable Distribution Law.** The act amends GS 50-20(b) to provide that there is a presumption that all real property creating a tenancy by the entirety during the marriage and before the date of separation is marital property. The presumption can be rebutted by the greater weight of the evidence. Also amends the definition of divisible debt found in GS 50-20(b)(4) to provide that only passive increases and passive decreases in marital debt after the date of separation is divisible debt. The act is effective October 1, 2013.

Domestic Violence

Cases Decided and Legislation Enacted Between June 4, 2013 and October 1, 2013

Legislation

S.L. 2013-237. (H 209) **Domestic Violence Protective Orders.** The act amends GS 50B-3 to provide that a domestic violence protective order entered without findings of fact and conclusions of law is valid if the order is entered upon the consent of the parties and the parties agree in writing that no findings of fact and conclusions of law are required. The amendment applies to consent orders entered on or after October 1, 2013.

S.L. 2013-390 (S 409). **Attorney fees in civil domestic violence orders and in civil no-contact orders.** Amends provisions in GS Chapter 50B to clarify that no costs or attorney fees can be assessed for the filing, issuance, registration, or service of a domestic violence protective order, except as provided in Rule 11 of the Rules of Civil Procedure, and amends GS Chapter 50C to allow the award of attorney fees as part of a civil no-contact order. The act also amends Chapter 50C to provide that when an ex parte temporary no-contact order is entered by the court, a hearing must be held within 10 days of the filing of the request for temporary relief and to provide that when a request for ex parte relied is denied, the trial on the request for a permanent no-contact order must be held within 30 days of the denial of the request for ex parte relief. The amendments apply to actions filed on or after October 1, 2013.

Divorce and Annulment

Cases Decided and Legislation Enacted Between June 4, 2013 and October 1, 2013

Legislation

S.L. 2013-93. (H 114) **Social Security Numbers in Divorce Complaints and Judgments.** The act amends GS 50-8 to delete requirement that the social security numbers of the parties be included in complaints for absolute divorce and judgments of absolute divorce. Effective June 5, 2013.

Paternity

Cases Decided and Legislation Enacted Between June 4, 2013 and October 1, 2013

Legislation

S.L. 2013-198. (H 219) **Children Born Out of Wedlock.** The act amends numerous provisions in the General Statutes to remove the terms "illegitimate" and "bastard" when used in reference to children born out of wedlock. The act also amends GS Chapter 29 to allow a child born out of wedlock to inherit from a person who died before or within one year of the birth of the child if paternity is established by DNA testing. Amendments were effective June 19, 2003.

Adoption

Cases Decided and Legislation Enacted Between June 4, 2013 and October 1, 2013

Legislation

S.L. 2013-236. (H 147) **Adoption Law Changes.** Makes various changes to the adoption laws, Chapter 48 of the General Statutes, effective July 3, 2013.

Death of stepparent petitioner. G.S. 48-2-204 provides for the completion of an adoption in the name of both petitioning spouses when one spouse dies after the petition is filed but before completion of the adoption. Section 2 of S.L. 2013-236 amends the statute to add a similar provision for stepparent adoptions. If a petitioning stepparent dies before the adoption is complete, the adoption may be completed in the petitioner's name, but only if the court gives notice to anyone who executed a consent to the adoption, giving that person notice of the death and notice that he or she may request a hearing on the adoption within 15 days after receiving the notice.

Failure to respond to notice. Section 3 of the act rewrites G.S. 48-2-207(a) to make clear that if a person whose consent to adoption is required by G.S. 48-3-601 is served with notice of the adoption and fails to respond, on motion of the petitioner the court must order that the person's consent to the adoption is not required.

Documents petitioner must file. In G.S. 48-2-305, which lists the things an adoption petitioner must file, section 5 of S.L. 2013-236 makes the following changes:

> Adds a provision that documents that are required to be filed and are not available when the petition is filed must be filed as they become available. Otherwise, documents must be filed when the petition is filed.
>
> Clarifies the requirement that a certificate of service required by G.S. 48-3-307(c) be filed if the person who placed the child for adoption executes a consent before receiving a copy of the preplacement assessment.
>
> Adds a requirement to file a certified copy of any judgment of conviction for first or second degree rape or rape of a child by an adult offender, resulting in the conception of the child, to establish that a person's consent to adoption is not required.

Notice and consent. Section 7 of the act amends G.S. 48-3-603(a)(9) to provide that consent is not required from a man who has been convicted of rape of a child by an adult (adding that offense to first and second degree rape) resulting in the conception of the child. Section 6 of the

act rewrites G.S. 48-2-401(c)(3) to provide that notice need not be given to a man whose consent is not required because of his conviction of first or second degree rape or rape of a child by an adult offender, resulting in the conception of the child.

Copy of consent or relinquishment. Section 8 rewrites G.S. 48-3-605(c) to require that a person before whom a consent is signed and acknowledged certify that to the best of his or her knowledge the person giving consent was given an original or copy of his or her fully executed consent. Section 10 rewrites G.S. 48-3-702 to require a person before whom a relinquishment is signed and acknowledged to make certifications comparable to those made when a consent is signed.

Miscellaneous

Cases Decided and Legislation Enacted Between June 4, 2013 and October 1, 2013

50C Civil No-Contact Order

- Trial court did not err by granting 50C order to brother of defendant where no evidence showed brother and sister ever resided together in the same home.
- Trial court did err in granting 50C order to plaintiff based on allegations in complaint when defendant failed to appear for trial and complaint did not establish that defendant had engaged in stalking.
- Statutory definition of 'harassment' is a "definitional Gordian Knot" but at a minimum requires that plaintiff prove that the alleged harassment was intended by defendant to cause plaintiff to fear bodily injury or to fear "substantial emotional distress." If the intent proven is to cause distress, plaintiff must prove he or she did actually suffer substantial emotional stress.
- "Substantial emotional distress" means "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling."

Tyll v. Willets, _ N.C. App. _, _S.E.2d_ (August 20, 2013). Trial court granted plaintiff's request for Civil No-Contact Order pursuant to Chapter 50C when defendant did not appear for trial and trial court concluded plaintiff's verified complaint established grounds for entry of order. Court of appeals disagreed, holding that allegations did not amount to stalking under the statute. The court of appeals rejected defendant's argument that because plaintiff and defendant are siblings, plaintiff was required to seek relief pursuant to Chapter 50B rather than 50C. The court of appeals held that while GS 50B-2(a)(1) defines the Chapter 50B relationships to include "current and former household members" and "persons of the opposite sex who live together or have lived together", the relationships listed as subject to Chapter 50B do not specifically include siblings. The court of appeals held that without evidence in the record, the court could not conclude the brother and sister in this case ever resided in the same household and therefore could not conclude the Chapter 50C order was entered in error for that reason. However, the court of appeals did hold that the allegations in the complaint that defendant sent "libel emails to his employer and mother" did not support the trial court's conclusion that defendant had engaged in "stalking" by harassment and therefore did not support entry of the 50C order. There was no allegation that plaintiff was in fear for his or his family's personal safety. Instead, according to the court of appeals, the allegations showed only that the emails "annoyed" and "pestered" plaintiff with no evidence that plaintiff suffered significant emotional distress as required to support a conclusion that defendant engaged in harassment.

Legislation

S.L. 2013-390 (S 409). **Attorney fees in civil domestic violence orders and in civil no-contact orders.** Amends provisions in GS Chapter 50B to clarify that no costs or attorney fees can be assessed for the filing, issuance, registration, or service of a domestic violence protective order, except as provided in Rule 11 of the Rules of Civil Procedure, and amends GS Chapter 50C to allow the award of attorney fees as part of a civil no-contact order. The act also amends Chapter 50C to provide that when an ex parte temporary no-contact order is entered by the court, a hearing must be held within 10 days of the filing of the request for temporary relief and to provide that when a request for ex parte relied is denied, the trial on the request for a permanent no-contact order must be held within 30 days of the denial of the request for ex parte relief. The amendments apply to actions filed on or after October 1, 2013.

S.L. 2013-303. (H 450) **Bail in Criminal Contempt cases.** Starting December 1, 2013, GS 5A-17 is amended to say that when criminal contempt includes confinement and the defendant appeals there must be a bail hearing within 24 hours. The hearing is to be before a district judge if the contempt is imposed by a clerk or magistrate; a superior court judge if imposed by a district judge; and a different superior court judge if the contempt is imposed by a superior court judge. If the right judge is not available by the 24-hour deadline, the bail hearing may be conducted by any judicial official.

SL 2013-411 (H 122). **Interlocutory appeals in domestic cases.** The act adds a new GS 50-19.1 and amends GS 7A-27 to provide an immediate right to appeal to the Court of Appeals from a district court's final adjudication of divorce, divorce from bed and board, child custody, child support, alimony or equitable distribution notwithstanding other pending claims in the same action. The appeal does not affect the trial court's jurisdiction over the remaining claims, and the failure to file an immediate appeal does not deprive the litigant of the right to appeal when all claims are resolved. Effective August 23, 2013.

SL 2013-416 (H 522). **Restricting the application of foreign law in domestic cases.** The act adds a new Article 7A to GS Chapter 1 to prohibit the application of foreign law in cases under Chapter 50 (Divorce and Alimony) and 50A (Uniform Child-Custody Jurisdiction and Enforcement Act) when doing so would violate a fundamental right of a person under the federal or state constitution. It also requires denial of a motion to transfer a proceeding to a foreign venue when doing so would have the same effect. The act applies to agreements and contracts entered on or after September 1, 2013.

S.L. 2013-198. (H 219) **Children Born Out of Wedlock.** The act amends numerous provisions in the General Statutes to remove the terms "illegitimate" and "bastard" when used in reference to children born out of wedlock. The act also amends GS Chapter 29 to allow a child born out of

wedlock to inherit from a person who died before or within one year of the birth of the child if paternity is established by DNA testing. Amendments were effective June 19, 2003.