**Family Law Update**

**Cases Decided Between**

**October 1, 2013 and June 4, 2014**

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**Custody**

**Cases Decided Between October 1, 2013 and June 4, 2014**

**‘Transferring Jurisdiction” to another state**

* A trial court has no authority to ‘transfer’ venue for a case to another state.
* GS 50A-207 allows a court to relinquish jurisdiction when it determines that another state is a more convenient forum for the litigation of the pending custody issue.
* A determination that another state is a more convenient forum must be supported by findings of fact on the matters the court is required to consider pursuant to GS 50A-207.
* When a court determines another state is a more convenient forum, the court must stay the NC proceedings to allow an action to be initiated in the other state. The NC court cannot dismiss the NC case, and the stay of the NC action is dependent upon an action being initiated in the other state.

**In the Matter of M.M., 750 S.E.2d 50 (N.C. App., November 5, 2013).** In juvenile matter discussed more fully in the juvenile case and legislative update, the trial court entered an order ‘transferring venue’ of the case to Michigan. The trial court later amended the order to state that it was “relinquishing jurisdiction” rather than changing venue. On appeal, the court of appeals construed the order as an attempt to relinquish child custody jurisdiction pursuant to GS 50A-207 based on a determination that Michigan is a more convenient forum. The court of appeals reversed the order for insufficient findings of fact. The trial court based the ruling on the fact that the child had lived in Michigan for a number of years but failed to make findings as to all other factors listed in GS 50A-207. In addition, the court of appeals held that the trial court erred in dismissing the NC action after ruling that Michigan was the more appropriate forum. The appellate court held that GS 50A-207 only allows a NC court to stay the NC proceedings upon the condition that a new action is initiated in the other state. According to the court of appeals, a trial court cannot simply dismiss an action, leaving a party in ‘legal limbo’ in the hope that the other state will hear the matter.

**Determining whether order is temporary or permanent**

* Trial court erred in determining last custody determination made in case was partially temporary and partially permanent. Custody orders must be considered as a whole order rather than broken down into parts.
* Order was not temporary because it was not entered without prejudice to either side, did not set a clear and specific reconvening date, and addressed all issues relating to custody.
* Whether there has been a substantial change in circumstances is a legal conclusion which must be supported by adequate findings of fact.

**Gary v. Bright, 750 S.E.2d 912 (N.C. App., December 3, 2013).** Trial judge modified existing custody order to increase dad’s visitation time after concluding modification was in best interest of the child. The trial judge concluded that the last order entered in case was partially permanent because it clearly awarded primary physical and legal custody to mom, but also partially temporary because it provided that dad’s limited visitation would last “until he complies with the spirit and letter of the previous orders entered in this case.” Because the trial court concluded the visitation provisions of the existing order were temporary, the trial court did not conclude there had been a substantial change in circumstances before applying the best interest standard to increase dad’s visitation in a new order. The court of appeals held that the trial court erred by modifying the last order without first concluding there had been a substantial change in circumstances because the last order was a permanent custody order rather than a temporary one. First, the court of appeals held that a custody order must be viewed as one whole order rather than separate parts. Therefore, a custody order either is permanent or temporary and it cannot be both. Second, the last order entered in this case clearly limited dad’s visitation and stated that the limitation would remain in effect until he complied with earlier orders but it also clearly settled the pending issues regarding custody by providing for primary physical custody of the child and visitation for dad. As the order did not say it was entered without prejudice, it did not set a clear and specific reconvening time and it resolved all pending issues regarding custody, the court of appeals held the order was permanent rather than temporary.

**Attorney fees**

* Attorney fee provision in separation agreement did not apply to court action to establish custody pursuant to GS 50-13.1.
* There is no requirement that an order actually entered in a case contain the same findings and conclusions articulated by the judge from the bench at the conclusion of a trial.

**Hennessey v. Duckworth, 752 S.E.2d 194 (N.C. App., December 3, 2013).** Parties entered into a separation agreement resolving all issues including property distribution, support and custody. The agreement was not incorporated into a court order. The agreement contained an attorney fee provision providing for the payment of fees by the “losing party” in any action initiated to “enforce compliance with the terms of the agreement or by reason of the breach of the agreement by either party.” An action was filed for custody pursuant to GS 50-13.1 and both parties requested more custodial rights than provided in the separation agreement. Upon conclusion of the proceedings, both parties requested attorney fees and the trial court awarded fees to mother. Father appealed, arguing that the trial court was bound by the attorney fee provision in the contract and arguing that mother could not recover fees when she was the “losing party” in the litigation. The court of appeals upheld the trial court award of fees to mother, holding that neither party in the case could be identified as the “losing party” as the trial court had granted and denied requests by each. In addition, the court held that GS 50-13.6 rather than the separation agreement controlled the award of fees in this case. As the contract provided for fees when litigation was initiated to enforce compliance with the contract or initiated due to a breach of the contract, that contract provision did not apply when both parties initiated litigation to establish custody pursuant to GS 50-13.1. Because the trial court made all findings required by GS 50-13.6, the court of appeals affirmed the fee award. The court of appeals also rejected father’s argument that the attorney fee award should be reversed because the findings contained in the written order for fees were not the same as the findings announced by the judge from the bench at the conclusion of the trial. The court of appeals held that Rule 58 provides that an order is not entered until it is reduced to writing, signed by the judge and filed with the clerk of court. According to the court of appeals, father’s argument that the “trial judge is restricted to findings he rendered at hearing when entering a written order .. is meritless.”

**Denial of visitation to a parent**

* GS 50-13.5(i) requires that prior to denying visitation to a parent, the court must find *either* that the parent is unfit *or* that visitation with the parent is not in the best interest of the child.
* Court of appeals opinion in Moore v. Moore, 160 NC App 569, 587 SE2d 74 (2003), holding that a denial of visitation is the equivalent of a TPR for a parent and that visitation cannot be denied to a parent absent a finding that the parent has waived his or her constitutional right to custody by conduct inconsistent with a parent’s protected status is disavowed as contrary to all prior case law.
* The constitutional rights of parents articulated in Petersen v. Rogers and Price v. Howard are “irrelevant” to custody claims between parents.
* Trial court did not err in denying all visitation to father who had been convicted of sexual misconduct with oldest daughter and who engaged in inappropriate sexual behavior with the other children, and who believed such conduct was appropriate.

**Respess v. Respess, 754 S.E.2d 691 (N.C. App., March 4, 2014).** Father pled guilty and was convicted of nine felony counts of indecent liberties based upon his inappropriate sexual activity with the oldest daughter of the parties. That child turned 18 before this action was filed. Mother filed for custody of the other minor children of the parties, requesting that the trial court prohibit all contact between father and the minor children. After concluding that visitation with the father would be contrary to the best interest of the children based on evidence of father’s inappropriate sexual conduct with all of the children and of father’s belief that such conduct was not inappropriate, the trial denied all contact to father. Father argued on appeal that the evidence was not sufficient to support the trial court’s denial of his request for visitation but the court of appeals disagreed. The court of appeals held that the language in GS 50-13.5(i) is “clear and unambiguous” and allows a trial court to deny visitation to a parent if it makes findings that visitation is not in the best interest of the child. The court disavowed the decision in Moore v. Moore, where the court held that a trial court may not deny visitation to a parent unless the trial court concludes the parent being denied contact has waived his or her constitutional right to custody by actions inconsistent with the constitutional rights of parents. The court of appeals held that the constitutional rights of parents set forth in the cases of Petersen v. Rogers and Price v. Howard are “irrelevant” to cases between parents which always are decided by the best interest of the child standard. The court of appeals held that the substantial and detailed evidence in this case of the father’s sexual conduct with each child clearly supported the trial court’s decision that contact was not in the best interest of the children.

**Modification; stipulation of substantial change; relocation effects**

* Because parties cannot stipulate to conclusions of law, a stipulation by parties that there has been a substantial change in circumstances is “invalid and ineffective”.
* Trial court did not err in finding relocation constituted a substantial change in circumstances even though the move actually occurred before entry of earlier custody order where effects of the move on the children did not manifest until after the entry of the previous order.
* Trial court’s findings of fact regarding impact of move on the children were sufficient to support the conclusion that there had been a change of circumstances substantially affecting the welfare of the children.

**Spoon v. Spoon, 755 S.E.2d 66 (N.C. App, March 18, 2014).** Mother appealed trial court order modifying custody order to give father primary custody of the minor children based on the conclusion that mother’s relocation constituted a substantial change in circumstances. Mother first argued that the trial court erred in relying on a stipulation entered between the parties during a previous proceeding that provided that a move by mother would constitute changed circumstances. While the court of appeals agreed that because parties cannot stipulate to a conclusion of law, a stipulation that there has been a substantial change in circumstance would be “invalid and ineffective”, the court of appeals determined that the trial court in this case did not actually “disregard its duty to determine whether a substantial change in circumstances had occurred” by relying on the stipulation but rather had made extensive findings of fact and reached the conclusion that there had been a changes sufficient to support the modification. The court of appeals also rejected mother’s argument that her relocation could not be the basis for the modification because she had moved before the entry of the last custody order entered in the case. According to the court of appeals, the trial court findings of fact established that the impact of the move on the children did not manifest and become apparent until after the entry of the previous order and therefore were appropriate to consider as a change since entry of the last order. And finally, the court of appeals rejected mother’s argument that the trial court findings of fact failed to establish that the move actually impacted the children. The findings showed that the grades of the children had dropped and the children had become “clingy, tearful and upset” since the move, and also showed that mother was attempting to “prioritize” the development of the children’s relationship with their new step-family over their relationship with their father and his family. The court of appeals held that these findings clearly showed that the move had a negative impact on the welfare of the children.

**Collateral estoppel between custody cases and juvenile cases**

* Trial court erred in concluding mother was collaterally estopped in a juvenile abuse, neglect and dependency proceeding from alleging father had molested the minor children because she had litigated the issue in an earlier Chapter 50 custody case between mother and father. Collateral estoppel does not apply because the burden of proof for custody is preponderance of the evidence while the burden of proof for adjudication of abuse, neglect or dependency is clear and convincing evidence.

**In the matter of K.A., E.A., and K.A., 756 S.E.2d 837 (N.C. App., April 1, 2014).** In a chapter 50 custody proceeding between mom and dad, mom alleged dad had sexually abused the three minor children. The trial court made a finding of fact that it was “highly unlikely” that defendant abused the children and found that mom had “perpetuated a false set of beliefs upon the children.” After the trial court awarded custody to father, DSS filed a petition alleging the children were abused. In the juvenile proceeding, the trial court held that mom was collaterally estopped from raising issue of father’s alleged sexual abuse of the children due to the litigation of that issue in the custody case. The court of appeals reversed, holding that collateral estoppel cannot apply when two proceeding have different burdens of proof. In a custody case, the burden is preponderance of the evidence while in an abuse, neglect and dependency proceeding, facts must be found based on clear and convincing evidence.

**Modification; stipulation of changed circumstances is ineffective; appointment of parenting coordinator**

* Because stipulations as to conclusions of law are “invalid and “ineffective”, a trial court cannot rely on a stipulation that there has been a substantial change in circumstances to support modification of custody.
* Trial court’s findings of fact regarding defendant’s conduct and the way her conduct significantly interfered with the parents’ ability to co-parent established that the change in circumstances since entry of the initial custody order had a detrimental effect on the minor child.
* Trial court conclusion that best interest of child would be served best by primary custody in father was supported by finding that father was the party most likely to foster a relationship between the child and the other parent.
* Trial court did not err in denying defendant’s request for the appointment of a parenting coordinator.

**Thomas v. Thomas, 757 S.E.2d 375 (N.C. App., May 6, 2014).** Both mother and father filed motions alleging a substantial change in circumstances since the entry of the existing custody order and requesting modification. At the beginning of the hearing, the trial court asked that each party stipulate there had been a substantial change in circumstances sufficient to support modification and the parties agreed. The trial court modified the custody order, granting plaintiff primary physical custody of the child. On appeal, defendant argued that a trial court cannot rely on a stipulation as to changed circumstances and the court of appeals agreed. Stating that stipulations as to conclusions of law are “invalid and ineffective”, the court of appeals held that a trial court had the duty to determine that there has been a substantial change in circumstances before modifying an existing custody order. However, in this case, the court of appeals held that despite the stipulation, the trial court made sufficient findings of fact in the final order to support the conclusion of changed circumstances. The court of appeals held that the factual findings showed that since father’s remarriage after the entry of the original custody order, mother had engaged in a pattern of disruptive behavior involving the relationship between father and the minor child, significantly interfering with the parties’ ability to co-parent, and detrimentally affecting the welfare of the minor child. The court of appeals also rejected mother’s argument that the trial court determination that primary custody to father would best serve the welfare of the child was unsupported by the evidence. The court of appeals pointed specifically to the trial court finding that, based on the past conduct of both parties, the father was the most likely party to facilitate the relationship between the other parent and the child. Finally, the court of appeals rejected mother’s argument that the trial court should have granted her motion to appoint a parenting coordinator pursuant to GS 50-90(1). The trial court concluded that the case was a high conflict case but that there was insufficient evidence introduced to establish that the parties had the ability to pay for the coordinator. The court of appeals held that the trial court has no affirmative duty to appoint a coordinator in high conflict cases and has no duty to require parties to produce evidence of ability to pay.

**Relocation; findings to support conclusion of changed circumstances**

* Trial court findings of fact were sufficient to support conclusion that mother’s proposed move to Oregon would constitute a substantial change in circumstances affecting the welfare of the minor child.
* Modification order established that trial court considered both the adverse effects of the proposed move on the child as well as the advantages of the move.
* Once the trial court concludes there has been a substantial change in circumstances, the determination of best interests is a matter left to the discretion of the court.

**Green v. Kelischek, \_ S.E.2d \_ (N.C. App., May 20, 2014).** Parents shared physical custody of child for several years. When mother remarried a man who lives in Oregon, she filed a motion to modify the existing custody order to allow her to move with the child to live in Oregon with her new husband. The trial court concluded there had been a substantial change in circumstances and ordered that mom would have primary custody of the child during the school year and dad would have visitation. However, the order provided that if mom moved to Oregon, primary custody of the child would go to dad. On appeal, mother argued that the trial court’s order did not contain findings sufficient to establish there had been a substantial change in circumstances. While holding that the mother had waived her ability to argue this point on appeal because she had argued in the trial court that there had been a substantial change, the court of appeals nevertheless pointed out that the findings made by the trial court were sufficient. The court held that the trial court clearly acknowledged that neither mother’s remarriage or the proposed relocation to Oregon alone constituted a substantial change, and made extensive findings regarding the tension that had developed between the parents since mother indicated she wanted to move with the child and the impact that tension was having on the child, the close bond between the child and his father as well as the father’s extended family in North Carolina and the stress and disruption that would be caused to the child’s relationship with those people should the mother take the child to Oregon, and the other disruptions in the child’s life that would result from the move. The trial court made a finding based on evidence from father that “because of the close relationship the child has with father and father’s family, the loss of ongoing, stable, consistent, weekly contact between father and the minor child would indeed have an adverse effect on the minor child.” The court of appeals also rejected mother’s argument that the trial court erred in concluding it would be in the child’s best interest to be in father’s custody if mother moved to Oregon, stating that best interest is a discretionary call for a trial judge.

**Domestic Violence**

**Cases Decided Between October 1, 2013 and June 4, 2014**

**Ordering searches and seizures of weapons**

* A trial court has no authority to order law enforcement officers, as part of relief granted in ex parte DVPO, to search defendant’s person, car and residence and seize all firearms found.
* The ‘catch-all’ provision found in GS 50B-3(a)(13) is not broad enough to allow judge to extend authority specifically relating to the surrender of firearms set out in GS 50B-3.1.

**State v. Elder, 753 S.E.2d 504 (N.C. App., January 21, 2014).** In a criminal trial, defendant made a motion to suppress evidence found during a search of his residence by law enforcement officers who had come to his residence to serve an ex parte DVPO entered pursuant to GS 50B. The ex parte order included a provision which the trial court indicated was included pursuant to the authority granted to the trial court in GS 50B-3(a)(13), the ‘catch-all provision’ allowing the court to include in the DVPO “any additional prohibitions or requirements the court deems necessary to protect any party or any minor child.” That provision ordered law enforcement to search the defendant’s person, car and residence and seize all firearms found. The trial court denied the motion to suppress but the court of appeals reversed, holding that the broad ‘catch-all’ provision in the remedy section of Chapter 50B is not broad enough to allow the trial judge to order such searches and seizures. Relying on rules of statutory construction, the court of appeals held that because GS 50B-3.1 addresses in detail the trial court’s authority with regard to firearms and does not allow the trial court to order any seizure of weapons (rather, it only allows the trial court to order defendant to “surrender” weapons), the general catch-all provision in the general remedy section of Chapter 50B cannot be read to broaden the specific provisions of GS 50B-3.1. Because the trial court had no authority to order the search, the trial court erred in denying defendant’s motion to suppress. Dissent by Judge Bryant. [NC Supreme Court granted a stay and then granted the request for a Writ of Supersedeas on March 6, 2014]

**Defendant’s time to file answer; 10-day hearing is trial on the merits**

* GS 50B-2(a) does not give a defendant 10 days to file an Answer; rather, it gives a defendant no more than 10 days to file an Answer.
* Where trial court entered an ex parte DVPO, trial on the merits of the 1 year DVPO could be held 10 days after issuance of the ex parte or 7 days following service of process, even if defendant had not had 10 days to file an Answer.
* Trial court did not err in issuing DVPO based upon allegations that originally were made in the context of a DSS investigation.

**Henderson v. Henderson, \_ S.E.2d \_ (N.C. App., June 3, 2014).** Trial court granted plaintiff mother’s request for an ex parte DVPO and scheduled a hearing with notice to defendant 10 days following the entry of the DVPO. Defendant was served 5 days before the scheduled hearing. Following the presentation of evidence at the “10-day hearing”, the trial court entered a 1 year DVPO. On appeal, defendant argued that the trial court had no subject matter jurisdiction to conduct the trial on the merits for the 1 year DVPO before defendant had at least 10 days following service of process to file an Answer. The court of appeals rejected his argument, stating that while GS 50B-2(a) does require that the summons issued when an ex parte DVPO is granted inform the defendant that an Answer must be filed within 10 days following service of process, this provision simply allows a defendant no more than 10 days to file an Answer. The court of appeals held that it does not give a defendant a right to at least10 days between service and a trial on the merits. The court of appeals noted that because the statute requires that a hearing be held within 10 days following issuance of the ex parte DVPO, the statute necessarily authorizes the trial court to conduct the hearings on the merits at that point in time. The court of appeals also rejected defendant’s argument that the trial court erred in basing the DVPO on allegations originally made by plaintiff in the context of a DSS proceeding. Because plaintiff presented evidence that was sufficient to support the findings of fact made by the trial court which in turn were sufficient to support the conclusion that defendant had committed acts of domestic violence, the entry of the 1 year DVPO was affirmed. While a DVPO cannot be based simply upon a finding that DSS had investigated allegations of abuse, the order can be based on findings of fact regarding occurrences that also were the basis of a DSS investigation.

**Entry of a final DVPO after entry of an ex parte order; time limit on continuances of ex parte DVPOs; checking boxes on AOC forms as sufficient findings of fact**

* A trial court had no jurisdiction to enter a 1 year DVPO after the ex parte order expired after being in effect for 18 months.
* Provision in GS 50B-2(c)(5) that “A continuance shall be limited to one extension of no more than 10 days unless all parties consent or good cause is shown” indicates that the General Assembly intends that continuances of ex parte orders be limited.
* While simply checking the boxes on the form ex parte DVPO was sufficient under the circumstances of this case because the trial court checked both the general findings printed under paragraph 2 of AOC form CV- 304 as well as the more specific findings under paragraph 4 to support an order requiring defendant to surrender all weapons, the trial court always should include more specific findings of fact in the space on the form under paragraph 2 to support the entry of the ex parte DVPO.

**Rudder v. Rudder, \_ S.E.2d \_ (N.C. App., June 3, 2014).** Trial court granted an ex parte DVPO and that order was “continued in effect” 13 times for a total time period of 18 months. Following the expiration of the ex parte order, plaintiff requested a hearing on the merits of the complaint. The trial court heard evidence and entered a one year DVPO. On appeal, defendant argued that the trial court’s findings of fact were insufficient to support entry of the ex parte order and also argued that the trial court had no authority to enter the one year DVPO after the ex parte DVPO expired after being in effect for more than one year. The court of appeals upheld the entry of the ex parte DVPO after concluding that in this particular case, simply checking the boxes on AOC form CV-304 was sufficient support for the trial court’s conclusion that defendant had committed an act of domestic violence because the trial court checked both box 2 – containing very general language – and box 4 which contains specific pre-printed findings sufficient to support an order requiring defendant to surrender weapons. However, the court of appeals held that “the better practice” is for a trial judge to write more specific findings in the space provided within box 2 – indicating that without the more specific finding contained in box 4, the order in this case would not have been withheld. However, the court of appeals agreed with defendant that the trial court had no jurisdiction to enter a one year protective order after the expiration of the ex parte DVPO that had been in effect for more than one year but then expired without being renewed. The court of appeals opinion also stated that the court was not holding that the ex parte could have been renewed again, citing the recent amendment to GS 50B-2(c)(5) providing that continuances should be limited to one extension as an indication that the General Assembly intends that ex parte DVPOs be limited in duration. The court of appeals also stated that it was not commenting on whether a trial court would have authority to enter a 1 year DVPO more than one year after the complaint is filed if no ex parte is entered.

**Violation of DVPO**

* A trial court did not err in concluding defendant had violated provisions of DVPO ordering that he not abuse or harass plaintiff where evidence showed plaintiff was “tormented by” defendant’s actions towards her family members and friends.

**Marshall, Moore and Moore v. Marshall, 757 S.E.2d 319 (N.C. App., April 1, 2014).** DVPO ordered defendant not to contact, abuse or harass plaintiff. Defendant repeatedly contacted and harassed members of plaintiff’s family and her friends. The trial court held him in contempt and the court of appeals affirmed. The court rejected defendant’s argument that he had not violated the DVPO because he did not contact plaintiff. The court of appeals affirmed the trial court’s conclusion that defendant violated the order by engaging in communications with plaintiff’s family and friends that he knew would torment and harass plaintiff.

**Civil No-Contact Orders (50C orders)**

**Cases Decided Between October 1, 2013 and June 4, 2014**

**Contempt**

* GS 50C-10 provides for the use of civil contempt rather than criminal contempt for a violation of a 50C no-contact order.
* Purge for civil contempt can include a fine payable to the party moving.
* Fine can be in any amount but trial court must determine contemnor has ability to pay.

**Tyll v. Berry, \_ S.E.2d \_ (N.C. App., May 20, 2014).** Chapter 50C no-contact order prohibited defendant from visiting, contacting, assaulting, or otherwise interfering with plaintiff or plaintiff’s family. Upon motion by plaintiff, the trial court found defendant in contempt for violating the order and provided that to purge the contempt, defendant must pay plaintiff $2500 for the past violation and $2500 for each future violation. Defendant appealed to the court of appeals. The court of appeals held that the contempt order was a civil contempt order because GS 50C-10 requires the use of civil contempt rather than criminal contempt for violations of 50C orders and because the trial court order made it clear that the trial court was attempting to force defendant to comply with the order in the future as opposed to simply punishing him for his past violations. While acknowledging that trial courts are prohibited from awarding compensatory damages in a contempt proceeding, the court of appeals held that a trial court does have the authority to order payment of a fine as a purge in civil contempt and held that the fine can be paid directly to the party moving for contempt rather than to the school system. The court of appeals remanded the case to the trial court for findings as to defendant’s ability to pay the fine ordered by the court.

**Child Support**

**Cases Decided Between October 1, 2013 and June 4, 2014**

**Reducing arrears to judgment**

* Second trial judge erred in setting aside judgment by first trial judge reducing arrears to judgment and ordering periodic payments towards arrears.
* First trial judge had authority to enter new judgment on amount of arrears owned pursuant to a judgment entered almost ten years prior. While there is no authority to ‘renew’ a judgment not collected within the 10 year statute of limitations, a new judgment can be entered in an independent action filed on the prior judgment.
* GS 50-13.4 gives the trial court authority to order periodic payments on arrears any time the court enters a judgment on the arrears.

**Duplin County DSS ex. Rel. Pulley v. Frazier, 751 S.E.2d 621 (N.C. App., November 19, 2013).** In 2001, a judgment was entered reducing defendant’s child support arrears to judgment and ordering periodic payments. In 2010, plaintiff filed a motion seeking to ‘renew’ the judgment as the 10 year statute of limitation was about to run and the 2001 judgment had not been satisfied. The first trial court entered a new judgment on the arrears and again ordered periodic payments. A second trial judge then granted defendant’s Rule 60 motion to set aside the new judgment after concluding that the trial court had no authority to order periodic payments in the new judgment. The court of appeals reversed, rejecting the contention of the second trial judge that GS 50-13.4 is too ‘vague’ to allow the new judgment and the order for periodic payments. The court of appeals held that plaintiff’s proceeding to obtain a new judgment on the unsatisfied, 10 year old judgment was appropriate and that GS 50-13.4 supported the trial judge’s order for periodic payments on the arrears.

**Imputing income; questioning pro se litigant**

* Trial court did not err in imputing income to father after concluding father quit his job in deliberate disregard of his child support obligation.
* Trial court has authority pursuant to Rule 611 of the Rules of Evidence to question pro se litigants in order to gather evidence needed to resolve the case.
* It was not an abuse of discretion for the trial judge to question pro se father regarding his reason for leaving his job and about his future educational and career plans.

**Cumberland County ex. rel. Rettig v. Rettig, *unpublished opinion*, 753 S.E.2d 740 (N.C. App., December 3, 2013).** On July 19, 2012, the trial court entered a temporary child support order requiring father to pay $984 guideline child support. On August 22, 2012, father resigned from his employment and registered as a full time student at a community college. Father thereafter filed a motion to modify based on his reduction in income. During the hearing on his motion to modify, father told the court his income had decreased because he quit his job in order to return to school full time and asked the court to reduce his child support obligation to reflect his current income. The trial court then questioned father, who was not represented by counsel during the hearing, about his reasons for leaving his employment and his future educational and career plans. At the conclusion of the hearing, the trial court set a permanent child support order based on the salary father earned from his previous employment after concluding income should be imputed to father because he voluntarily left his employment in deliberate disregard of his child support obligation which had been set just a few weeks before father decided to become a full-time student. On appeal, father argued the trial court “treated him as a hostile witness” and violated Rule 611 of the Rules of Evidence by questioning him in such detail about his decision to become a full time student. The court of appeals disagreed, holding that the trial court acted within the authority granted by Rule 611 which allows the trial court to control the manner and presentation of evidence. The court of appeals also rejected father’s argument that the trial court posed “impermissibly leading” questions to father. According to the court of appeals, the trial court’s questioning was sufficiently focused to procure the information needed to decide the issue presented to the court. In addition, the court of appeals held that the evidence supported the trial court’s determination that father’s reduction in income was the result of bad faith and supported the trial court’s decision to impute income in the amount father had earned from his job before he resigned to return to school.

**Motion for blood test to disprove paternity**

* The trial court did not err in denying defendant’s motion for a blood test, requested pursuant to GS 50-13.13 as part of defendant’s request pursuant to that statute to have his child support obligation set aside due to his contention that is not the child’s father.
* Where motion filed in support request pursuant to GS 50-13.13 fails to show ‘good cause to believe defendant is not the father of the child’, the trial court cannot order a blood test.

**Guilford County ex. rel. IJames and Yoes v. Sutton, *unpublished opinion*, 753 S.E.2d 397 (N.C. App., November 3, 2013).** Child support order was entered against defendant based on affidavit of paternity executed by defendant. Thereafter, defendant filed a motion to disestablish paternity and set the child support order aside pursuant to GS 50-13.13. In support of his request, defendant alleged in a verified motion that “at the time the child was conceived, the child’s mother told the defendant that she was sexually active with at least two other men; that she used the internet to seek sexual partners; and that she told defendant he was the child’s father.” The trial court denied defendant’s request for a blood test after concluding that defendant’s verified motion failed to establish good cause to believe defendant is not the child’s father. The court of appeals affirmed, agreeing with the trial court’s conclusion about the sufficiency of the allegations to establish good cause. GS 50-13.13 does give the court the authority to set aside a child support order if a defendant proves he is not the child’s father. However, the court cannot order a blood test to help defendant prove that fact unless the verified motion contains sufficient information to allow court to find good cause to believe he is not the father.

**Defenses to registration of support order entered in another state**

* Trial court erred in refusing to register a child support order entered in Colorado based on concerns regarding the obligor’s ability to pay support.

**Carteret County o/b/o Kendall v. Kendall, 752 S.E.2d 764 (N.C. App., January 7, 2014).** Plaintiff filed action pursuant to GS 52C-6-607 to register and enforce a child support order entered in Colorado. Defendant contested registration by arguing that due to the fact he was erroneously registered as a sex offender in North Carolina, he had been unable to secure employment. The trial court denied plaintiff’s request for registration, concluding that it would not be equitable to register given defendant’s circumstances. The court of appeals reversed, holding that UIFSA requires that support orders be registered unless a defendant can show one of the defenses specifically listed in GS 52C-6-607. The court of appeals held that the list in that statute is exclusive and an equitable concern such as the one expressed by the trial court in this case is not an option listed in that statute.

**Retroactive support; imputing income; awarding a vehicle as support; attorney fees**

* Retroactive child support must be based on evidence of party’s actual expenditures for the child during the time period for which retroactive support is sought. The child support guidelines adopted by the Conference of Chief District Court Judges cannot change case law.
* Finding of bad faith required to impute income to father was supported by findings that father’s criminal convictions for sexually abusing his daughter lead to the loss of his professional license and his job.
* Amount of income imputed to a parent must be supported by evidence regarding parent’s past earnings or be in the amount of minimum wage if parent had no previous earnings.
* Trial court did not err in transferring vehicle to mother as part of the child support order even though the trial court made no findings as to the value of the vehicle.
* Trial court can consider income of new spouse when determining whether one parent should pay attorney fees to the other parent.
* There is no requirement that the court find parent has ability to pay attorney fees before awarding attorney fees to the other parent who has insufficient means to defray the cost of litigation.

**Respess v. Respess, 754 S.E.2d 691(N.C. App., March 4, 2014).** The trial court applied the guidelines to determine amount of retroactive child support, in accordance with guideline provision stating that a trial court can use either the guidelines or evidence of actual expenditures to set retroactive support. Citing the opinion in Robinson v. Robinson, 210 NC App 319 (2011), the court of appeals held that the child support guidelines cannot overrule existing case law. Existing case law provides that retroactive support must be based on evidence of actual expenditures.

The court of appeals affirmed the trial court’s finding that father had acted in bad faith deliberate disregard of his child support obligation when he engaged in conduct that lead to the loss of his professional license and his job. However, the trial court erred in imputing an amount that the trial court determined to be half of the amount father made from his last employment. The court of appeals held that the amount of income imputed must be based on evidence of past earning capacity of the parent. In this case, there were no findings indicating why the trial court decided to impute half of father’s last annual salary rather than the full amount.

Court of appeals also rejected father’s argument that the trial court erred by awarding mother a vehicle owned by father as an “additional form of support” without making a finding as to the value of the vehicle. The court of appeals held that GS 50-13.4 allows the court to transfer personal property as child support and does not require that the property be valued by the trial court.

In determining whether to order father to pay attorney fees to mother, trial court properly considered income of father’s new wife. According to the court, “where a party’s new spouse shares responsibility for the parties’ needs and expenses, it is proper for the court to consider the income received by the new spouse.” However, according to the court of appeals, there is no requirement that the trial court determine a parent has the ability to pay the attorney fees of the other parent – “the determination of whether a party has sufficient means to defray the necessary cost of litigation [does not require] a comparison of the relative estates of the parties.”

**Registration of order from another state; enforcement of all provisions**

* When Tennessee order was confirmed as a matter of law through the registration process found in GS 52C-6-603, the North Carolina trial court had authority to use contempt to enforce all provisions in the order and not just the support provisions.
* Trial court had authority to grant contempt motion filed by the plaintiffs who were not parties to the Tennessee order because they clearly were third party beneficiaries of the provisions in the consent judgment.
* Trial court had authority to award attorney fees to plaintiff in contempt proceeding where underlying consent judgment authorized the payment of attorney fees by any breaching party.

**Marshall, Moore and Moore v. Marshall, 757 S.E.2d 319 (N.C. App., April 1, 2014).** Defendant husband and plaintiff wife entered into a Marital Dissolution Agreement in Tennessee. The agreement provided that defendant would make monetary support payments to plaintiff wife and provide health insurance to her. In addition, the agreement prohibited defendant from harassing plaintiff wife or third parties who also are plaintiffs in this case. The Agreement was incorporated into a court order in Tennessee and subsequently registered in North Carolina through the procedure for registration of a foreign support order found in UIFSA, in GS 52C-6-6-3. The North Carolina trial court held defendant in contempt for violation of the harassment provisions of the registered order. Defendant appealed, arguing in part that while registration gives the North Carolina court authority to enforce support provisions in the foreign order, it does not give the court authority to enforce provisions not related to support. The court of appeals disagreed, holding that once the order is registered, the court has authority to enforce any provision in the order. The court of appeals also affirmed the trial court’s finding of contempt based on the motion for contempt filed by the other two plaintiffs in this case, rejecting defendant’s argument that he could not be held in contempt for harassing those parties because they were not parties to the Tennessee consent order. The court of appeals held that the order was clear that the other people were intended beneficiaries of the harassment provisions in the order even though they were not actually parties to the order. The court of appeals also upheld the trial court’s award of attorney fees to plaintiff, holding that the fees were authorized by language in the consent judgment stating that fees would be paid by any breaching party.

**Postseparation Support and Alimony**

**Cases Decided Between October 1, 2013 and June 4, 2014**

**Affidavits as evidence; consideration of future expenses; attorney fees**

* Party is not required to produce evidence of financial information contained in financial affidavit because the affidavit itself is evidence.
* Trial court did not err in considering expenses wife is likely to incur for house maintenance costs in the future in determining her reasonable needs.
* Trial court did not err in determining wife’s investment income had decreased even though market value of the principle amount in the investment account had increased.
* Where dependent spouse had an estate of over $1.5 million, the trial court erred in determining she had insufficient means to defray the costs of litigation.

**Parsons v. Parsons, 752 S.E.2d 530 (N.C. App., December 17, 2013).** Plaintiff former husband appealed order of trial court modifying alimony order to increase the amount of monthly payment to dependent former wife from $5,028 to $7,560 based on findings that wife’s monthly expenses had increased, her income had decreased and husband’s income had increased. The trial court also awarded wife $40,000 in attorney fees. The court of appeals affirmed the increase in alimony but vacated the order for attorney fees. The court of appeals held that the trial court conclusion that there had been a substantial change in the financial circumstances of the parties was sufficiently supported by the trial court findings of fact and the findings were sufficiently supported by the evidence presented. The court of appeals rejected husband’s argument that the trial court erred in basing findings of fact on wife’s financial affidavit because wife did not introduce evidence of the information contained in the affidavit. The court of appeals held that the affidavit is evidence itself and supporting evidence is not necessary. The court of appeals also rejected husband’s argument that the trial court erred in including in the calculation of wife’s expensed amounts wife alleged she would need in the future to pay house maintenance expenses. While husband argued such expenses are speculative, the court of appeals held that “it is, of course, appropriate for the trial court to make findings on and consider reasonable future expenses in ordering or modifying alimony, including those relating to upkeep of defendant’s residence.” The court of appeals also rejected husband’s contention that the trial court should not have determined wife’s investment income had decreased when the principle in her investment account actually had increased. The dividends payable to wife had decreased but the principle had grown, and husband argued wife should be required to take the appreciated amount out of principle to supplement her income. The court of appeals disagreed, holding that while the trial court correctly considered the principle value of the account as an asset of wife in determining the total value of her estate, it would have been inappropriate to consider the growth of that asset as income as well. However, the court of appeals agreed with husband’s contention that wife should not have been awarded attorney fees. According to the court of appeals, it was error for the trial court to conclude wife had insufficient means to pay her attorney fees when findings indicated she has an estate worth more than $1.5 million.

**Marital misconduct; indignities; provocation**

* Trial court’s conclusion that defendant former husband committed marital misconduct in the form of indignities was sufficiently supported by evidence that husband was controlling and verbally abusive toward plaintiff, and engaged in a pattern of isolating plaintiff and their children from broader society.
* A finding of Indignities requires more than a showing of an isolated incidence, and evidence in this case was sufficient to show defendant engaged in this course of conduct repeatedly and over time.
* While old and established case law indicates that a trial court must specifically find lack of provocation by the spouse seeking to prove indignities, “it is not entirely clear that such a finding is required [under the current alimony statutes adopted in 1995].”

**Dechkovskaia v. Dechkovskaia, 754 S.E.2d 831 (N.C. App., February 18, 2014).** Trial court awarded former wife alimony in the amount of $3,500 a month for a term of 12 years based in part on the conclusion that former husband committed acts of marital misconduct during the marriage “by offering indignities to plaintiff [dependent spouse].” The parties were immigrants from Russia and the trial court found that defendant had engaged in behavior designed to control plaintiff and isolate her and their child from the broader American society. Specific conduct included denying plaintiff access to the parties’ bank accounts and other financial information and refusing to allow the child of the parties to attend school. Defendant also attempted to control the food plaintiff and the children ate and did not allow them to associate with anyone who was not Russian. On appeal, husband argued the trial court findings regarding the misconduct were not supported by competent evidence. The court of appeals disagreed, holding that the evidence “paints a picture of defendant as controlling and verbally abusive, and describes a pattern of isolating plaintiff and the parties’ children from broader society.” As indignities requires a showing of a course of conduct rather than an isolated occurrence, the court of appeals noted that the evidence in this case did in fact establish that defendant had engaged in this course of conduct over an extended period of time.

Defendant also argued that the trial court erred by finding indignities without specifically concluding that plaintiff did not provoke his behavior. Stating that “the argument that a spouse – of either sex – could legally justify emotional or verbal abuse of the nature found by the trial court by some sort of “provocation” strains credulity, at least based on modern sensibilities and values,” the court of appeals nevertheless acknowledged that case law dating back to the early 1800s in North Carolina based on “fault-based divorce and divorce from bed and board” did require that a trial court specifically find that the indignities were committed “without provocation” by the other spouse. The court of appeals stated that the 1995 alimony statutes do not mention the word ‘provocation’ and therefore concludes that “it is not entirely clear that such a finding is [still] required.” After a lengthy discussion of the history of the provocation rule and the reasons such a rule now is inconsistent with “the substantial changes in procedural law, substantive family law, or the vast changes in the status of women” in society since the adoption of the provocation rule, along with an acknowledgment that the court of appeals cannot overrule existing supreme court precedent, the court of appeals concluded that in this case, the trial court findings – while not specifically addressing the issue – made it clear that plaintiff did nothing that could be considered “adequate provocation” of defendant’s abuse.

**Order denying PSS affects a substantial rights; abandonment as marital misconduct**

* An order denying PSS can be immediately appealed because it is an interlocutory order affecting a substantial right.
* Trial court’s finding that defendant abandoned plaintiff was supported by the evidence. Fact that plaintiff did not specifically object to defendant leaving the marital home did not preclude finding of abandonment by defendant.

**Sorey v. Sorey, 757 S.E.2d 518 (N.C. App., May 6, 2014).** Trial court denied defendant’s request for PSS after concluding defendant had engaged in marital misconduct. The defendant appealed. The court of appeals first held that the appeal of the interlocutory order was appropriate because, while an order granting PSS does not affect a substantial right, an order denying a request for PSS does affect a substantial right. The court of appeals then rejected defendant’s argument that the evidence was insufficient to support a finding that defendant abandoned plaintiff. The trial court found that defendant told plaintiff she wanted to move, plaintiff refused to move with her, she left the marital home and deposited plaintiff’s belongings at the home of the son of the parties while plaintiff was at work, and then told plaintiff that “she did not want him anymore.” The court of appeals held that plaintiff’s failure to explicitly object to defendant’s move from the marital residence did not preclude the trial court from finding abandonment.

**Contempt; findings to support conclusion of present ability to pay**

* Findings of fact in order of civil contempt were sufficient to show plaintiff had the present ability to pay the $20,000 purge within the 60 days allowed by the trial court order.
* Based on evidence concerning plaintiff’s recent income and expenses, his method of paying his expenses, including his use of income from his closely held corporation, the trial court reasonably concluded he could take reasonable steps to pay the purge amount within the 60 day period.

**Gordon v. Gordon, 757 S.E.2d 351 (N.C. App., April 15, 2014).** Trial court held plaintiff in civil contempt for failure to make alimony payments required by consent judgment and ordered plaintiff to be imprisoned unless he paid $20,000 within 60 days of the entry of the contempt order. The court of appeals affirmed the contempt order, rejecting plaintiff’s arguments that the order lacked findings sufficient to establish he has the present ability to comply with the purge provisions. The court of appeals held that findings regarding plaintiff’s financial circumstances were sufficient to support the conclusion that he had the ability to pay within the 60 day period allowed him by the trial court. The trial court made an extensive “inventory” of plaintiff’s income and expenses and made findings regarding the way plaintiff earns money and pays expenses, and these findings established that plaintiff could take reasonable steps to be able to pay the amount ordered within 60 days. The reasonable steps included not making voluntary payments to his mother and adult children and borrowing money from cash advances through his credit card accounts. The court also rejected plaintiff’s contention that the contempt order was erroneous because the trial court order found only that defendant “had the ability to pay” rather than the defendant “has” the ability to pay. The court of appeals held that the contempt order clearly showed that the trial court was referring to his ability to pay the during the time period immediately before and during the contempt hearing, and the use of the word “had” reflected only that the trial court actually entered the order approximately one month following the hearing.

**Divorce and Annulment**

**Cases Decided Between October 1, 2013 and June 4, 2014**

**Annulment; voidable marriage; estoppel**

* A marriage based on a ceremony in North Carolina not properly solemnized pursuant to the requirements of G.S. 51-1 is voidable.
* A voidable marriage may be annulled pursuant to G.S. 50-4 in a “direct proceeding”.
* A counterclaim seeking annulment filed in response to a complaint seeking alimony is a “direct proceeding”.
* Marriage ceremony performed by a “medicine man” ordained by the Universal Life Church was not properly solemnized and therefore was voidable in an annulment proceeding.
* Amendment to GS 51-1.1 passed by the General Assembly in 1981 validated marriages performed by ministers ordained by the Universal Life Church *before* the effective date of that amendment, July 3, 1981, but does not validate marriages performed by such ministers *after* that date.
* Judicial estoppel applies only when a party has relied on an inconsistent position in an earlier judicial proceeding.
* Equitable estoppel is a broader remedy than judicial estoppel, and quasi-estoppel is a subcategory of equitable estoppel that does not require a showing of detrimental reliance.
* Spouse was not prohibited from arguing estoppel based on the doctrine of unclean hands where both spouses were ‘equally negligent’ in relying on credentials of the medicine man who performed the voidable marriage ceremony.
* Spouse was barred by doctrine of quasi-estoppel from contesting wife’s claim for alimony based on invalidity of marriage because he was as negligent as his wife in relying on credentials of medicine man.

**Duncan v. Duncan, 745 S.E.2d 451 (NC App, February 18, 2014).** Parties participated in a marriage ceremony in 1989 officiated by a person who held himself out as a “Cherokee medicine man” and who was ordained as a minster by the Universal Life Church. In 2001, an attorney suggested to the parties that the 1989 ceremony did not result in a valid marriage and thereafter, the parties participated in a second ceremony in 2001 officiated by a Presbyterian minister. When the parties separated in 2005, plaintiff wife claimed that the marriage between the parties began in 1989 and requested alimony and equitable distribution. Husband counterclaimed, arguing that the date of marriage was 2001 and requesting annulment of the 1989 marriage pursuant to GS 51-4. The trial court concluded that the 1989 ceremony resulted in a valid marriage and that defendant was judicially and equitably estopped from contesting the validity of the 1989 marriage. The court of appeals first held that husband’s annulment claim was properly before the trial court, concluding that a marriage not properly solemnized in accordance with the requirements of GS 51-1 is voidable and an annulment proceeding is the proper way to void the marriage from its inception. Acknowledging that annulments only may be sought in a “direct proceeding”, the court held that a counterclaim for annulment pursuant to GS 50-4 filed in response to a claim for alimony and equitable distribution is a ‘direct proceeding’. The court of appeals then held that defendant had met the “high burden” of proving the invalidity of the 1989 marriage by showing that the person who officiated the ceremony was ordained only by the Universal Life Church. Relying on the Supreme Court decision in the case of Lynch v. Lynch, 301 N.C. 479, 272 S.E.2d 349 (1980), the court of appeals held that an ordination from the Universal Life Church does not meet the requirements of GS 51-1. The court rejected husband’s argument that the statutory amendment by the General Assembly following the Lynch decision validated all marriage performed by ministers ordained by this organization, finding that the amendment was intended to validate only the marriages that were officiated before the Lynch decision and therefore does not apply to marriages officiated by Universal Life ministers after the effective date of the amendment, July 3, 1981.

After determining the 1989 marriage was invalid, the court of appeals turned to the issue of estoppel and held that while the trial court erred in applying the doctrine of judicial estoppel, the trial court properly concluded that husband should be equitably estopped from raising the invalidity of the marriage as a defense to wife’s claim for spousal support. According to the court of appeals, judicial estoppel can apply when a party attempts to assert a position that is contrary to a position that person has taken in a previous judicial proceeding. As there had been no previous judicial proceeding wherein husband asserted any position relating to the marriage, the trial court erred in using judicial estoppel in this case. However, the court of appeals held that equitable estoppel – more precisely, quasi-estoppel – was correctly applied by the trial court to prohibit defendant from contesting wife’s alimony claim. Defendant’s only argument against the application of equitable estoppel was that wife’s “unclean hands” resulting from her participation in the invalid marriage ceremony barred the court from applying estoppel to help her. The court of appeals held that application of estoppel principles “turns on the particular facts of each case”, and stated that where both spouses were “equally negligent” in relying on the medicine man’s credentials, the wife did not have unclean hands. The court noted that had defendant been able to establish that plaintiff was more negligent or more culpable than he the result would have been different. For example, if defendant could have proved plaintiff actually knew at the time of the ceremony that the medicine man was not authorized to perform the ceremony while defendant had no such actual knowledge or that plaintiff misrepresented the man’s credentials to defendant, her unclean hands would have barred the application of estoppel. Dissent by McGee on issue of whether defendant met burden of showing invalidity of 1989 marriage.

**Equitable Distribution**

**Cases Decided Between October 1, 2013 and June 4, 2014**

**Divisible property; postseparation income from marital corporation**

* Postseparation distributions of income from marital LLC were part divisible property and part compensation to husband for his actions managing the LLC following separation.
* Trial court determination regarding portion of postseparation distributions attributable to the actions of husband was supported by the trial court’s findings of fact.

**Binder v. Binder, *unpublished opinion*, 753 S.E.2d 743 (N.C. App., December 17, 2013).** During separation, husband collected $2,183,762.00 from a marital LLC. The sole asset of the LLC was a shopping center and the LLC earned income from the rents generated by the shopping center. The trial court determined that a portion of the funds collected by husband during separation was payment for husband’s services managing the LLC after the date of separation. The trial court determined that $304,014 was husband’s compensation for his postseparation service based on husband’s testimony that he managed the tenants, cleaned the toilets, and performed other daily management services after the date of separation, as well as on testimony from other witnesses that five percent of the total distributions from the LLC would be a customary and reasonable management fee. Because it was income earned from husband’s postseparation efforts, the $304,014 was properly classified as husband’s property. The remaining $1,879,748 was properly classified as divisible property because there was no evidence indicating it had been earned as the result of the postseparation efforts of either spouse.

**Failure to value retirement; postseparation payments; stipulation in pretrial order**

* Trial court did not err in failing to classify and distribute defendant’s pension where plaintiff failed to present credible evidence of value of pension on date of separation.
* Plaintiff was not entitled to credit for postseparation mortgage payments made on house she received in interim distribution because all payments accrued to her benefit.
* Where plaintiff stipulated to existence of a promissory note from plaintiff’s brother to the parties in pretrial order and offered testimony as to value of the note at trial, plaintiff cannot argue on appeal that there was no evidence to support the value placed on note by trial court.

**Johnson v. Johnson, 750 S.E.2d 25(November 5, 2013).** Trial court refused to distribute defendant’s military pension after concluding plaintiff had failed to offer evidence of the date of separation value of the pension. Court of appeals affirmed trial court, rejecting plaintiff’s argument that trial court could have used defendant’s testimony that he “could retire sometime in 2012” and that his monthly payment would be “around $3500” at that time, along with actuarial tables, discount rates, and other information the trial court could “find on the internet” to arrive at a value for the pension. The court of appeals cited the valuation methodology found in the case of Bishop v. Bishop, 113 NC App 725 (1994), and held that plaintiff’s evidence was insufficient to allow the trial court to use the methodology in Bishop, even if the trial judge had been inclined to attempt to apply the methodology herself. The court of appeals noted that while defendant testified that his monthly payment would be “around $3500” if he retired “sometime in 2012”, the Bishop case requires that a pension be valued based on the assumption that defendant retired on the date of separation which was in 2009 in this case. The court of appeals also rejected plaintiff’s argument that the trial court erred in failing to “credit” her for payments made during separation on the marital residence when the trial court valued the marital residence. The court of appeals held that the trial court correctly classified the increase in value of the marital residence as divisible property and distributed it to plaintiff. Because the plaintiff received the house and the mortgage as an interim distribution, any payments she made to reduce the mortgage accrued to her benefit and she was not entitled to any credit for those payments in the final distribution judgment. Finally, both parties listed a promissory note from plaintiff’s brother as a marital asset in the pretrial order. Defendant listed it with a value of $45,000 and plaintiff listed a value of $40,000. At trial, plaintiff contended it should be valued at $45,000. The trial court classified the note as a marital asset valued at $45,000 but plaintiff argued on appeal that the trial court erred in valuing the note when no documentary evidence of value was introduced at trial. The court of appeals rejected the argument, holding that plaintiff stipulated that the note was marital and offered evidence of the value through her own testimony at trial and failed to offer documentary evidence or argue to the trial court that it was necessary.

**Divisible property; foundation for business records; attorney fees; costs**

* Trial court did not err in failing to find marital stock had increased in value during separation even though plaintiff’s expert testified that it had. Trial court has discretion to accept expert’s opinion or not.
* Trial court erred in concluding income from stock received after the date of separation was not divisible property where income was paid as a result of husband’s work for the company before the date of separation. Husband had burden of proving what portion of the income, if any, was earned through his postseparation efforts.
* Trial court erred in refusing to admit business journals offered by plaintiff to show value of commissions paid to defendant during separation. Plaintiff offered sufficient foundation for admission of the journals in the form of affidavits from the person who prepared the journals.
* Trial court erred in refusing plaintiff’s attorney fee request made in conjunction with her custody, support and alimony claims after concluding she had sufficient means to pay the fees. Even though the estates of the two parties were similar, the record clearly showed defendant was better able to pay the fees than was plaintiff.
* Trial court did not err in refusing to award plaintiff transportation costs for expert witnesses where party seeking to recover fees did not show that each witness was subpoenaed and where amount submitted included fees for witness trial preparation.

**Simon v. Simon, 753 S.E.2d 475 (N.C. App. December 3, 2013).** During separation, husband received commissions from marital stock and the amount he received was based on his work performance. The trial court held that the income was not divisible property because receipt of the funds was dependent on husband continuing to work for the company and on his work performance. The court of appeals held that the trial court erred with regard to income received by husband based on his work during the last year of the marriage and before the date of separation. Because the parties separated in September and the income was paid at the end of the year, the court of appeals held that the income would be divisible except to the extent husband can prove on remand that it was earned as the result of his postseparation efforts.

The court of appeals also held that the trial court erred in refusing to allow plaintiff to introduce business journals offered to show value of commissions paid to defendant during separation. The trial court ruled that the affidavits offered by plaintiff were insufficient foundation to allow the journals to be introduced under the business records exception to the hearsay rule. The court of appeals held that the affidavits, executed by the person who created the records, were sufficient foundation.

The trial court also resolved plaintiff’s claims for custody, child support and alimony. Because the estates of the parties were substantially similar after entry of the equitable distribution judgment, the trial court denied plaintiff’s request for attorney fees. The court of appeals reversed and remanded for entry of an award of attorney fees to plaintiff after holding that the record showed plaintiff had no liquid assets and no regular income, and she had not worked in over 20 years. Noting that by the time of trial, defendant had paid most of his attorney fees but plaintiff had an outstanding balance of $122,000 fees associated with the custody, support and alimony, the court of appeals held that the fact that the estates of the two seemed similar was not sufficient to support the conclusion that plaintiff had sufficient means to pay.

Finally, the court of appeals affirmed the trial court denial of plaintiff’s request for transportation fees for her expert witness as part of court costs assigned to defendant. According to the court of appeals, a trial court has authority to award transportation costs for witnesses who testify after being subpoenaed as well as costs for the time spent testifying, but the court may not award costs for the time the witness spent preparing his or her testimony. In this case, plaintiff failed to show that every witness was subpoenaed and failed to separate out their travel time and expenses from the time the witnesses spent preparing to testify.

**Property titled in name of child**

* Trial court erred in classifying and distributing 2 houses titled in name of the child of the parties.
* Property cannot be marital property unless one or both spouses were legal or equitable owners of the property on the date of separation.
* Property titled in name of someone other than one of the parties may be classified as marital property only if the trial court imposes a trust on the property. A trust cannot be imposed unless the title holder is joined as a party to the equitable distribution proceeding.
* Facts supporting imposition of a constructive trust on real property must be found by clear and convincing evidence.

**Dechkovskaia v. Dechkovskaia, 754 S.E.2d 831 (N.C. App., February 18, 2014).** In equitable distribution proceeding, the trial court classified as marital property two houses acquired during the marriage of the parties. Title to both houses was held in the name of the minor child of the parties on the date of separation. The court of appeals vacated the distribution, holding that property held in the name of someone other than one of the spouses on the date of separation cannot be classified as marital property unless the trial court concludes that one or both spouses actually held equitable title to the property on the date of separation and imposes a constructive or resulting trust on the property. Because imposition of a trust divests the legal title holder of ownership of the property, a trial court cannot impose a trust unless the title holder is made a party to the equitable distribution proceeding. The title holder in this case was a minor child, so the court of appeals noted that a Rule 17 guardian ad litem must be appointed for the child when the child is added as a party.

**Spousal Agreement**

**Cases Decided Between October 1, 2013 and June 4, 2014**

**Rescission based on mutual mistake**

* Trial court did not err in refusing to set aside separation agreement based on husband’s contention that both parties considered only the value of wife’s actual contributions to State Employees’ Retirement Plan when drafting the agreement rather than the total value of the pension plan as that value would have been determined in an equitable distribution proceeding.
* Party seeking to rescind contract based on mutual mistake must show by clear, cogent and convincing evidence that contract was based on a mutual mistake of fact.
* A mutual mistake as to the law is not a basis for rescinding a contract.
* Fact that parties used value of actual contributions to the pension to distribute their marital property rather than the value that would have been used had the parties pursued equitable distribution was, if anything, a mutual mistake of law.

**Herring v. Herring, 752 S.E.2d 190 (N.C. App., December 3, 2013).** Parties drafted separation agreement providing in part that both parties would keep as separate property the retirement plans each owned in their individual names on the date of separation. Former husband later filed action to rescind the contract, arguing both parties were considering only the actual contributions wife had made to her State Employees’ Retirement Plan during the marriage when they decided how to divide their marital assets. He claimed that both parties were mistaken as to the actual value of the pension plan. The trial court denied the motion to rescind and the court of appeals affirmed. According to the court of appeals, a separation agreement may be set aside based on fraud, mutual mistake of fact, or a unilateral mistake of fact based on fraud. The party seeking rescission of the contract must prove the basis by clear, cogent and convincing evidence. The evidence in this case showed that, when negotiating the terms of their separation agreement, both parties considered the amount wife actually could withdraw at the time of separation if she terminated her service with the state at that time. The court held that there was no mistake on the part of either party with regard to that amount. The court of appeals held that husband’s argument showed, if anything, a mutual mistake about the law that would have applied had the parties pursued equitable distribution rather than settling their issues with the contract. Husband’s argument was that, had the pension been valued using the Bishop formula as the court would have been required to do in an equitable distribution proceeding, the value would have been much higher than the value of wife’s actual contributions. The court of appeals held that the parties were free to use whatever value they wanted to use when they were negotiating their contract and because they both used the same value, there was no mutual mistake of fact.