

**Family Law Case Update  
Cases Decided Between November 1, 2004 and June 7, 2005**

**North Carolina Association of District Court Judges  
Summer Conference  
June 23, 2005  
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Wrightsville Beach, N.C.**

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Administrative Office of the Courts: [www.nccourts.org](http://www.nccourts.org).**

**Child Custody**  
**Cases Decided Between November 1, 2004 and June 7, 2005**

**Martin v. Martin, N.C. App., 605 S.E.2d 203 (December 7, 2004).**

**Held.** Trial court failed to make sufficient findings and conclusions to support an order that father not own or possess firearms until the children become emancipated.

**Discussion.** A 50B domestic violence order had been entered between mom and dad. That order included provisions prohibiting the father from using physical discipline on the son and requiring father to surrender all firearms. After the expiration of that 50B order, mom filed a chapter 50 custody action. As part of the Chapter 50 custody order, the trial court ordered dad not to own or possess firearms until the children are emancipated. The court of appeals held that the trial court order did not contain sufficient findings to show how the children were affected by the father's possession or ownership of firearms. The court of appeals stated "the [trial] court's finding that defendant keeps guns at his home and on his person, without any finding that the children are endangered by those guns, does not support its order barring defendant from owning or possessing guns...."

**Held.** Trial court erred by failing to make findings regarding the history of domestic violence between the parties.

**Discussion.** The court of appeals remanded the case to the trial court for further findings required by GS 50-13.2(a). That statute requires findings about "acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party." The court held that this statute required the trial court to make findings as to whether the safety of the children is affected by father's possession of firearms.

**David N. and Deborah N. v. Jason N. and Charla B., 359 N.C. 303, 608 S.E.2d 751 (2005), reversing 164 N.C. App. 687, 596 S.E.2d 266 (2004).**

**Held.** Trial court conclusion that father is a fit parent did prohibit the court from concluding that he had waived his constitutional right to custody by conduct inconsistent with his protected status as a parent.

**Discussion.** In a case brought by grandparents seeking custody of eight year old grandchild who had resided with them since he was 10 months old, trial court concluded that defendant waived his constitutional right to custody by his lack of involvement in the life of the child and his lack of financial support. However, the trial court also concluded that defendant was "fit and proper" to have joint legal custody and visitation. The trial court applied the best interest test and granted primary physical custody to grandparents and visitation to defendant father. The court of appeals reversed, holding that the finding of fitness was inconsistent with the finding that father had waived his constitutional right to custody. The supreme court disagreed with the court of appeals, holding that a parent's constitutional right to custody can be waived by unfitness or by conduct inconsistent with their protected status.

**Held.** Trial court erred in failing to show that it applied the clear and convincing evidence standard to determine whether defendant had waived his constitutional right to custody.

**Discussion.** The supreme court remanded case to the trial court for additional findings because the final order of the trial court did not show that the court used the clear and convincing evidence standard that must be applied to determinations regarding the waiver of parental constitutional right to custody.

**Faulkenberry v. Faulkenberry, 610 S.E.2d 237 (N.C. App., April 5, 2005).**

**Held.** Trial court did not err in denying plaintiff's motion for a new trial where the "newly discovered evidence" offered by plaintiff was evidence of events occurring after the custody trial.

**Discussion.** Following the entry of a custody order granting defendant sole custody of the children, plaintiff filed a motion for a new trial pursuant to Rule 59. The plaintiff argued that between the end of the custody trial when the judge announced the custody decision in open court and the entry of the judgment, defendant engaged in conduct injurious to the children. The trial court denied the motion and the court of appeals affirmed.

According to the court of appeals, Rule 59 allows a new trial only upon the basis of newly discovered evidence in existence at the time of the trial of which the party was excusably ignorant. Because plaintiff's motion was based upon the alleged conduct of defendant after the trial, it was properly denied by the trial court.

**Ford v. Wright, 611 S.E.2d 456 (N.C. App., May 3, 2005).**

**Held.** Evidence did not support the findings relied upon by the trial court to support the conclusion that there had been a substantial change of circumstances affecting the child.

**Discussion.** Trial court modified a joint custodial arrangement to give plaintiff mother primary custody and defendant father visitation. To support the conclusion that there had been a substantial change of circumstances since the entry of the original order, the trial court made findings that the parties were unable to communicate concerning care of the child and that disagreements and disputes between the parents had resulted in emotional harm and trauma to the child. The court of appeals agreed with father's contention that the evidence presented at trial did not support either finding. According to the court of appeals, evidence showed that despite the conflict between the parents, they had found ways to communicate with regard to the needs of the child and had been successful in working out the details of the joint custody arrangement. In addition, the court held that the only evidence of the impact of the arguments between the parties on the child was testimony that the child had cried following one of the episodes. According to the court of appeals, such a "normal reaction to parental disagreement" was insufficient to support a finding of emotional harm or trauma.

**Held.** Trial court's findings about father's use of alcohol were insufficient to support conclusion of substantial change of circumstances without additional findings about the impact of the alcohol use on the child.

**Discussion.** Evidence showed father drank alcohol on a daily basis and that day care workers noted the odor of alcohol on him at least four times when he came to pick the child up at the end of the day. Trial court made findings about the evidence but made no findings about the impact of the alcohol use on the child. The court of appeals held that without findings as to the impact on the child, the findings about alcohol use could not support the conclusion that there had been a substantial change of circumstances affecting the child. The court noted that the North Carolina Supreme Court has held that the effects

of some parental conduct may be “self-evident.” However, according to the court of appeals, the father’s use of alcohol in this case was not conduct sufficient to support such an inference, especially in light of other findings indicating that he is a fit and caring parent.

**Bennett v. Hawks and Hawks, N.C. App., S.E.2d (May 17, 2005).**

**Held.** Trial court erred in awarding custody to grandparents without stating in order that it used the clear and convincing evidentiary standard to decide whether parents had waived their constitutional right to custody.

**Discussion.** Plaintiff mother filed claim for custody against father. Paternal grandparents intervened seeking custody. Trial court found that parents had acted in a manner inconsistent with their protected status as parents and thereby waived their right to custody. The trial court thereafter applied the best interest of the child test and awarded all parties joint custody of the child with primary physical custody placed with grandparents. The court of appeals remanded the case to the trial court because the custody order did not specify the evidentiary standard used by the trial court to decide that the parents had waived their constitutional right to custody. According to the court of appeals, the standard must be specified in the order because the normal standard in custody cases is preponderance of the evidence while the appropriate standard for determining a waiver of parental rights is clear and convincing evidence.

**Volume 1: Family Law**  
**Equitable Distribution**  
**Cases Decided Between November 1, 2004 and June 7, 2005**

**Ubertaccio v. Ubertaccio, 395 N.C. 175, 604 S.E.2d 912 (2004), adopting concurring opinion in 161 N.C. App. 352, 588 S.E.2d 905 (2003).**

**Held.** Trial court did not err in classifying proceeds from the sale of stock received by the wife after separation and before the date of distribution as divisible property.

**Discussion.** As a result of an employment contract entered into by wife before the date of separation, wife received stock from her employer after the date of separation and before the date of distribution. Wife sold the stock and received \$82,000 before the equitable distribution trial. The trial court made findings that the stock and proceeds were acquired as the result of wife's efforts during the marriage and before the date of distribution, and therefore concluded that the proceeds were divisible property pursuant to GS 50-20(b)(4)(b). As neither party objected to the findings regarding the acquisition of the stock through wife's efforts before separation, the concurring opinion of the court of appeals (adopted by the supreme court) held those findings were conclusive on appeal.

(There is no indication in the opinion as to the evidence upon which the trial court based these factual findings). Concurring opinion (adopted by the supreme court) rejected the argument that the employment contract granted plaintiff stock options that were required to be classified and distributed in accordance with the pension provisions of GS 50-20.1.

**Held.** All "salary substitutes" or compensation the receipt of which is deferred to the future, do not fall within the provisions and limitations of GS 50-20.1. Only those that are "in the nature of pension or retirement benefits" are classified and distributed as "deferred compensation."

**Discussion.** At the court of appeals, all three judges on the panel wrote separate opinions because they could not reach agreement on the analysis that should be applied to this case. Significantly, the three judges disagreed over the application of Fountain v. Fountain, 148 N.C. App. 329 (2002), to the present case. Fountain sets out rules for classifying and distributing stock options, but also indicates that all forms of "deferred compensation" must be classified and distributed in accordance with the provisions and limitations of GS 50-20.1 (the pension part of the equitable distribution statute). To resolve the case, the concurring opinion adopted by the supreme court first concluded that the assets in this case were not in fact stock options. Instead, the wife acquired a contract to receive stock in the future and she acquired that contract before the date of separation. She had received the stock by the date of distribution, and it was the proceeds from the sale of that stock that needed to be classified. So, according to the concurring opinion, the Fountain decision is not directly applicable to this case. However, significantly, the concurring opinion also expressly disagreed with the indication in Fountain that all assets the receipt of which are deferred to some future date, fall within the definition of "deferred compensation" as used in GS 50-20.1. Instead, the supreme court held that GS 50-20.1 should apply only to assets that are in the nature of pension and retirement benefits.

**Lee v. Lee, 605 S.E.2d 222 (N.C. App., Dec.7, 2004).**

**Held.** Trial court did not err in amending QDRO to require plaintiff to pay all fees and penalties associated with the lump sum transfer of funds from defendant's retirement account.

**Discussion.** Equitable distribution claims of the parties were resolved by a consent judgment that required three QDROs to distribute various retirement accounts. Two of the subsequently drafted QDROs provided for the payment of fees and penalties but the third did not. Trial court amended the third QDRO pursuant to Rule 60(a) after concluding that the omission was a clerical error. Court of appeals agreed the failure to provide for fees was a clerical error in that the exclusion was an "oversight or omission" related to distribution and amendment to include the fees did not "affect the substance of the award itself."

**Held.** Trial court did not err in denying defendant's Rule 60(b)(6) motion requesting relief from a distribution ordered by a QDRO.

**Discussion.** QDRO that distributed defendant's retirement account provided that, five years from the date of entry, plaintiff would receive \$402,393 or one-half of the monies in the account, whichever is higher. At the time of separation, defendant's account had a value of \$675,756. However, by the time of distribution five years after entry of the QDRO, the account balance had dropped to \$498,000. Defendant argued that because the value dropped due to market forces beyond his control, the trial court should set aside the original QDRO. The court of appeals upheld the trial court's denial of the motion, holding "a change in the value of the stock market over the course of five years does not amount to an extraordinary or unforeseeable event" that would justify use of Rule 60(b)(6) to set aside the QDRO.

**Robertson v. Robertson, 605 S.E.2d 667 (N.C. App., December 21, 2004)**

**Held.** Trial court failed to make findings sufficient to show that it considered the possible adverse financial consequences for liquidating assets to pay a distributive award ordered by the court, or to show that it considered the liabilities of the person ordered to pay the award when it determined that his income was sufficient to allow him to pay the award.

**Discussion.** Trial court order concluded that the presumption in favor of an in-kind distribution was rebutted by the fact that the primary assets in this case are a pension plan and stock in a family-owned business. In ordering a \$52,000 distributive award to wife, the trial court made findings that husband had his pension and stock as well as real and personal property including bank accounts that he could use to satisfy the judgment. In addition, the trial court found he had an annual income of \$93,000. The court of appeals held these findings insufficient to show that the trial judge considered "whether an adjustment is needed to offset any adverse financial consequences to defendant for liquidating assets to pay the distributive award." The court of appeals held that the judgment needed additional findings "concerning the difficulty and possible financial and tax consequences of borrowing money against or liquidating the stock, the [real property], and the personal property to pay the amount of the judgment lien within 90 days." However, the court seems to say that the trial court's finding regarding the pension plan was sufficient; regarding that asset the trial court found that the plan would be "difficult to liquidate and might cause unfavorable tax consequences."

In addition, the court of appeals held that the trial court could not consider defendant's annual income when identifying assets out of which a distributive award might be satisfied without also considering his reasonable expenses and liabilities.

**Held.** Trial court did not err in using the coverture fraction contained in GS 50-20.1(d) to classify and value defendant's profit sharing plan.

**Discussion.** Court of appeals rejected defendant's contention that the trial court erred by using the coverture fraction to classify and value his profit sharing plan. Defendant argued that the fraction only applies to defined benefit plans. The court of appeals held that GS 50-20.1(d) applies to the classification and valuation of "all vested and nonvested pension, retirement, or deferred compensation benefits."

**Held.** Depreciation of marital home after the date of separation and before the date of distribution should have been classified and distributed as divisible property where trial court found that reduction in value was caused by the actions of both spouses.

**Discussion.** Trial court found that depreciation of marital home was caused by the neglect of both parties. The trial court concluded that because it was caused by the actions of the spouses it was not divisible property. The court of appeals disagreed. According to the court, GS 50-20(b)(4)(a) provides that depreciation caused by the actions of a spouse is not divisible property. When the reduction is caused by the actions of both, the court held that "the parties must share the consequent diminution in value occasioned by their joint actions and inactions."

**Dalgewicz (Hearten) v. Dalgewicz, 606 S.E.2d 164 (N.C. App., December 21, 2004)**

**Held.** Trial court erred in failing to make findings and conclusions regarding the classification and date of separation value of marital assets.

**Discussion.** Trial court entered a judgment on wife's claim for equitable distribution after dismissing husband's claim as a sanction for his failure to participate in the case and his lack of compliance with court orders. The final order contained many findings about husband's misconduct and waste of marital assets and provided for an unequal distribution in favor of wife. However, the court of appeals held that the trial court failed to find a date of separation value for most of the assets distributed by the court. Due to the number of assets not valued, the court of appeals held that a new trial was required.

**Held.** Trial court did not err in ordering sanctions against defendant, including attorney fees and dismissal of his claim for equitable distribution.

**Discussion.** Trial court made findings that husband refused to attend hearings, provide responses to discovery, and pay financial obligations as ordered by the court, and that these failures caused plaintiff to "expend a substantial sum of money" and "caused a great deal of time for the court and the plaintiff." The court of appeals held these findings sufficient to support the imposition of sanctions pursuant to GS 50-21(e).

**Held.** Trial court erred in distributing the value of a leased vehicle as marital property.

**Discussion.** The trial court ordered defendant to pay plaintiff the value of a leased Lincoln Navigator after finding that defendant's conduct had resulted in the waste of that asset. The court of appeals held that "because the vehicle was leased, neither plaintiff nor defendant had any ownership or equity interest in it, and therefore the trial court was prohibited from classifying and valuing it as a marital asset."

**Britt(Shanks) v. Britt, 606 S.E.2d 910 (N.C. App., January 18, 2005).**

**Held.** Delay of sixteen months between end of trial and entry of equitable distribution order did not automatically require a new trial.

**Discussion.** Court of appeals rejected plaintiff's argument that the delay of sixteen months, standing alone, entitled her to a new trial. The court of appeals held that wife made no attempt to show any potential change in the circumstances of the parties or the property that would impact the equitable distribution order. The court also noted that the most significant asset was the marital home which had been sold prior to the equitable distribution trial.

**Allen v. Allen, 607 S.E.2d 331 (N.C. App., February 1, 2005)**

**Held.** There was insufficient evidence to support trial court's finding that defendant's postseparation actions contributed to the reduction in value of marital stock accounts.

**Discussion.** Trial court classified two stock accounts as marital property. The court then concluded that the reduction in the value of the accounts following separation was a distribution factor rather than divisible property after finding that the accounts were "under the control" of defendant during separation. The court of appeals held that the evidence was insufficient to show whether his actions actually contributed to the reduction in value and remanded the issue to the trial court for further evidence and findings.

**Held.** Trial court erred by failing to make a finding that the presumption that an in-kind distribution is equitable had been rebutted before ordering a distributive award.

**Discussion.** Trial court ordered a distributive award of \$219,000 payable over a period of six years but failed to specifically find that the presumption in favor of an in-kind distribution had been rebutted. Court of appeals held this failure required remand, even though the court acknowledged that the record shows that one significant asset is a close-corporation not susceptible to in-kind division. The court held that evidence of the close-corporation would be enough to support a finding that the presumption had been rebutted.

**Held.** Trial court made sufficient findings to show defendant had sufficient liquid assets from which to pay the distributive award.

**Discussion.** The trial court made findings about defendant's annual income and about the equity in the marital home. The marital home was distributed to defendant and defendant had refinanced the mortgage on the home to increase the equity line. The trial court ordered defendant to pay \$10,000 of the distributive award out of the proceeds from the refinancing and to pay the balance by monthly payments over six years. The court of appeals held that these findings supported the distributive award.

**Held.** Tax refund received after the date of separation was properly classified as marital.

**Discussion.** Court of appeals rejected argument that a tax refund from a return filed jointly was not marital property because it was not owned by either party on the date of separation. The court of appeals held that "funds received after the date of separation may appropriately be considered marital property when the right to receive those funds was acquired during the marriage and before the date of separation."

**Held.** Trial court did not err in classifying and distributing tax refund even though the refund was not listed in the pre-trial order.

**Discussion.** Parties signed a pre-trial order containing a stipulation that all property to be classified, valued and distributed was listed in the schedules attached to the order.

Defendant argued on appeal that the trial court could not distribute the tax refund because it was not listed in the schedules. The court of appeals disagreed, holding that while the pre-trial stipulations conclusively established the classification, value and distribution of the property listed in the schedules, there was no waiver of equitable distribution of property not listed in the order.

**Held.** Trial court erred in classifying and distributing \$5,200 profit attributed to plaintiff from a Subchapter S Corporation because the profit actually was owned by the corporation rather than either party.

**Discussion.** Defendant's tax return indicated a \$15,000 "pass-through" of earnings from defendant's sub-chapter S corporation and indicated that plaintiff's share of the profit was \$5,200. However, defendant testified that the money had not been paid out as a shareholder distribution. The court of appeals held that, while share holders pay tax on the earnings, the profits of a sub-chapter S corporation are "retained earnings" of the corporation until distributed to shareholders. Because the money was still owned by the corporation, the trial court should not have included the funds in the distribution order.

**Brenenstuhl v. Brenenstuhl, 610 S.E.2d 301 (N.C. App., April 5, 2005).**

**Held.** Trial court did not err in dividing a military pension pursuant to the provisions of GS 50-20.1 where incorporated separation agreement provided that "issues of retirement will be addressed at a future date."

**Discussion.** Parties executed a separation agreement that divided all marital property but provided that "issues of retirement will be addressed at a future date." A divorce judgment was entered and the agreement was incorporated. Approximately four years later, plaintiff retired from the military and defendant filed a motion in the cause requesting the trial court divide the military pension. The trial court awarded 25% of the pension to defendant and the court of appeals affirmed. The court held that the statement in the incorporated agreement was sufficient to allow the trial court to divide the pension in accordance with the equitable distribution statute.

**Volume 1: Family Law**  
**Postseparation Support and Alimony**  
**Cases Decided Between November 1, 2004 and June 7, 2005**

**Evans v. Evans, 610 S.E.2d 264 (N.C. App., April 5, 2005).**

**Held.** Trial court did not err in denying defendant's request for PSS after concluding defendant had committed indignities during the marriage.

**Discussion.** Court of appeals upheld trial court's conclusion that defendant had committed indignities sufficient to support the granting of a divorce from bed and board to plaintiff. (For summary of evidence that supported the conclusion, see case summary in Bench Book Chapter on Divorce and Divorce from Bed and Board). Citing GS 50-16.2A(d) which states that the court shall consider the marital misconduct of the dependant spouse in determining postseparation support, the court of appeals rejected defendant's contention that marital fault alone should not be sufficient to justify a denial of PSS.

**Francis v. Francis, 612 S.E.2d 141 (N.C. App., April 5, 2005).**

**Held.** Trial court did not err in ordering alimony payments to begin 7 months after the entry of the order and to end five years later.

**Discussion.** In an opinion that gives very little information about the facts of the case or the findings of the trial court, the court of appeals rejected plaintiff's contention that the trial court erred in "denying alimony for a period of 22 months". The opinion shows only that the order was issued on November 24, 2003 and that it ordered payments to begin as of June 1, 2003 and to continue for a period of five years or until plaintiff reaches the age of 62, whichever is later. Court of appeals held that GS 50-16.3A(b) gives the trial court discretion to determine the appropriate duration of an alimony award as long as the trial court considers all factors set out in GS 50-16.3A(b)(1)-(16). Because the trial court considered all required factors and plaintiff showed no abuse of discretion, the duration of the order was affirmed.

**Held.** Trial court did not err in considering plaintiff's investment portfolio in setting amount and duration of alimony award.

**Discussion.** Without any explanation of the facts relating to this assignment of error, the court of appeals rejected plaintiff's contention that the trial court erred in considering her investment portfolio when determining the alimony award. The court of appeals held simply that GS 50-16.3A(b)(15) allows the trial court to consider "[a]ny other factor relating to the economic circumstances of the parties that the court finds to be just and proper."

**Held.** Trial court did not abuse its discretion in awarding plaintiff one-third of the amount of her actual attorney fees.

**Discussion.** Trial court awarded plaintiff \$17,202.91 in attorney fees (for alimony, child custody and child support claims). Plaintiff argued on appeal that the award should have been higher. The court of appeals noted that this amount represented one-third of the fees incurred by plaintiff and that the trial court concluded that this amount was reasonable because of the "nature and scope of the legal services rendered and the skill and time

required of counsel and her staff.” The court upheld the award stating that plaintiff failed to show an abuse of discretion on the part of the trial court.

**Hook v. Hook (Schwenzfeier), 611 S.E.2d 869 (N.C. App., May 3, 2005).**

**Held.** Trial court did not err in dismissing plaintiff’s request to modify an alimony order entered by a New Jersey court after concluding that New Jersey has continuing exclusive jurisdiction under UIFSA.

**Discussion.** Parties divorced in New Jersey in 1996 and the divorce judgment incorporated a property settlement agreement that included alimony. Both parties moved from New Jersey following the divorce. In 2002, plaintiff asked the New Jersey court to modify the alimony because he lost his job. The New Jersey court held that it had no subject matter jurisdiction to modify the order because neither party presently resided in New Jersey. Wife subsequently registered the order in North Carolina and requested enforcement. Plaintiff objected to enforcement and requested modification. The North Carolina trial court registered the order, ordered plaintiff to pay all arrears, but dismissed plaintiff’s request for modification after concluding that New Jersey has exclusive, continuing jurisdiction with regard to modification. Plaintiff appealed and the court of appeals held that, pursuant to UIFSA sections GS 52C-2-205(f) and 52C-2-206(c), the state issuing an alimony order retains exclusive, continuing jurisdiction to modify the order as long as the order remains in effect. Unlike child support orders, the issuing state does not lose jurisdiction when both parties leave the state. Also unlike child support orders, the parties cannot confer modification jurisdiction on another state by consent.

**Note:** While the issuing state retains exclusive jurisdiction to modify an alimony order, any state with personal jurisdiction over the obligor can enforce the alimony order.

**Held.** To the extent the alimony provisions of UIFSA conflict with GS 50-16.9, UIFSA provisions control.

**Discussion.** Plaintiff argued that GS 50-16.9 gives the North Carolina court authority to modify the order despite UIFSA. That statute states: “When an order for alimony has been entered by a court of another jurisdiction, a court of this State may, upon gaining jurisdiction over the person of both parties in a civil action instituted for that purpose, and upon a showing of changed circumstances, enter a new order for alimony which modifies or supersedes such order for alimony to the extent that it could have been so modified in the jurisdiction where granted.” The court of appeals held that while this statute was consistent with URESA (the predecessor of UIFSA), it clearly contradicts the provisions of UIFSA. The court held that because 1) UIFSA is the more specific statute, and 2) UIFSA is the most recently enacted of the two statutes, UIFSA provisions control to resolve any inconsistency between the two statutes. The court also stated: “We do not believe the General Assembly set out to make a radical departure from prior law, by adopting UIFSA and repealing URESA, simply to have its effect undone by then-existing section 50-16.9(c).”

**Volume 1: Family Law**  
**Child Support**  
**Cases Decided Between November 1, 2004 and June 7, 2005**

**Spicer v. Spicer, 607 S.E.2d 678 (N.C. App., February 1, 2005)**

**Held.** Trial court did not err in applying guidelines to defendant's recurring income and deviating from the guidelines with regard to his non-recurring income.

**Discussion.** Defendant was severely injured in an accident. He received a lump sum settlement in resolution of his personal injury claims. The settlement was placed in an inter vivos family trust with his father as grantor. To establish child support, the trial court applied the guidelines to defendant's recurring income from a part-time job and social security disability, social security payments to the child, and income from a disability program of his former employer. The trial court then deviated from the guidelines to determine the percentage of the lump sum payment held in trust and ordered that a percentage of the trust principal be set up in trust for the child. Court of appeals held that trial court had discretion to deviate with regard to the trust principal and apply guidelines to the recurring income.

**Held.** Trial court did not err in including \$300 a month in defendant's recurring income as the value attributed to free housing provided to him by his parents.

**Discussion.** Court of appeals rejected defendant's argument that the inclusion of the value of the housing provided by his parents was an improper imputation of income. Court of appeals held that income includes "in-kind payments, such as a company car, free housing or reimbursed meals, if they are significant and reduce personal living expenses." As the housing amounted to actual income, trial court did not impute income to defendant.

**Held.** Trial court did not err in treating defendant's trust principal as non-recurring income.

**Discussion.** Court of appeals rejected defendant's argument that income should include only those personal injury settlements that represent lost wages. He argued that because his settlement was for past and future medical expenses and compensation for pain and suffering, it should not be considered as income for purposes of child support. The court of appeals held that the definition of income within the child support guidelines is sufficiently broad to cover all forms of personal injury recovery. The court noted that it is within the discretion of the trial court to weigh the needs of the injured or disabled parent with the needs of the child to determine how to distribute the proceeds.

**Held.** The trial court did not err in ordering both monthly payments and a lump sum payment.

**Discussion.** Trial court ordered defendant to pay monthly payments from his recurring income and ordered a lump sum payment from defendant's trust to establish trust for child. Court of appeals rejected defendant's argument that trial courts must order one payment method or the other but not both. In addition, the court of appeals held that "the trial court is not limited to the methods of payment specified in the statute," but rather has broad discretion in fashioning awards.

**Held.** Trial court erred in deviating from the guidelines without making findings about the reasonable needs of the child.

**Discussion.** Trial court decided that application of the guideline percentage to defendant's trust principal would result in an award higher than necessary to meet the needs of the child. The court of appeals held that in order to allow meaningful appellate review of the final order, the judgment must give the basis for the amount awarded as the result of the deviation. The record contained mother's affidavit with listed expenses, but the final order contained no findings regarding the child's reasonable needs. Court of appeals noted that the expenses identified by the mother exceeded the total income of the family when the parents lived together. The court of appeals reminded the trial court that reasonable needs must be determined in light of the parties' accustomed standard of living, and remanded for further findings.

**Held.** Trial court did not err in awarding attorney fees to wife.

**Discussion.** Because both parties filed claims for custody that had not been resolved at the time of the child support hearing, there was no need for the trial court to make a finding that defendant had failed to provide reasonable support before awarding fees. When a party seeks both custody and support, fees are appropriate if court finds party seeking fees 1) acted in good faith and 2) lacked sufficient means to defray the costs of the suit. As trial court made both findings in this case, award of fees was appropriate.

**Gaston County ex. rel. Miller v. Miller, 608 S.E.2d 101 (N.C. App., February 15, 2005).**

**Held.** Trial court did not err in concluding that adoption assistance payments are income to the adopted children rather than the adopting parents.

**Discussion.** Parties adopted two children and received adoption assistance payments for both. The trial court considered the payments to be income of the children and deviated from the guidelines after finding that because of the income received by the children, the guideline amount would exceed the reasonable needs of the children. Defendant argued that he should have received a credit to reduce his child support obligation by the amount of the adoption payments because the payments were subsidies to the adoptive mother. The court of appeals disagreed, citing federal regulations governing the payments as well as case law from Arizona to conclude that the payments are income of the children.

**Young (Lindquist) v. Young, 609 S.E.2d 795 (N.C. App., March 15, 2005).**

**Held.** Trial court erred in including in contempt order a provision prohibiting plaintiff from seeking an increase in child support based upon defendant's increased or decreased income, or upon a change in defendant's visitation with the minor child.

**Discussion.** During a contempt hearing, the parties agreed that plaintiff would not seek an increase in child support based upon defendant's increased or decreased income, or upon an increase in defendant's visitation, for a period of two years. The trial court included that provision as part of the contempt order. The court of appeals held part of the provision "superfluous" and meaningless, and part void as against public policy. The court reasoned that parties cannot contract to deny the trial court authority to set child support. According to the court, because case law prohibits the modification of a support order based only on the obligor's increase in income, this provision of the order is "superfluous". Similarly, because an obligor's obligation cannot be increased based upon his decrease in income, the court held that provision to be meaningless as well. The court then held that a change in visitation may be the basis for a modification of support.

Therefore, any agreement between the parties to limit the court's authority to modify on that basis is "void".

**Price (Nercessian) v. Price, 609 S.E.2d 450 (N.C. App., March 15, 2005).**

**Held.** Defendant was barred by the doctrine of "judicial estoppel" from challenging the service of process in an earlier child support case.

**Discussion.** Defendant filed motion alleging that a 2002 order finding him in arrears in the amount of \$187,680.30 should be vacated because he was not properly served with process before original child support order was entered in 1994. The trial court ruled that service was proper but the court of appeals did not reach the issue of service. Instead, the court of appeals held defendant was barred from asserting the defense by the doctrine of judicial estoppel, a form of estoppel that precludes a litigant from asserting a legal position inconsistent with a position asserted by that litigant earlier in the same or related litigation. According to the court, defendant filed an action for divorce in the state of Washington after the entry of the North Carolina child support order. In the Washington case, defendant alleged that North Carolina had entered a "conclusive" order with regard to support of the minor children of the parties. Without such an allegation, the court of appeals stated that Washington law would have required that the issue of support be settled before defendant's claim for divorce could be granted. The court of appeals held that application of judicial estoppel requires: 1) that a party's subsequent position be clearly inconsistent with its earlier position; 2) that the court consider whether the party succeeded in persuading the court to accept the earlier position; and 3) that the court determine the party would derive an unfair advantage or impose an unfair detriment on the other party if not estopped. The court held that defendant's statement in the Washington case that the North Carolina order was "conclusive" as to child support was sufficient to support application of the doctrine in this case.

**Beamer v. Beamer(Roakes), 610 S.E.2d 220 (N.C. App., April 5, 2005).**

**Held.** Trial court erred in deviating from the guidelines without making findings as to the reasonable needs of the child and without explaining the basis for the amount of support awarded.

**Discussion.** Plaintiff requested modification of a child support order based upon his decreased income. Trial court found that the decrease constituted a substantial change of circumstances. The trial court held that the amount required by the guidelines would not meet the reasonable needs of the children, and set support approximately \$500 higher than the amount required by the guidelines. The trial court found that the needs of the children had not changed since the entry of the original order but made no other findings regarding the needs. The court of appeals held that without findings about the reasonable needs of the children at the time of the modification, there can be no affective appellate review of the trial court's decision to deviate. The court rejected plaintiff's argument that because there was evidence introduced at trial concerning the needs of the children, the appellate court should review the trial court's decision by looking at evidence in the record. The court of appeals held that is not sufficient to show that evidence was introduced about the needs if the trial court makes no findings as to the needs and their reasonableness. In addition, the court held that a trial court's order must explain how the trial court decided on the amount awarded following a deviation.

**Holland v. Holland, 610 S.E.2d 231 (N.C. App., April 5, 2005).**

**Held.** Trial court erred in failing to make findings as to obligor's income at the time of the child support hearing.

**Discussion.** Obligor is a farmer. A child support hearing was held in 2002 and the support order was entered in January 2003. However, the trial court made findings only about obligor's income in 2001 as shown by his 2001 tax return. The court of appeals held that child support orders must be based on the income of the parties at the time the child support order is entered and remanded the case to the trial court for further findings. The court of appeals acknowledged that the "nature of plaintiff's farming business" makes it difficult to determine his income at any particular point in time. However, the court also stated: "While we believe the trial court could have used plaintiff's 2001 income to determine his income for purposes of computing his child support obligation, the order fails to support this approach with the necessary findings of fact." This statement indicates that trial courts may use past income to estimate present income, as long as findings are made to show why the estimate is reasonable.

**Held.** Trial court erred in finding that all depreciation taken by obligor on his 2001 tax return was accelerated depreciation that had to be included in income for the purpose of establishing support.

**Discussion.** Trial court determined that the depreciation taken on obligor's tax return was accelerated depreciation allowed for farm equipment. Because the child support guidelines do not allow accelerated depreciation to be deducted from income, the trial court determined income by adding back the total amount shown as depreciation on the return. The court of appeals held that the return showed that the majority of the depreciation taken on the return was actually straight-line depreciation rather than accelerated depreciation. Because both the guidelines and case law allow trial courts the discretion to deduct straight-line depreciation when determining income for a self-employed person, the court of appeals instructed the trial court to consider the depreciation when entering the new support order.

**Ford v. Wright, 611 S.E.2d 456 (N.C. App., May 3, 2005).**

**Held.** Trial court erred by imputing income to obligor without finding that he intentionally decreased his income in bad faith.

**Discussion.** Trial court modified child support order after modifying the custody arrangement between the parties. The trial court determined father's income by considering "his age, experience, work ethic, work experience, skills, knowledge and job performance" as shown by the evidence. The court of appeals reversed, holding that actual income must be used absent a finding that an obligor is intentionally depressing his or her income in a bad faith attempt to avoid a child support obligation.

**Volume 1: Family Law**  
**Separation Agreements**  
**Cases Decided Between November 1, 2004 and June 7, 2005**

**Jackson v Jackson, 610 S.E.2d 731 (N.C. App., March 15, 2005).**

**Held.** Trial court did not err in declaring entire separation agreement null and void due to vagueness of terms.

**Discussion.** Wife brought action for specific enforcement of separation agreement. Husband counterclaimed for specific performance but also requested that the agreement be voided because the terms were too vague to enforce. The trial court voided the agreement and the court of appeals agreed. The court of appeals rejected plaintiff's argument that the trial court should have considered the intent of the parties to interpret the agreement, holding that the degree of vagueness in this particular agreement would have required the trial court to supply material terms to the contract. While the parol evidence rule allows a trial court to consider evidence of intent to interpret ambiguous terms, the court of appeals held that the rule does not allow a trial court to create terms that were not agreed upon at the time the agreement was signed. Dissent argued that the terms were not too ambiguous to be interpreted.

**Held.** Trial court did not err in voiding entire agreement rather than voiding only the vague provisions even though contract contained a severability clause.

**Discussion.** Trial court held that entire agreement was too vague to be helped by severing certain clauses and the court of appeals agreed. Court held that severability clause cannot be invoked to strike portions of a contract when doing so would "eviscerate" the entire agreement.

**Volume 1: Family Law**  
**Divorce and Divorce From Bed and Board**  
**Cases Decided Between November 1, 2004 and June 7, 2005**

**Divorce from Bed and Board**

**Evans v. Evans, 610 S.E.2d 264 (N.C. App., April 5, 2005).**

**Held.** Evidence was sufficient to support the conclusion that defendant had subjected plaintiff to indignities making his life burdensome and his condition intolerable.

**Discussion.** Defendant appealed order granting plaintiff's request for divorce from bed and board. Trial court concluded that defendant had subjected plaintiff to indignities and the court of appeals affirmed. Evidence upon which conclusion was based included: defendant kept condoms in her purse even though she and plaintiff had no sexual relationship; defendant engaged in sexually explicit emails with a doctor in Chapel Hill; she had defendant removed from the home on two occasions by initiating 50B actions against him that were subsequently dismissed; while plaintiff was out of the home, defendant damaged and failed to clean the home; during the last several years of the marriage, defendant slapped plaintiff numerous times; and defendant took 3 trips during the last 18 months of the marriage where she was gone for three to four nights each without telling plaintiff where she was going.

**Held.** Trial court did not err in overruling defendant's objection to the admission of the emails between defendant and the doctor in Chapel Hill.

**Discussion.** Defendant argued that the emails should have been excluded because they were obtained in violation of the federal Electronic Communications Privacy Act, 18 USC sec. 2511(1)(c) and (d). The court of appeals held that while the federal law prohibits the disclosure or use of any electronic communication intercepted in violation of the provisions of the Privacy Act, the Act only applies to interceptions made at the time the communication is electronically transmitted. Because the emails in this case were stored on, and recovered from, the hard drive of the family computer, they were not interceptions prohibited by the Privacy Act.

**Volume 1: Family Law - Miscellaneous Matters  
Cases Decided Between November 1, 2004 and June 7, 2005**

**Criminal Conversation**

**Misenheimer v. Burris, 610 S.E.2d 271 (N.C. App., April 5, 2005).**

**Held.** Three year statute of limitations for criminal conversation begins to run at time adultery is committed.

**Discussion.** Plaintiff's wife and defendant began a sexual relationship in 1991 that continued until 1994 or 1995. Plaintiff filed the complaint against defendant alleging criminal conversation in 2000. Trial court held that the discovery rule in GS 1-52(16) applies to start the statute of limitations running at the time plaintiff discovers the adultery rather than at the time the adultery is committed. The court of appeals reversed, holding that the discovery rule does not apply because GS 1-52(12) specifies a limitation period of three years for criminal conversation claims. Dissent by Tyson.

**Alienation of Affection**

**McCutchen v. McCutchen, 612 S.E.2d 162 (N.C. App., May 3, 2005).**

**Held.** Trial court did not err in granting defendant's motion for summary judgment as to plaintiff's claim for alienation of affection after concluding that the action was filed in violation of the 3-year statute of limitation.

**Discussion.** Plaintiff brought alienation and criminal conversation claims against the mistress of her former husband. Husband and defendant began a sexual relationship in September 1998. Plaintiff and her husband separated in September 1998 and were divorced in May 2002. Plaintiff filed this action in April 2003. The trial court granted defendant's motion for summary judgment after concluding that the statute of limitation had run on the alienation claim. The court of appeals agreed, holding that the cause of action accrued in this case no later than September 1998 when plaintiff and her husband separated. The court based its decision on Pharr v. Beck, 147 NC App 268 (2001) wherein the court held that alienation of affection claims must be based upon pre-separation conduct. The court rejected plaintiff's argument that the statute should be tolled because the extramarital conduct in this case continued beyond the date of separation and therefore should be viewed as an on-going injury. Dissent by Tyson.

**Marriage Ceremonies**

**S.L. 2005-56 "AN ACT TO ALLOWING A DISTRICT COURT JUDGE TO PERFORM MARRIAGE CEREMONIES"**. Amends GS 51-1 to allow district court judges of this state or any other state to perform marriage ceremonies in North Carolina between the dates of June 23, 2005 and June 27, 2005.

**Resumption of Maiden Name**

**S.L. 2005-38 "AN ACT ALLOWING A PERSON WHO HAS RECEIVED AN ABSOLUTE DIVORCE TO CHANGE HIS OR HER NAME IN THE COUNTY WHERE THE DIVORCE WAS GRANTED."** Amends GS 50-12 to allow persons to apply for a resumption of their maiden name after a divorce judgment has been entered. Application must be made to clerk of court in county where divorce was entered. Amendment is effective May 12, 2005 and applies to petitions filed 90 days after that date.

**Volume 2, Chapter 2**  
**Summary of Judicial Disciplinary Actions**  
**Cases Decided Between November 1, 2004 and June 7, 2005**

**In re: Judge Harrison, 611 S.E.2d 834 (N.C., May 5, 2005).**

**Held.** Judge is removed from office due to physical and mental incapacities that interfere with her ability to perform her duties and which are likely to be permanent.

**Discussion.** Respondent judge stipulated to findings regarding conduct that she agreed constituted conduct prejudicial to the administration of justice that could bring the judicial office into disrepute. Respondent contended and Judicial Standards Commission agreed that respondent's conduct was the result of mental and physical incapacities caused by stress and diabetes, and that those conditions are likely to continue. Supreme Court accepted recommendation of Commission that Judge Harrison be removed from office.