

# Family Law Update

Cheryl Howell  
June 2011

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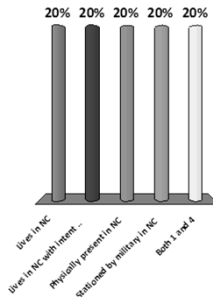
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## For divorce, "resident" means:

1. Lives in NC
2. Lives in NC with intent to remain
3. Physically present in NC
4. Stationed by military in NC
5. Both 1 and 4



Category	Percentage
lives in NC	20%
lives in NC with intent to remain...	20%
physically present in NC	20%
stationed by military in NC	20%
Both 1 and 4	20%

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## Residence



› *Huston v. Huston*, unpublished opinion, COA May 2011

› Distinguish 'domicile'?



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## Equitable Distribution

- ▶ True or false?
  - An unequal distribution can be supported by the conclusion that an unequal distribution is equitable based on trial court's consideration of the statutory distribution factors?

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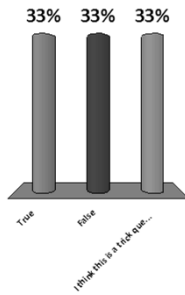
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## True or False?

1. True
2. False
3. I think this is a trick question so I am not going to answer



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## *Lucas v. Lucas*

- ▶ Strong presumption that Equal is Equitable
- ▶ Findings re classification and valuation are essential
  - *Robinson*, COA, March 15, 2011
  - *See also Duruanyim*, COA, May 2010



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## Equitable Distribution

- ▶ Retirement account (all marital) worth \$40,000 on DOS
- ▶ Same account worth \$20,000 on DOT
- ▶ What is the (\$20,000)?

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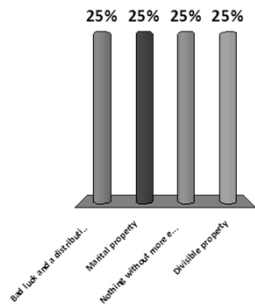
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## (\$20,000): What is it?

1. Bad luck and a distribution factor
2. Marital property
3. Nothing without more evidence
4. Divisible property



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## Cheek v. Cheek

- ▶ Remember the presumption regarding postseparation change in value
  - *Wirth v. Wirth*, 193 NC App 657 (2008)
- ▶ "Actions of a spouse?"
  - Selling stock in the account
  - Moving money around
  - Purchasing and trading shares

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## Classify

- ▶ \$2,200 check from homeowner's insurance after separation
- ▶ Paid to cover cost of repair to roof on marital property



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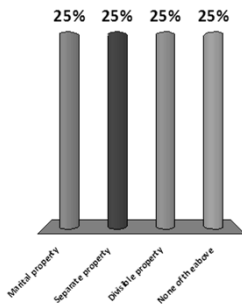
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## Classify the \$2,200

1. Marital property
2. Separate property
3. Divisible property
4. None of the above



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## *Kittredge v. Hegney*

- ▶ Damages for breach of property settlement (breach of contract):
  - \$60,000 for failure to return personal property
  - \$1,000 for damage to property during trespass
  - Lost business profits due to loss of personal property
  - Costs incurred by plaintiff when defendant cancelled credit card
  - Restraining order prohibiting harassment???????

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## Ratification



- ▶ *Honeycutt*, COA, Nov. 16, 2010
  - Executed portions of agreement established ratification
  
- ▶ *Rolls v. Rolls*, COA, Dec. 21, 2010
  - Entry of DRO dividing IRA established ratification

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## Consider

- ▶ Contract: "Parties will use best efforts to keep all court records sealed and all court proceedings closed if either initiates litigation."
  
- ▶ Both parties ask you to order all records sealed and all proceedings closed

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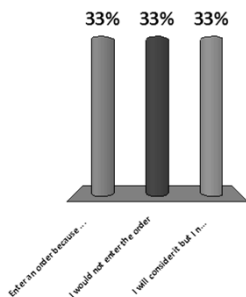
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## What would you do?

1. Enter an order because everyone agrees
2. I would not enter the order
3. I will consider it but I need much more information



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### France v. France



- ▶ Presumption in favor of public access
  - 'Qualified constitutional right' on part of the public
- ▶ See also "Procedure to Assert Right of Access"
  - GS 1-72.1



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### Alimony

- ▶ Order: Pay \$500 for 44 months
- ▶ 54 months later: Substantial change in circumstances
- ▶ Dependent spouse: Please modify to require \$500 for at least another 44 months

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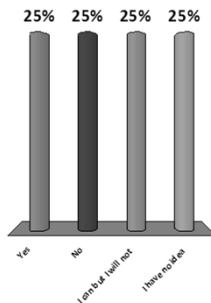
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### Can you grant her request?

1. Yes
2. No
3. I can but I will not
4. I have no idea



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### *Cathey v. Cathey*

- ▶ Decided under pre-1995 alimony statute
- ▶ 1995 statute authorizes periodic payment for set period of time
- ▶ Does that make a difference?



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### Consider



- ▶ Plaintiff files for custody, child support and PSS
- ▶ Parties live together in same house
- ▶ Plaintiff says she 'desires to separate'
- ▶ Defendant files motion to dismiss because parties are not separated

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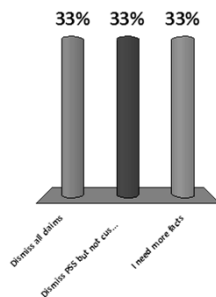
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### What would you do?

1. Dismiss all claims
2. Dismiss PSS but not custody or child support
3. I need more facts



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**Baumann**

- ▶ Statutory interpretation answers the question
- ▶ PSS different than custody and support



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**Baumann**

- ▶ “There is no question but that, in most instances, the entry of a formal order addressing child custody and support issues would be unnecessary in the event that the children’s parents are living together and providing adequate support for their children, we are able to foresee situations, such as the one at issue here, where that might not necessarily be the case.”

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**Possession of the house?**

- ▶ “Where ... husband and wife are living together, children being in their joint custody and being adequately supported by the supporting spouse, in the absence of allegations that would support an award of alimony or divorce, one spouse may not maintain an action to evict the other, get sole custody of the children and obtain an order for support.”
  - *Harper v. Harper*, 50 NC App 394 (1981)

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### Possession of the house?

- ▶ “Even if the wife and children had been living separate from the husband and there was a justiciable controversy as to custody and support, we have not been referred to any authority that would authorize the judge to evict defendant from his home and assign it to wife for her use and that of the children.”
  - *Harper*

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### *Baumann*

- ▶ *Harper* is not an “insurmountable obstacle to the relief requested by plaintiff in that plaintiff has not sought to evict defendant and is ... limited to claims for custody and support.”
  - FN 4
- ▶ But note: GS 50-13.4(e) now allows the court to order possession of the home as part of child support.

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### Consider



- ▶ Plaintiff files for custody, child support and PSS
- ▶ Parties live together in same house
- ▶ Plaintiff says she ‘desires to separate’
- ▶ Plaintiff also asks for temporary custody and temporary child support

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### Consider

- ▶ At temporary hearing, plaintiff asks for temporary custody and possession of the house as child support
- ▶ Limited evidence shows both parents have participated in care of children, both have good relationships with their children and both are fit and proper to exercise custody

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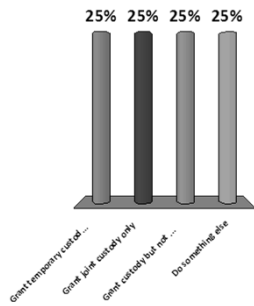
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### I am likely to.....

1. Grant temporary custody and possession of the house to one parent
2. Grant joint custody only
3. Grant custody but not possession of the house
4. Do something else




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### Consider

- ▶ Custody case set for trial (along with numerous others on calendar)
- ▶ Plaintiff appears but defendant does not
- ▶ No answer in file but evidence of proper service and notice of trial
- ▶ Plaintiff hands up custody order when case is called. Order grants custody to plaintiff and 'reasonable visitation' to defendant.




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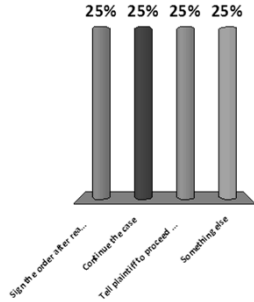
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### I am likely to.....

1. Sign the order after reading it carefully
2. Continue the case
3. Tell plaintiff to proceed with evidence
4. Something else




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### Consider



- ▶ Plaintiffs file custody complaint
- ▶ Alleges "relationship in nature of parent-child" even though unrelated to child
- ▶ Alleges that child has been in their custody for last 6 months
- ▶ Parents of child consent to entry of order granting custody to plaintiffs

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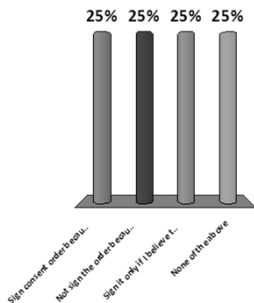
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### I am likely to.....

1. Sign consent order because they all agree
2. Not sign the order because it would be void
3. Sign it only if I believe the order is in the best interest of the child
4. None of the above




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## Standing

- ▶ Matter of subject matter jurisdiction
- ▶ Remember *Tilley v. Diamond*, 184 NC App 758 (2007) and *Meyers v. Baldwin and Baker*, COA, July 2010
- ▶ *Bohannon*, COA, Dec. 2010
  - Allegations of relationship not sufficient
  - *But see Rodriguez*, COA, April 2011 (grandparents) and *Yurek v. Baker*, COA, 2009 (aunt and uncle)

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## Waiver of Parental Rights

- ▶ Standing issue?????
- ▶ *See Rodriguez*, COA, April 2011
- ▶ *But cf.*
  - *Bivens v. Cottle*, 120 NC App 467 (1995)
  - *Speaks v. Fanek*, 122 NC App 389 (1996)
  - *Sloan v. Sloan*, 164 NC App 190 (2004)



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## Modification Jurisdiction

- ▶ Pennsylvania entered custody determination when everyone lived in state
- ▶ Mom incarcerated in Pennsylvania
- ▶ Dad and kids move to NC
- ▶ 2 years later, TPR action filed in NC
  - Mom still incarcerated

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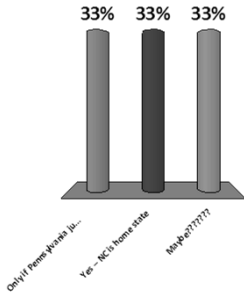
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### Can NC court modify?

1. Only if Pennsylvania judge enters order saying we can
2. Yes - NC is home state
3. Maybe???????



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### Compare

- ▶ Michigan gave joint custody
- ▶ Dad moved to NC with kids
- ▶ Mom moved to Georgia
- ▶ A year after moving to NC, dad files action asking to modify because he wants to move to Memphis

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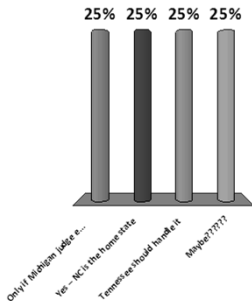
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### Can NC court modify

1. Only if Michigan judge enters order saying we can
2. Yes - NC is the home state
3. Tennessee should handle it
4. Maybe???????



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### For UCCJEA experts only.....

- ▶ Parents live in NC with kids for 2 years
- ▶ Visit family in Japan frequently
- ▶ May 2008 - all go to Japan for visit
- ▶ 3 weeks later - mom says me and the kids are not leaving Japan
- ▶ Nov 2008 - dad files custody action in NC

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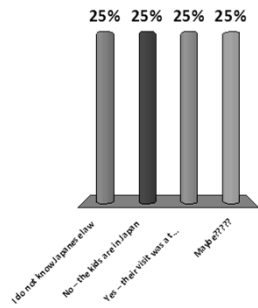
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### Does NC court have jurisdiction?

1. I do not know Japanese law
2. No - the kids are in Japan
3. Yes - their visit was a temporary absence
4. Maybe?????



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### International Service of Process

- ▶ See *Hammond v. Hammond*, 704 SE2d 74 (COA, March 2011)
- ▶ See also School of Government 2004 AOJ Bulletin by Mark Weidemaier, *International Service of Process Under the Hague Convention*

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## Compare

- ▶ Michigan gave joint custody and ordered child support
- ▶ Dad moved to NC with kids
- ▶ Mom moved to Georgia
- ▶ A year after moving to NC, dad files action asking to modify child support

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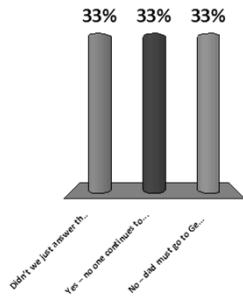
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## Can NC court modify?

1. Didn't we just answer this question?
2. Yes - no one continues to live in Michigan
3. No - dad must go to Georgia



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## Jurisdiction

- ▶ Remember UIFSA rules are different than those of the UCCJEA
- ▶ Don't forget the "Play Away" rule
- ▶ We don't want this to be too easy for you.....



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