

Family Law Update
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Child Custody

Contempt

- No civil contempt unless party violates unambiguous specific provision in a court order
 - *Bunch v. Kennedy Bunch*, NC App (Oct. 4, 2016)(p.2)
 - *Williams v. Chaney*, NC App (Nov. 15, 2016)(p.3)
 - *McKinney v. McKinney*, NC (May 16, 2017)(p.9)
 - No civil contempt if purge is completed before contempt order entered (maybe criminal contempt)

Attorney fees for contempt

- Authorized by GS 50-13.6
 - Only with findings required by that statute
 - *Williams v. Chaney*
 - Person seeking fees was acting in good faith and had insufficient means to defray the cost of the contempt procedure
 - Cannot order against respondent unless respondent found in contempt or not found in contempt only because complied with purge before the hearing
 - *McKinney*

Entry of Judgment

- Rule of Civil Procedure 58
 - No contempt if purge performed before contempt order written, signed and filed
 - *McKinney* (p.9)
 - Judge not bound by oral rendition at end of trial
 - *Scoggin v. Scoggin*, NC App (Oct. 18, 2016)(p.2)

Guardianship v. Custody

- Guardianship is the more comprehensive status
 - Custody is just one aspect of guardianship
- A guardianship order renders issues of custody “moot”
- A guardianship order will supersede all previous custody orders
- Once clerk assumes jurisdiction, district court cannot enter custody orders (at least absent an emergency)
 - *Corbett v. Lynch*, NC App (Dec. 20, 2016)(p.4)
 - See also *McKoy v. McKoy*, 202 NC App 509 (2010)(p.6)

Scope of Authority

- GS 50-13.2(b)
 - Custody orders may include “such terms, including visitation as will best promote the interest and welfare of the child.”
 - But discretion is not unlimited:
 - *“In proceedings involving the custody ... of a minor child, the ... judge is authorized to determine the party or parties to whom custody of the child shall be awarded, whether and to what extent a noncustodial person shall be allowed visitation privileges, ... whether an order for child custody or support shall be modified or vacated based on a change in circumstances, and certain other related matters.”*
 - Appert v. Appert, 80 NC App 27 (1986)
 - Kanellos v. Kanellos, 795 NC App 225 (NC App 2016)(p.6)

Kanellos

- “Put simply, a district court must consider the pros and cons of ordering primary custody with each parent, contemplating the two options *as they exist*, and then choose which is in the child's best interest. ... However, a court cannot ... create a “new and improved” third option, even if the district court sincerely believes it would be in the child's best interest.”
- “A judgment awarding custody is *based upon the conditions found to exist at the time it is entered,*” quoting *Stanback v. Stanback*, 266 N.C. 72, 76, 145 S.E.2d 332, 335 (1965)

Other stuff in GS 50-13.2

- “An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate”
- “Any order for custody, including visitation, may, as a condition of such custody or visitation, require either or both parents, or any other person seeking custody or visitation, to abstain from consuming alcohol and may require submission to a continuous alcohol monitoring system.”
- “An order for custody of a minor child may provide for such child to be taken outside of the State”

Other stuff in GS 50-13.2

- “If the court finds that domestic violence has occurred, the court shall enter such orders that best protect the children and party who were the victims of domestic violence, in accordance with the provisions of G.S. 50B-3(a1)(1), (2), and (3).”
- “An order for custody of a minor child may provide for visitation rights by electronic communication.”
- “Absent an order of the court to the contrary, each parent shall have equal access to the records of the minor child involving the health, education, and welfare of the child.”

What else has been approved

- Provisions to facilitate the custody and visitation plan
 - Location of supervised visitation
 - Payment of visitation expenses
 - Order party to deliver child to other for visitation
- Provisions to resolve disputes that “directly implicate a child’s relationship with each parent or academic or other activities”
 - Prohibit use of specific babysitter when babysitter interfered with parent’s relationship with child
 - Prohibit home schooling when home schooling amounts to neglect or significantly interferes with other parent’s ability to visit

It’s also okay to order parties not to make negative comments about the other
Watkins, 120 NC App 475 (1995)

What we know you can’t do.....

- Order a parent to relocate or not to relocate or live in specific place
 - *Kanellos*
- Prohibit father from possessing firearms absent evidence of threat to safety of children
 - *Martin v. Martin, 167 NC App 365 (1995)*
- Order psychological testing or treatment of a party in a permanent custody order
 - *Jones v. Patience, 121 NC App 434 (1996)*
 - *But cf. Maxwell v. Maxwell, 212 NC App 614 (2011)*(okay when dad committed domestic violence)
- Order child support placed in escrow if child doesn’t comply with visitation schedule
 - *Appert v. Appert, 80 NC App 27 (1986)*

Modification

- Evidence necessary to show substantial change affecting welfare of the child
 - *Laprade v. Barry*, NC App (May 2, 2017)(p. 8)
 - Evidence was sufficient
 - *Farmer v. Farmer*, NC App (June 6, 2017)(p. 11)
 - Evidence was not sufficient

S.L. 2017-22 (S 53) - Orders on or after Oct. 1, 2017

- "§ 50-13.5. Procedure in actions for custody or support of minor children.
 - (d) Service of Process; Notice; Interlocutory Orders. –
 - (3) ... A temporary custody order that requires a law enforcement officer to take physical custody of a minor child shall be accompanied by a warrant to take physical custody of a minor child as set forth in G.S. 50A-311.

GS 50A-311 Warrant

“(b) If the court, upon the testimony of the petitioner or other witness, finds that the child is imminently likely to suffer serious physical harm or be removed from this State, it may issue a warrant to take physical custody of the child. The petition must be heard on the next judicial day after the warrant is executed unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible.”

GS 50A-311 Warrant

“(c) A warrant to take physical custody of a child must:

- (1) Recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based;
- (2) Direct law enforcement officers to take physical custody of the child immediately; and
- (3) Provide for the placement of the child pending final relief.”

Child Support

Child Support Guidelines p. 3

“(2) Income from Self-Employment or Operation of a Business. Gross income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, is defined as gross receipts minus ordinary and necessary expenses required for self-employment or business operation. ...

In most cases, this amount will differ from a determination of business income for tax purposes.”

Sergeef (p. 14)

- Trial court did not err in using tax return to determine gross business income rather than using evidence of gross receipts minus expenses when trial court found tax returns more credible.
- “Tax returns have long been consistently relied upon by North Carolina courts as constituting competent evidence of a self-employed individual’s income.”

PSS and Alimony

Cohabitation

GS 50-16.9(b):
“(b) If a dependent spouse who is receiving postseparation support or alimony from a supporting spouse under a judgment or order of a court of this State remarries or engages in cohabitation, the postseparation support or alimony shall terminate.”

Cohabitation

- Cohabitation is a defense to a PSS or alimony claim, even if there is no support order to 'terminate'
 - *Orren v. Orren*, NC App (May 16, 2017)(p. 16)
 - Support obligation terminates upon cohabitation
 - *Williamson v. Williamson*, 142 NC App 702 (2001)

Equitable Distribution

Procedural Issues

- Request for "unequal division of marital property" in prayer for relief is sufficient to state a claim for ED
 - *Gurganus*, NC App (Feb. 21, 2017)(p. 22)
- ED can be filed along with a divorce from bed and board, but only if parties are living separate and apart at time of filing
 - *Gurganus*
 - *Miller v. Miller*, NC App (April 18, 2017)(p.32)

More procedural issues.....

- ED judgments cannot be modified or amended
 - *Gurganus*
 - *Orren v. Orren*, NC App (May 16, 2017)(p.16)
- Unless specifically instructed to do so, trial court is not required to have a hearing when case is remanded from court of appeal
 - *Lund v. Lund*, NC App (March 21, 2017)(p. 31)

Miller, NC App (April 18, 2017)(p. 32)

- Former spouse’s need to file ED claim can be basis for setting aside divorce pursuant to Rule 60(b)(6)
 - Even if other party has remarried
- Trial court should not order marital property to be sold
 - At least absent good reason
 - *Cf. Wall v. Wall*, 140 NC App 303 (2000)
 - See blog post “ED: CAN THE COURT ORDER THE SALE OF MARITAL PROPERTY?” (April 28, 2017) www.civil.sog.unc.edu
- Contract right to funds from future timber harvest “too speculative” to be property
 - See blog post “WHAT IS PROPERTY?” (May 5, 2017) www.civil.sog.unc.edu

Military pensions

- Federal law allows state courts to distribute “disposable retired pay” in an ED proceeding
- The definition of “disposable retired pay” excludes amounts deducted from that pay as the result of a waiver required for service member to receive disability benefits
- Federal military disability benefits cannot be distributed by state courts

Military pensions

- What do you do?
 - ED order awards wife 50% of marital portion of husband’s military pension
 - Husband retires a year later. Wife begins to receive \$500 per month
 - 13 years later, husband converts part of his retirement to disability
 - Wife’s monthly payment now \$250 per month
 - Wife asks court to amend distribution order to award her higher percentage of remaining retirement pay

Conversion after judgment

- “We believe neither *Mansell* nor the FSPA prohibits a state court from amending a qualifying order to increase a non-military spouse’s share of a military spouse’s retirement pay where the military spouse has, subsequent to the original qualifying order, elected to receive disability benefits in place of retired pay.”
 - *White v. White*, 152 NC App 588 (2002)
- “State court may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse’s portion of retirement pay caused by the waiver of retirement pay to receive disability benefits.”
 - *Howell v. Howell*, 581 US __ (May 15, 2017)

Pension distribution

- GS 50-20.1(d)

“The award shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the ... pension ... to the total amount of time of employment.”

“The award ...shall not include contributions, years of service, or compensation which may accrue after the date of separation.”

“The award shall include gains and losses on the prorated portion of the benefit vested at the date of separation.”

Seifert, 319 NC 367 (1987)

- Distribution order: fraction to be applied to **disposable retired pay** when employee retires and begins to receive benefits to determine marital portion of pension payment

Time Earning Pension While Married Before Separation
 Total Time Participating in the Plan [at retirement]

- Held: this fraction does not violate GS 50-20.1(d)
 - *Accord Gurganus v. Gurganus*, NC App (2/21/2017)(p.22)

Military pensions (p. 23)

- For purposes of state court property divisions, the definition of “disposable retired pay” was amended effective Dec. 23, 2016 to include only:

- “(i) the amount of basic pay payable to the member for the member’s pay grade and years of service at the time of the court order (was at the time of retirement), as increased by
- “(ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member’s retirement using the adjustment provisions under that section applicable to the member upon retirement.”
