

**Family Law Update  
Cases Decided Between  
June 19, 2018 and September 18, 2018**

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**Custody**  
**Cases Decided Between June 19, 2018 and September 18, 2018**

**Civil contempt; modification; attorney fees**

- Civil contempt order reversed because trial court failed to specify the purge condition necessary to terminate the civil contempt.
- Violations of provisions of custody order addressing communication and visitation are more appropriately addressed by criminal contempt than civil contempt.
- Where extensive findings of fact clearly established there had been a substantial change affecting the welfare of the children, the court of appeals affirmed the modification of custody even though order did not specifically state there had been a substantial change in circumstances.
- Mother waived her objection to the sufficiency of father’s pleading requesting attorney fees when she did not raise her objection to his pleading until late in the attorney fee hearing and evidence established grounds for the trial court’s award of fees to him.

**Kolczak v. Johnson, \_ N.C. App. \_, S.E.2d (July 3, 2018).** Mother appealed order that held her in civil contempt, modified custody, and ordered her to pay father’s attorney fees.

Contempt. The trial court held mother in civil contempt for violating terms of a custody order. The court of appeals held that the findings of fact and evidence supported the trial court’s conclusion that mother had willfully violated the terms of the order by:

- failing to inform father of certain events as required by the custody order,
- failing to give father the right of first refusal when she needed child care for the child as specified in the custody order,
- allowing her husband to be present when the children were at her home when order provided that children were to have no contact with the husband, and
- scheduling the children for camps during times that interfered with father’s custodial time with the children.

However, the court of appeals reversed the contempt order because it did not contain a clear purge condition indicating how mother could take herself out of contempt. Declining to remand this issue to the trial court for purge conditions, the court of appeals stated that because these violations by mother related to communication and visitation provisions of a custody order rather than the payment of support, it was not “apparent how an appropriate civil purge condition could coerce the defendant to comply with a court order as opposed to punishing her for a past condition.” In a footnote, the court stated that this situation was more appropriate for criminal contempt than civil.

Modification of custody order. The court of appeals rejected mother’s argument that the trial court erred by modifying custody without specifically concluding there had been a substantial change in circumstances affecting the welfare of the child. The court noted that a trial court always should state this specific conclusion in a modification order but affirmed in this case

because the findings of fact were extensive and clearly established changed circumstances that affected the children in a negative manner.

Attorney fees. Mother also argued that the trial court erred in awarding father attorney fees for the modification proceeding because his motion requesting attorney fees did not allege he had insufficient means to defray the costs of the action. The court of appeals affirmed the award without discussing whether such an allegation is required in a motion requesting attorney fees. Instead, the court held that mom waived her objection to the sufficiency of father's written motion by failing to object until late in the attorney fee hearing after evidence had been presented indicating father did not have the ability to pay the attorney fees.

### **Attorney fees; findings of fact to show customary fees**

Trial court order for attorney fees vacated where there was no evidence in the record regarding the customary fee for like work in the community.

**WFC Lynnwood I LLC v. Lee of Raleigh, 817 S.E.2d 437 (N.C. App. June 5, 2018).** The trial court awarded attorney fees to plaintiff in action regarding a commercial lease and liquidated damages. The trial court supported the award in part with the following finding:

“The Court is aware of the range of hourly rates charged by law firms in Wake County as well as in North Carolina for litigation of business contracts like this. The court finds the hourly rates billed to Plaintiffs as set for the Counsel's affidavit are fair and reasonable and conform to or are less than hourly rates charged in and around North Carolina and specifically in Wake County by firms and attorneys with comparable experience in matters of comparable complexity.”

The majority held that because there was no evidence in the record to show the customary fees in the community, the trial court erred in making this finding of fact. Dissent argues that the trial court was taking judicial notice of the community standard and that judicial notice is appropriate in these circumstances if the judge actually is aware of the community standard. *See Simpson v. Simpson*, 209 NC App 320 (2011)(in custody case, trial court had the discretion to take judicial notice of customary fees in the community if the judge actually knew the customary fees).

The majority opinion does not mention judicial notice, so it is unclear whether the majority is indicating judicial notice is not appropriate in this circumstance or whether the majority does not agree with the dissent that this trial judge took judicial notice of the customary fees in this case.

### **Temporary order converting to permanent order; splitting joint legal custody**

- Where existing custody order was a temporary order that had not converted to a permanent order, trial court was not required to find a substantial change in circumstances before modifying the custodial arrangement in that order.
- In considering whether a temporary order has converted to a permanent order, the court should consider the amount of time between the entry of the temporary order and the time when a party first requests a hearing on the issue of permanent custody rather than the time the court actually conducts the hearing on permanent custody.

- Trial court erred in splitting joint legal custody without making findings sufficient to support the split of joint decision-making authority. Custody order must show how allocation of decision-making authority will protect the welfare of the child.

**Eddington v. Lamb, \_ N.C. App. \_, S.E.2d (August 7, 2018).** Trial court order granted mother primary physical custody and dad secondary physical custody of parties' minor child. The trial court also granted joint legal custody to the parties but split decision-making authority by giving mom final authority as to health-care and education decisions and giving father final authority as to the child's participation in sports. The father argued on appeal that the trial court erred because the custody order modified an existing order that he argued was a permanent order without first finding a substantial change in circumstances and by splitting joint legal custody.

Temporary order. Father argued that the trial court erred in concluding that the temporary order entered in the case remained a temporary order at the time of the final custody trial. Father argued that the temporary order had converted to a final order by staying in effect for more than two years. The court of appeals affirmed the trial court's decision that the temporary order remained a temporary order and held that for the purpose of determining whether a temporary order has converted to permanent, "the relevant time period starts when a temporary order is entered and ends when a party requests the matter be set for hearing, not when the hearing is held." The court explained that crowded court dockets frequently are the reason temporary orders stay in place for an extended period of time. In this case, only nine months passed between entry of the temporary order and father's first request that the permanent custody hearing be scheduled. Because the parties were engaged in the litigation process and did not simply allow the case to "lie dormant," the temporary order did not convert to a permanent order due to the passage of time.

Split Joint Legal Custody. The court of appeals agreed with father's argument that the trial court failed to make sufficient findings to justify 'deviating' from true joint legal custody. While the trial court's findings established that the parties had disagreements that affected the welfare of the child concerning one health-related issue and one issue regarding after-school care, the court of appeals held that these two issues were not sufficient to justify imposing such a broad limitation on father's decision-making authority on all health-care and education issues. To support such a deviation from joint legal custody, the trial court order must show a causal link between the dispute between the parents and the welfare of the child, and show how the allocation of legal custody will protect the welfare of the child.

### **Modification; substantial change can be change in impact of circumstances on the children**

- A substantial change in circumstances justifying modification can be either a positive change or a negative change.
- A parent's improved circumstances can support a modification of custody when findings show the change improved her ability to care for the children or otherwise affected the welfare of the children.
- Fact that mother was sober, father had limited intellectual ability and the parents had difficulty communicating at the time the original custody order was entered did not mean those continuing circumstances could not support a conclusion that there has been a

substantial change in circumstances where evidence showed the changing impact of those circumstances on the children.

**Shell v. Shell, \_ N.C. App. \_, \_ S.E.2d \_ (August 21, 2018).** Original custody order granted primary physical custody to father and visitation to mother. At the time of the entry of the original order, mom had a history of alcohol and drug abuse, was unable to maintain employment and moved frequently. Father had limited intellectual abilities, struggled with literacy and relied heavily on his parents to manage his affairs and help him care for the children. He lived with his parents at the time of the original custody order and he and the children continued to reside with them when mother filed a motion to modify four years later. The trial court modified custody after concluding there had been a substantial change in circumstances and granted primary physical custody to mother and visitation to dad. The trial court concluded that improvement in mom's life and in her parenting skills, along with father's increased animosity toward mother and his efforts to keep mother away from the children constituted a substantial change in circumstances justifying the change in primary custody.

Mother's sobriety. Father argued that the trial court erred in considering mom's sobriety as a change in circumstances because she had been sober for four months at the time of the original custody order. The court of appeals held that the improvement in mother's ability to care for her children resulting from her continued sobriety during the four years between entry of the original order and the motion to modify was an appropriate change for the trial court to consider. The findings of fact in the order clearly showed that the mother's improvement affected the welfare of the children.

Mother's remarriage. Father argued, and the court of appeals agreed, that a parent's remarriage is not a substantial change in circumstances standing alone. In this case, however, additional findings regarding the positive impact of the remarriage on mother's stability and ability to parent and about the positive relationship between the children and mother's new husband that had developed in the years since the original custody order supported the trial court conclusion that there had been a substantial change affecting the welfare of the children.

Father's limited abilities. Father also argued that the trial court erred in considering his limited intellectual abilities and struggles with literacy because he had those same issues at the time of the original order. The court of appeals held that the trial court findings established that the impact of father's condition on the children had changed since the original order because as the children aged, their needs became more complex. The trial court did not err in considering that father was less able to meet many of the needs of the children than he was at the time of the original order and that he refused to allow mother to help the children with the things he could not.

Parents' inability to communicate. Similarly, father argued that the trial court should not have considered the inability of the parents to interact without arguing and their inability to cooperate with each other to parent the children because they had the same relationship at the time of the original order. Again, the court of appeals held that even though the relationship of the parents was bad at the time of the original order, the findings by the trial court clearly established that

the impact of this relationship on the children had worsened in the time between the original order and the modification hearing.

### **Custody evaluator testimony**

- Trial court did not err in admitting testimony and report of custody evaluator appointed by the court with the consent of the parties.
- Trial court did not err in ordering a temporary suspension of mother's visitation rights with the children without finding that visitation is not in the best interest of the children as required by GS 50-13.5(i) when findings established mother had engaged in conduct detrimental to the welfare of the children.
- Trial court can make findings of fact regarding the conduct of the parents based on the testimony and report of a custody evaluator.

**Sneed v. Sneed, \_ N.C. App. \_, S.E.2d (September 18, 2018).** After finding that mother had engaged in conduct intended to alienate the children from their father, the trial court entered a custody order that required the parties to participate in a program designed to assist families with “troubled and alienated parent-child relationships.” The court awarded the parents joint physical custody, alternating on a week-to-week basis, until they began participating in the alienation program. The order provided that mother could have no contact with the children while the parties participated in the program and for a period of 90 days after. Following the completion of the program and the 90-day period of no contact, the court would “determine the conditions, timing, and nature of resumption of contact between mother and the minor children.”

Expert testimony of custody evaluator. Mother appealed the custody order, first arguing that the trial court erred in admitting the testimony and report of the custody evaluator because the testimony was not relevant or reliable as required by Evidence Rule 702(a). Mother argued that the evaluator's report was not relevant expert testimony as required by Rule 702(a) because it did not provide the court information “based on scientific, technical or other specialized knowledge.” Instead, mother contended that the information provided by the evaluator “did not provide insight beyond conclusions the trial court could readily draw from its ordinary experience,” and only provided “a version of the facts found after interviewing the same people, and reviewing the same records, that came before the trial court.” In addition, mother argued that the testimony and opinion of the evaluator failed to meet the reliability requirement of Rule 702(a) because it was not based upon an articulated methodology and the expert did not provide the “principals or methods relied upon” or “the actual technique used” to form her opinions.

The court of appeals described mother's arguments as “meritless.” The court pointed out that the evaluator explained that a custody evaluation is “a comprehensive evaluation that gathers information in order the expert to form opinions related to the court's determination of child custody and parenting plans.” In addition, the evaluator described in detail the process she followed in conducting the evaluation, which included interviewing the parents and other third parties, conducting psychological testing of the parents, and observing the interactions between the parents and the children. After reviewing the testimony of the evaluator regarding her process and emphasizing that the trial court appointed the evaluator with the consent of the parties, the court of appeals held that mother “failed to demonstrate how the trial court abused its discretion in admitting the expert testimony and report.”

Mother also argued that there was no evidence in the record to support the findings of fact regarding her past conduct because the only evidence regarding her conduct came from the report of the evaluator. The court of appeals held that the expert's testimony and report provided the required evidentiary support for the trial court's findings of fact.

Denying a parent visitation with children. Finally, mother argued that the trial court had no authority to suspend her visitation with the children pending completion of the alienation program without first concluding that visitation with her is not in the best interest of the children as required by GS 50-13.5(i). That statute states:

“In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.”

The court of appeals rejected her argument, concluding that the trial court findings of fact clearly showed mother engaged in conduct detrimental to the welfare of the children by alienating them from their father. The court held that findings establishing that a parent engaged in conduct detrimental to the welfare of the children are sufficient to meet the requirements of GS 50-13.5(i).

**Custody jurisdiction; modification of order from another state; conduct inconsistent with protected status; authority to hear motion for new trial; jurisdiction following an appeal**

- NC court had subject matter jurisdiction to modify Florida custody order where neither the parties nor the child continued to reside in Florida and NC was the home state of the child at the time mother filed the motion to modify custody.
- Trial court did not err in applying NC law rather than the law of Florida when determining whether to modify the Florida order.
- Trial court conclusion that mother acted inconsistent with her constitutionally protected status was supported by findings that mother created a parent-child relationship between the grandmother and child without indicating her intent that the relationship be temporary and by findings that mother had extremely limited contact with the child for 7 years before requesting return of custody.
- Judge other than the trial judge has no authority to consider a Rule 59 request for a new trial, even if the trial judge recused himself from further action in a case.
- When an appeal is pending relating to a custody order, the trial court has no jurisdiction to hear any matter relating to the custody of the child subject to the custody order on appeal.

**Quevedo-Woolf v. Overholser and Carter, \_ N.C. App. \_, S.E.2d (September 18, 2018).**

Mother lived with grandmother in Florida at the time the child was born. When child was a year old, mom moved out of the house, leaving child with grandmother. Mother testified that she left the child with grandmother “for stability” because mom was moving into the home of friend. Mother allowed grandmother to care for the child and visited the child only sporadically. Shortly after moving out of grandmother's home, mom agreed to the entry of a “temporary custody



order” issued by the court in Florida granting sole legal and physical custody to grandmother. That order provided that mother could petition for return of her child to her custody at any point in time. Florida law required that custody be returned to mother upon her petition as long as the court determined her to be a fit parent.

Grandmother and child moved to NC when the child was three. Mom had very limited contact with the child, failing to contact the child for a period of over two years at one point. Shortly after grandmother and child moved to NC, Mom filed a petition in the Florida court asking that custody be returned to her but her petition eventually was dismissed for failure of mother to prosecute her claim. In a four-year period, mom contacted the child only three times.

Mom married in 2012 when the child was 7 years old and asked grandmother to return custody of the child to her. When grandmother refused, mom filed a motion to register the Florida custody order in NC and a motion to modify that order to return custody to her. Grandmother filed a motion for custody, alleging mom had abandoned the child and otherwise acted inconsistent with her protected status. After years of court proceedings and temporary orders, in 2016, the trial court concluded mother failed to show a substantial change in circumstances and denied her motion to modify the Florida order. The trial court also concluded mother had acted inconsistent with her constitutionally protected status.

Mom filed a motion for a new trial, arguing that the trial court had no jurisdiction to modify the Florida order and asking the court to apply Florida law and return the child to her. The trial judge who denied mother’s motion to modify recused himself following the entry of his order, so a different trial judge heard mother’s motion for a new trial. The second judge granted mother’s motion for a new trial after concluding NC had no jurisdiction to act because Florida had continuing exclusive jurisdiction over custody of the child. The trial court also ordered a new trial if the Florida court agreed to relinquish jurisdiction to NC. Thereafter, a Florida order was entered “transferring jurisdiction” to NC. Mother then filed another motion requesting return of custody to her pursuant to Florida law. Following a hearing on that motion, the NC trial judge applied Florida law and held that mom was entitled to return of the child.

Mom appealed the original trial court order denying her motion to modify. Grandmother appealed the granting of the Rule 59 motion and the final order returning the child to mother.

Subject matter jurisdiction to modify the Florida order. Mom argued that NC had no subject matter jurisdiction to do anything other than enforce the Florida order pursuant to Florida law because Florida had continuing exclusive jurisdiction over custody of the child. The court of appeals disagreed, holding that Florida lost continuing exclusive jurisdiction when all of the parties left the state of Florida. Because Florida did not have continuing exclusive jurisdiction, NC had jurisdiction to consider the motion to modify the Florida order pursuant to GS 50A-203 because NC was the home state of the time plaintiff initiated the action in NC.

Choice of law to apply to request for modification. Mom argued that the trial court erred in applying NC law regarding modification of custody rather than the law of Florida. Florida has a statute providing that a parent who has temporarily relinquished custody to a third party can petition the court at any point in time for return of custody without showing changed

circumstances. Mom argued that principles of Full Faith and Credit required the NC court to allow mother to regain custody of the child pursuant to the terms of Florida law.

The court of appeals disagreed, holding that Full Faith and Credit requires NC courts to enforce the Florida order, but once NC obtained jurisdiction to modify the judgment, NC law applies to determine when modification is appropriate. Therefore, the trial court did not err in applying GS 50-13.7 and in determining that modification was not appropriate where mom failed to show a substantial change in circumstances since the entry of the Florida order granting custody to grandmother.

Conduct inconsistent with protected status. The court of appeals affirmed the trial court's conclusion that mom waived her constitutional right to exclusive care, custody and control of her child by acting inconsistent with that protected status. It is not clear why this was an issue in this case; the appellate opinion states that the trial court dismissed mother's request for custody modification and made no custody determination at all. The trial court simply left the Florida order in place. Nevertheless, the trial court order concluded mother had waived her constitutional rights and the court of appeals held that the findings of fact supported this conclusion.

The appellate court made it clear that the fact mother left the child with grandmother and agreed to entry of the temporary custody order was not sufficient, standing alone to support the conclusion that she had waived her protected status. The court stated that "[mother's] recognition that [grandmother] was in a better position to care for [the child] at the time [mother] consented to the entry of the Florida order is presumed by this court to have been an act of parental responsibility" rather than conduct inconsistent with her parental responsibility. However, the court held that mother's actions and inaction subsequent to her relinquishment of custody to grandmother was conduct inconsistent with her parental responsibilities. According to the court, mother voluntarily created a parent-like relationship between the child and the grandmother and did nothing to indicate she intended that relationship to be temporary. Her extended "lack of ability, or desire, to take on even minimal continuing acts of parental love and responsibility," was sufficient to support the trial court conclusion that she waived her constitutional protection.

Authority of judge to hear Rule 59 motion for new trial. Following recusal of the judge who conducted the hearing on mother's motion to modify custody, a second judge considered and granted mother's motion for a new trial. Grandmother argued on appeal that the second judge did not have jurisdiction to hear the Rule 59 motion and the court of appeals agreed. Only the trial judge can consider a Rule 59 request.

Jurisdiction to act while custody issues on appeal. Mother had appealed the trial court order denying her request for modification of the Florida order and grandmother had appealed the trial court order granting the Rule 59 motion by the time mother filed her final motion for return of custody pursuant to Florida law. Grandmother argued on appeal that the trial court had no jurisdiction to enter the third order granting custody to mother because of those pending appeals and the court of appeals agreed. The court of appeals held that whenever the custody of a child is an issue on appeal, the trial court has no jurisdiction to enter a custody order relating to that child whether in the appealed case or in a subsequently filed proceeding.

**PSS and Alimony**  
**Cases Decided Between June 19, 2018 and September 18, 2018**

**Venue; mandatory change**

- GS 50-3 requires that the court change venue in an alimony case when the conditions provided in the statute are met. The change is mandatory rather than discretionary.
- The court must change venue even if a final alimony order has been entered and no motion for modification is pending.

**Scheinert v. Sheinert, \_ N.C. App. \_, S.E.2d (July 3, 2018).** Plaintiff filed a claim for alimony in Randolph County when she lived in Randolph County and defendant lived in Caswell County. After the trial court entered an alimony order, plaintiff moved to Indiana. Defendant filed a motion pursuant to GS 50-3 requesting that venue be changed to Caswell County. The trial court transferred venue and plaintiff appealed.

The court of appeals held that GS 50-3 mandates that the trial court transfer venue to the county where defendant resides when both parties resided in NC when plaintiff filed the action but plaintiff moves out of state thereafter. The court remanded the transfer order in this case because the trial court did not actually make a finding of fact that both parties lived in NC at the time plaintiff filed the original action.

The court of appeals rejected plaintiff's argument that the trial court erred in changing venue when there was no issue relating to alimony pending before the trial court. The court of appeals held that the specific language of GS 50-3 allows a party to request transfer before a party files a motion in an alimony case to ensure that defendant can file all future issues in the county where defendant resides.



**Domestic Violence**  
**Cases Decided Between June 19, 2018 and September 18, 2018**

**Award of attorney fees in DVPO**

- Chapter GS 50B authorizes the award of attorney fees in a DVPO.
- Trial court erred in ordering fees in a DVPO when plaintiff did not request attorney fees in the complaint or in a motion filed before the DVPO hearing. If requested in a motion, plaintiff must give defendant at least 5 days notice before a hearing on the request as required by Rule 6 of the Rules of Civil Procedure.
- Trial court erred in ordering fees in a DVPO without making findings of fact to establish the reasonableness of the amount of fees awarded.

**Mitman v. Shipley, unpublished opinion, \_ N.C. App. \_, S.E.2d (September 18, 2018).**

Trial court granted plaintiff's request for a one-year DVPO. As part of the relief granted in the DVPO, the trial court ordered defendant to pay \$8,386.90 in attorney fees to plaintiff.

The court of appeals held that GS 50B-3(10) authorizes the court to award attorney fees to either party as part of the relief granted in a DVPO. However, the court of appeals held that the trial court should not have awarded attorney fees when plaintiff failed to request fees either in the complaint or in a motion and failed to give defendant at least 5 days notice of the request as required by Rule 6 of the Rules of Civil Procedure. Further, the trial court erred in awarding fees without making findings of fact to support the reasonableness of the amount of fees awarded.



**Spousal Agreements  
Cases Decided Between June 19, 2018 and September 18, 2018**

**Legislation**

**S.L. 2018-86 (H 688). Effective June 25, 2018 and applying to appeals filed on or after that date, amends GS 50-19.1 to include an order or judgment pertaining to the validity of a premarital agreement to the list of orders and judgments that can be appealed even if other claims in an action remain pending in the trial court.**

Rule 54(b) of the Rules of Civil Procedure allows the appeal of the final resolution of a claim when other claims remain pending in the case only when a judge certifies there is “no just reason for delay.” GS 50-19.1 creates exceptions to that rule by allowing the immediate appeal of a final judgment in a claim for divorce, divorce from bed and board, child custody, child support, alimony and equitable distribution even if other claims remain pending in the case. S.L. 2018-86 amends GS 50-19.1 to add an order or judgment pertaining to the validity of a premarital agreement to the list of orders and judgments that can be appealed immediately without court certification.





**Equitable Distribution**  
**Cases Decided Between June 19, 2018 and September 18, 2018**

**Classification of a 529 Education Savings Plan**

- Funds in a 529 education savings plan are property of the parent(s) rather than property of the children who are the intended beneficiaries of the plan.
- Because the funds in the account remain property of the parent(s), the account is marital property if funded with marital funds.
- Courts cannot create exceptions to the definition of marital property for public policy reasons because equitable distribution is a cause of action created by statute. Any exception to the statutory definition of marital property must come from the General Assembly.

**Berens v. Barends, \_ N.C. App. \_, S.E.2d (August 7, 2018).** Defendant argued on appeal that the trial court in an equitable distribution proceeding erred by classifying a 529 education saving plan as marital property. Defendant argued that the parties made a gift of the marital funds to the children when they put the money into the savings account. The court of appeals affirmed the trial court, holding that the funds in a 529 account remain property owned by the parents rather than by the children. The court of appeals also rejected mother’s request that the court create an exception to the definition of marital property for these accounts based on the public policy concern that allowing the court to distribute the accounts is contrary to the best interest of the children who are the intended beneficiaries of the account. According to the court of appeals, only the General Assembly can create exceptions to the broad definition of marital property contained in the equitable distribution statute.

**Classification of business interest**

- Appreciation in the value of a separate business during the marriage is presumed to be marital property. Spouse seeking to classify all or part of the value of the appreciation as separate property has the burden of proving it was passive appreciation.
- Trial court is not required to determine cause of appreciation with “mathematical precision” but can reasonably approximate values based on evidence presented.
- Trial court findings of fact supported the conclusion that appreciation was half active and half passive where husband and husband’s father owned equal interest in business and worked together to cause the appreciation during the marriage. While husband’s efforts resulted in active appreciation, appreciation caused by husband’s father was passive appreciation because it was not appreciation caused by marital effort.
- Appreciation caused by market forces also is passive appreciation.
- Postseparation distributions from a marital business that represent a return on investment in marital property is divisible property.
- Postseparation self-employment income from a marital business is not divisible property.
- Parties are bound by the characterization of postseparation income from a marital business on their income tax returns.
- Trial court classification of postseparation income as self-employment income of husband had to be vacated where evidence of the nature of the income was inconclusive.

**Blair v. Blair, \_ N.C. App. \_, S.E.2d (August 7, 2018).** Trial court found that partnership created by husband and his father before the date of marriage was owned equally by husband and his father during the marriage and on the date of separation. The trial court also found that the partnership increased significantly in value during the marriage as the result of the work done by husband and his father and as the result of market forces. Based on these findings of fact, the trial court classified one-half of the date of separation value of the appreciation that occurred during the marriage as marital property.

On appeal, wife argued that the trial court erred in concluding defendant and his father were equal partners and argued that more of the appreciation was marital property. Wife pointed out that all of the appreciation must be presumed to be marital because it occurred during the marriage and argued that husband failed to rebut that presumption.

The court of appeals affirmed the trial court, holding that the evidence supported the trial court's finding that husband owned only one-half of the partnership despite conflicting evidence presented at trial indicating husband frequently received more than 50% of the distributions from the partnership during the marriage. The trial court had the discretion to believe husband's testimony that he and his father agreed they were equal partners despite the occasional unequal distributions.

The court of appeals also affirmed the trial court finding that only one-half of the increase in value of the partnership during the marriage was marital property. Although all appreciation of separate property during the marriage is presumed to be marital, evidence supported the trial court's conclusion that husband had rebutted the presumption by showing that his father's work and market forces contributed to the appreciation. Rejecting wife's argument that the evidence did not show precisely how the father's work and the market forces contributed to the increase, the court of appeals held that the trial court is not required to determine such percentages with "mathematical certainty." The trial court will be affirmed as long as findings show that the court "reasonable approximated" the values of the marital and non-marital interests.

The trial court also found that income received by husband from the business after the date of separation was salary for his work in the business after the date of separation. Wife argued that all or a portion of the money was divisible property because the funds were distributions from the partnership to the partners. The court of appeals agreed with wife that distributions represent a return on capital investment for the partners and therefor are divisible property to the extent they are a return on capital investment in marital property. On the other hand, the court held that funds that are compensation for husband's work after the date of separation are not divisible property. In addition, the court of appeals held that parties are bound by the way they characterize the income on their business and personal tax returns. Because the evidence in the record was not sufficient to show whether the amounts received by husband were compensation to him or distributions, the court of appeals remanded this issue to the trial court for further findings to support the classification of the money.

### **Classification; valuation; distributive award**

- Trial court order erred by distributing house to wife after ED judgment indicated that the trial court concluded the home was separate property because a court has no authority to distribute separate property in an ED proceeding.
- The trial court erred in distributing the “considerable equity” in a house that was marital property without determining the actual value of the equity.
- Trial court erred in valuing a vehicle at \$10,000 based only on evidence that parties paid off a \$10,000 encumbrance on the vehicle several years before the date of separation because that pay off was not evidence of the date of separation value of the vehicle.
- Trial court did not err by failing to place a value on the date of separation balance due on a home equity loan where the court concluded the home equity loan was the separate debt of husband. Separate debt does not need to be valued and the court cannot distribute it.
- The balance in a 401K account and equity in real estate are not “liquid” assets to be considered as a distribution factor pursuant to GS 50-20(c)(9) because they are not “readily convertible into cash.”

**Watson v. Watson, \_ N.C. App. \_, S.E.2d (August 21, 2018).** The trial court ED judgment was “internally inconsistent” in that it stated that the marital home was the separate property of the parties that they owned as joint tenants before the marriage but also stated that there was “considerable equity” in the house that was marital property. The trial court distributed the house to the wife. The court of appeals remanded the classification issue to the trial court for clarification, holding that if the house is separate property, the trial court has no authority to distribute it because a court only has authority to distribute marital property in an ED judgment. The court of appeals also stated that in order to distribute the “considerable equity” that the trial court believed to be marital property, the trial court must value the equity.

The court of appeals also held that the trial court erred in valuing a vehicle that was marital property at \$10,000 based on evidence that the parties paid off a \$10,000 debt encumbering the vehicle several years before the parties separated. The court of appeals held that the payoff was not evidence of the date of separation value of the vehicle.

The court of appeals also concluded that the trial court did not err by failing to value the debt owing pursuant to a home equity line of credit on the date of separation because the trial court also concluded that the debt was not marital debt but was the separate debt of the husband. The trial court is not required to identify the specific amount due on debt that is not marital debt.

Finally the court of appeals held that the trial court erred in considering the balance in a 401K account and equity in a home as a distribution factor pursuant to GS 50-20(c)(9) which allows the court to consider the “liquid” assets of a party in determining whether an equal distribution is equitable. The court cited the definition of liquid asset in Black’s Law Dictionary that a liquid asset is one that is “readily convertible into cash.” The court held that because liquidation of a 401K account requires the payment of a tax penalty and liquidation of the equity in a home requires that the home be sold, neither are “readily convertible into cash”.

**Entry of QDRO; jurisdiction after appeal**

- Trial court had no subject matter jurisdiction to enter domestic relations order to divide retirement accounts while equitable distribution judgment was on appeal.
- Appeal divests the trial court of jurisdiction until the appellate court issues the mandate returning the case to the trial court.

**Henson v. Henson, \_ N.C. App. \_, \_ S.E.2d \_ (September 4, 2018).** Wife appealed an equitable distribution order. The court of appeals issued an opinion on June 6, 2017, reversing the order in part and remanding the case to the trial court. The court of appeals issued the mandate on June 26, 2017. On June 20, 2017, the trial court entered a domestic relations order directing the distribution of a SEP account and an IRA that were part of the equitable distribution made by the trial court. In a second appeal, husband argued that the trial court had no subject matter jurisdiction to enter the domestic relations order before the appellate court issued the mandate and the court of appeals agreed.

Wife first argued that the trial court had subject matter jurisdiction to enter the domestic relations order because it simply restated the terms of the original ED order. The court of appeals disagreed, finding that the domestic relations order was substantively different from the original order because it ordered the distribution of all gains and losses on the accounts since the entry of the ED judgment while the original ED judgement ordered distribution only of the date of separation value.

Wife then argued that the trial court had subject matter jurisdiction to enter the domestic relations order because the distribution of the retirement accounts was not an issue raised on appeal. The court of appeals rejected this argument, holding that the appeal of the ED judgment divested the trial court of all jurisdiction relating to the ED judgment “as a whole.”

Finally, the court of appeals agreed with husband that an appeal divests the trial court of jurisdiction until the appellate court issues the mandate returning the case to the trial court. The court of appeals retains jurisdiction during the time between the entry of the appellate opinion and the issuance of the mandate 20 days later.

**Civil No-Contact Orders, Chapter 50C**  
**Cases Decided Between June 19, 2018 and September 18, 2018**

**Firearms restrictions; catch-all provision**

- Chapter 50C does not authorize the court to order defendant not to purchase or possess firearms or to order defendant to surrender firearms.
- The catch-all relief provision in GS 50C-5 does not give a judge “unfettered discretion” to order any relief the judge believes necessary to protect a victim.

**Russell v. Wofford, \_ N.C. App. \_, S.E.2d (June 19, 2018).** After concluding defendant committed an act of nonconsensual sexual conduct against plaintiff, the trial court entered a civil no-contact order pursuant to Chapter 50C. Along with other relief, the trial court ordered defendant to surrender all firearms and not to purchase or possess any firearm for the duration of the order and revoked his concealed carry permit. The court of appeals upheld the entry of the no-contact order but held that the trial court exceeded its authority by ordering defendant not to possess or purchase firearms and to surrender all firearms and by revoking his concealed carry permit. The court of appeals rejected plaintiff’s argument that GS 50C-5(b)(7) authorizing the court to order “other relief deemed necessary and appropriate by the court” should be interpreted broadly enough to allow the trial court to limit a defendant’s access to firearms. The court of appeals cited *State v. Elder*, 368 NC 70 (2015), wherein the supreme court refused to adopt a broad interpretation of a similar catch-all provision in Chapter 50B. According to the court of appeals, just like Chapter 50B, Chapter 50C does not give a judge “unfettered discretion” to order any relief the judge believes necessary to protect a victim of unlawful conduct. The court repeatedly pointed out that plaintiff had not requested that defendant’s access to firearms be limited and that defendant had no notice before the 50C hearing that his access to firearms would be an issue during the trial.