

Family Law Update

May 2020

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Custody

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Today's Custody Topics.....

- Best Interest Findings
- Modification
- Grandparents

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GS 50-13.01: NC public policy to.....

- "(1) Encourage focused, good faith, and child-centered parenting agreements to reduce needless litigation over child custody matters and to promote the best interest of the child.
- (2) Encourage parents to take responsibility for their child by setting the expectation that parenthood will be a significant and ongoing responsibility.
- (3) Encourage programs and court practices that reflect the active and ongoing participation of both parents in the child's life and contact with both parents when such is in the child's best interest, regardless of the parents' present marital status, subject to laws regarding abuse, neglect, and dependency.
- (4) Encourage both parents to share equitably in the rights and responsibilities of raising their child, even after dissolution of marriage or unwed relationship.
- (5) Encourage each parent to establish and maintain a healthy relationship with the other parent when such is determined to be in the best interest of the child, taking into account mental illness, substance abuse, domestic violence, or any other factor the court deems appropriate."

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Best Interest

- "Custody is to be awarded to the person who will best promote the interest and welfare of the child."
 - GS 50-13.2(a)
- The "polar star" which guides the discretion of the judges is the welfare and needs of the child.
 - *In re Pearl*, 305 NC 640 (1982)
- Judge must determine the environment that will "best encourage full development of the child's physical, mental, emotional, moral and spiritual faculties."
 - *In re Pearl*, 305 NC 640 (1982)

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- *Hinson v. Hinson* (p.2)
 - Findings in custody order must state how the parenting plan meets the needs of the child; facts must be linked to the welfare of the child.
 - "[T]he trial court made findings that mother unilaterally withdrew the children from one school and moved them to another but there were no further findings to show whether the move was good or bad for the children. In addition, there were findings that father worked a 24-hour shift every third day and mom worked part-time 16 hours a week but did not indicate whether either fact supported the trial court determination that father should have primary custody. ..."

Best Interest: Required Findings of Fact


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Best Interest: Required Findings of Fact

- *Paynich v. Vestal* (p. 4)
 - Restricting parent to supervised visitation requires findings that parent is unfit or that the restriction is necessary for the welfare of the child
 - GS 50-13.5(i)
 - Restriction on parent's access to school and medical records must be linked to child's welfare

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Relocation: Required Findings of Fact



- *Tuel v. Tuel* (p. 5)
 - Required findings when relocation is at issue include those set out in *Ramirez-Barker v. Barker*, 107 NC App 71 (1992)

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Ramirez-Barker factors

"In exercising its discretion in determining the best interest of the child in a relocation case, factors appropriately considered by the trial court include but are not limited to:

- the advantages of the relocation in terms of its capacity to improve the life of the child;
- the motives of the custodial parent in seeking the move;
- the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the courts of North Carolina;
- the integrity of the noncustodial parent in resisting the relocation;
- and the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent."

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Ramirez-Barker

"Although most relocations will present both advantages and disadvantages for the child, when the disadvantages are outweighed by the advantages, as determined and weighed by the trial court, the trial court is well within its discretion to permit the relocation."

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Tuel v. Tuel.....

A custody order is not "fatally deficient if the trial court fails to make explicit findings addressing each and every *Ramirez-Barker* factor. ...[T]he court's primary concern is the ***furtherance of the welfare and best interests of the child and its placement in the home environment that will be most conducive of the full development of its physical, mental and moral faculties...*** Nonetheless, these factors will be highly relevant to the best interest of the child in nearly all of these situations."

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Modification: Required Findings


- A substantial change
- That affects the welfare of the child, and
- A modification of the existing order is in the best interest of the child

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Change that affects the child.....

- Improvement in life of a parent has a self-evident impact on the child ???
 - Deanes v. Deanes* (p.3)
 - Padilla v. Whitley de Padilla* (p.9)
 - But cf. Hinson* (p.2)

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Grandparents

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Graham v. Jones (p. 7)

- Father of children dies
- Children live with mother
- Paternal grandparents file complaint seeking custody or visitation
- Can court give paternal grandparents custody or visitation?

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Grandparent custody and visitation

GS 50-13.1(e)

- Custody or visitation
- Grandparents always have the required relationship
- Rodrigues v. Rodrigues*, 211 NC App 267 (2011)
- Grandparent must allege and prove parents are unfit, have neglected welfare of child or have acted otherwise inconsistent with their protected status as parents
- Custody or visitation is in child's best interest

GS 50-13.2(b1) and GS 50-13.5(j)

- Visitation only
- Only as part of an on-going dispute between parents
- Visitation is in child's best interest

GS 50-13.2A

- Visitation only
- After a relative or step-parent adoption
- Visitation is in child's best interest

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Attorney fees

- GS 50-13.6
 - "In an action or proceeding for the custody or support**, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit."
- Can grandparents seeking visitation under grandparent visitation statute be ordered to pay fees?
 - Sullivan v. Woody* (p. 8)

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Child Support

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Today's Child Support Topics.....

- Contempt
- Modification
- Medical Support

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Contempt

- Criminal or civil??
- “[Father] is hereby ordered into custody of the Sheriff ... for a period of thirty (30) days which shall be suspended by [father] abiding by the terms of this child support as herein set above or until such time as he purges himself of contempt.”
- Can the court also order that father be arrested immediately upon the failure to pay support as required?

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Unger v. Unger (p.10)

- Specific term of incarceration makes this a criminal contempt adjudication
- Order containing legal errors is not necessarily a void order
- It is a violation of Due Process to order respondent arrested for failing to comply with terms of suspended sentence without a hearing

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Morris v. Powell
(p. 13)

- Support obligation terminates when child is emancipated
- Emancipation only occurs upon entry of court order of emancipation or upon child's marriage
- Vested support arrears cannot be modified (forgiven)
 - GS 50-13.10
- Honest belief that his support obligation terminated when child left home supported conclusion that father was not in civil contempt

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Contempt procedure

- *Hardy v. Hardy* (p. 14)
- *Walker v. Surles*
 - (unpublished, p. 15)

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Modification:
Hart v. Hart
(p.11)

- Mom, dad and kids live in Washington when child support order entered (Order #1)
 - Washington order recognizes 'scrivener's error' (Order #2)
 - Washington enters "Corrected Order" (Order #3)
- Mom and kids move to NC
- Mom registers Washington support order, filing only Order #1 and Order #2
- Dad moves to NC
- Dad files motion to modify

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Jurisdiction to modify??

- GS 52C-6-609
 - Order to be modified must be registered in NC
- GS 52C-6-613
 - If all parties reside in NC and kids do not reside in issuing state, NC has subject matter jurisdiction to modify
- GS 52C-6-611
 - If all parties have left issuing state but all parties **do not live in NC**, motion to modify cannot be filed where petitioner lives and must be filed in state with personal jurisdiction over respondent (the 'play away rule')

***Under UIFSA, parties can consent to subject matter jurisdiction in a writing filed with the court

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Hart v. Hart (p. 11)

- NC has subject matter jurisdiction under UIFSA
 - All parties and kids live in NC when motion filed
- Registration process is procedural and not a matter of subject matter jurisdiction
- Mom 'substantially complied' with registration process
- Increase in dad's time with kids resulting from his move to NC was a substantial change in circumstances justifying modification of support

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Change to Child Support Guidelines (p. 16)

Health Care Issues

Applies to support orders entered on or after March 1, 2020

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Health care coverage

"The court must order either parent to obtain and maintain medical health care coverage for a child if it is actually and currently available to the parent at a reasonable cost. Health care coverage includes fee for service, health maintenance organization, preferred provider organization, **and other kinds of private health insurance and public health care coverage, such as Medicaid**, under which medical services can be provided to the dependent child."

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Modification

- "In compliance with 45 C.F.R. section 303.8(d), the need to provide for the child's health care needs in a support order, through health insurance or other means, is a substantial change in circumstances warranting modification of a child support order, regardless of whether an adjustment in the amount of support is necessary."

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Domestic Violence

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Quackenbush v. Groat
(p. 18)

- In ruling on defendant's motion to dismiss for failure to state a claim, trial court should have considered additional handwritten pages filed along with the form Complaint.
- Complaint must contain "a short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief."


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Cf. Martin v. Martin,
832 SE2d 191 (2019)


- In *Martin*, "[t]his Court determined that the trial court should not have based a finding of domestic violence solely on evidence presented by the plaintiff at trial which she had not mentioned in the complaint, based upon defendant's objection to that evidence at trial."
- *Quackenbush v. Groat*



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Alimony



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Crago v. Crago
(p. 20)

From trial court:
"Husband is representing himself and the first two sentences of his closing argument was "how is she [Wife] dependent upon me if she has a \$1,000,000.00"



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GS 50-16.1A(2)



"Dependent spouse" means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse."

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Required considerations
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- (1) the accustomed standard of living of the parties prior to the separation,
- (2) the income and expenses of each of the parties at the time of the trial,
- (3) the value of the estates, if any, of both spouses at the time of the hearing, and
- (4) "the length of [the] marriage and the contribution each party has made to the financial status of the family over the years."

- *Hunt v. Hunt*, 112 NC App 722 (1993), quoting *Williams v. Williams*, 299 NC 174 (1980)

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Estate depletion??

“[T]he trial court consideration of the ‘estates’ of the parties is intended primarily for the purpose of providing it with another guide in evaluating the earnings and earning capacity of the parties, and not for the purpose of determining capability of self-support through estate depletion.”

Williams v. Williams
299 NC 174 (1980)

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Meyers v. Meyers (p. 21)

- Alimony order must be supported by findings on all factors in GS 50-16.3A about which evidence is presented
- Reasonable needs of dependent spouse must be determined in light of the accustomed standard of living during marriage
 - Dependent spouse not “entitled to same lifestyle as supporting spouse” but reasonable needs are not limited to actual needs at time of trial
 - Retirement savings may be a reasonable need if parties had pattern of saving during marriage

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Disclosure of Experts

- Rule 26(b)(4)(a)(1) of the Rules of Civil Procedure now requires that expert witnesses be disclosed before trial, even if identification of experts is not required by a discovery request, discovery plan or a court order.
- Rule 26 does not specify when experts must be disclosed and does not provide a specific sanction for the failure to disclose.
- If a trial court determines a party failed to disclose an expert within a reasonable time prior to trial, the court has the inherent authority to determine an appropriate sanction.
- The trial court has discretion to exclude expert testimony as a sanction if the court in its discretion determines it is appropriate to do so because the failure to disclose gives a party an “unfair technical advantage.”

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Equitable Distribution

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Crago again (p. 24)

- Wife purchased life insurance policy on life of former husband – the father of her children
- Wife married plaintiff husband
- Premiums paid on insurance policy during the marriage, some with marital funds
- Former husband dies
- Wife receives \$1,000,000 life insurance proceeds
- Wife and plaintiff husband separate while most of the funds are still in wife’s bank account
- Are the insurance proceeds marital property?

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Crago v. Crago

- Rejected use of the ‘analytic’ approach
 - Classify according to what funds are intended to replace
- Applied ‘mechanistic approach’ to classify funds as marital property
 - Funds meet the definition of marital property and do not meet the definition of separate property
 - Funds might be both marital and separate property but wife failed to present evidence of her separate contribution

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Best v. Staton
(p.26)

- Plaintiff filed Complaint for ED and other claims
- Husband filed Answer requesting that he “be allowed to file for equitable distribution upon separation of the parties or a ruling on the Divorce from Bed and Board.”
- Parties separated
- Husband filed amended Answer and Counterclaim for ED
- Does trial court have jurisdiction to adjudicate ED?

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Dismissal for failure to prosecute
(p. 30)

Rule 41 Involuntary Dismissal requires 3 findings:

- First, that plaintiff acted in a manner which deliberately and unreasonably delayed the matter;
- Second, the amount of prejudice suffered by defendant as a result of plaintiff's delay, and
- Third, the reasons that a sanction other than dismissal will not suffice. (trial court must show it considered and rejected lesser sanctions and why it rejected lesser sanctions).

**Involuntary dismissal is WITH PREJUDICE unless dismissal order specifically states otherwise

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