Family Law Update
Cases Decided and Legislation Enacted Between June 16, 2021, and October 6, 2021

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Custody
Cases Decided Between June 16, 2021, and October 6, 2021

Modification; self-evident impact of change on welfare of child

- When custody order to be modified contains no findings of fact as to the circumstances at the time the order was entered, trial judge considering modification must make findings of fact to establish the "base line" circumstances at the time the original order was entered to be able to determine whether there has been a substantial change in circumstances.
- Evidence must establish that the change in circumstances identified by the trial court to support modification is a change that impacts the welfare of the child.
- An order modifying custody should make specific findings about the impact on the welfare of the child. However, direct evidence linking the change to the child and specific findings relating to the impact are not required when the effects of the change on the child are "self-evident."
- Changes relating to the ability of the parents to communicate and their inability to agree on matters relating to the child did not have a self-evident impact on the child. Trial court order vacated and remanded for more specific findings.

Henderson v. Wittig, N.C. Ap. , S.E.2d (July 6, 2021). Parties consented to the entry of a parenting agreement providing for shared physical custody on a two-week rotating schedule. Soon after entry of the order, the parties began having difficulty abiding by the order. They had extensive communication issues and numerous disagreements over issues relating to vacation time, school related matters and healthcare decisions pertaining to the child. Mother filed a motion to modify and the trial court modified the custody order.

On appeal, father first argued that the trial court erred by failing to make findings of fact as to the circumstances at the time the parenting agreement was entered to support the finding in the modification order that a substantial change in circumstances had occurred. The court of appeals held that when the original custody order does not contain findings as to the circumstances at the time of entry (and parenting agreements reached in mediation generally do not contain such findings), the trial court hearing the modification request must make findings to establish the "base line of events at the time the initial order was entered." The court held there is "no set minimum threshold for the number, content, or specificity to guide the trial court in making these findings." In this case, the court of appeals held that the trial court modification order was sufficient where it stated the child was three years old and in day care at the time of the original order, that the parties were both unmarried and father traveled frequently for work." As the change in circumstances identified by the court related to disagreements of the parties over issues relating to the child starting school and father's marriage, the findings were sufficient to support the conclusion that circumstances had changed.

Father also argued that the trial court order did not contain sufficient findings linking the change in circumstances to the welfare of the child and the court of appeals agreed. The court held that the changes in this case, the inability of the parents to communicate and agree on issues relating to the child, were not changes that have a 'self-evident impact' on the welfare of the child.

Blog post on the holding in this case and other case law discussing self-evident impact.

Modification of custody: establishing impact of change on welfare of child

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G.S. 50-13.7(a) provides that "… an order … for the custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." However, case law supplements this statute to provide that an order may be modified only upon a showing of a *substantial* change in circumstances since the entry of the original order, *Savani v. Savani*, 102 NC App 496 (2001), and the substantial change must affect the welfare of the minor child. *Pulliam v. Smith*, 348 NC 616 (1998); *Shipman v. Shipman*, 357 NC 471 (2003).

The party requesting modification has the burden of showing a substantial change in circumstances affecting the welfare of the child, *Blacklley v. Blackley*, 285 NC 358 (1974), and evidence must demonstrate a connection between the change or changes and the welfare of the child. *Shipman*, 357 NC 471 (2003).

A significant number of trial court modification orders have been vacated by the appellate courts because of a lack of findings of fact specifically linking the changes identified to the physical and/or emotional well-being of the child. *See e.g. Brewer v. Brewer*, 139 NC App 222 (2000)(findings about mother's improved lifestyle and ability to provide the children with a stable home life were insufficient where court failed to find how these changes would impact the children); *Browning v. Helff*, 136 NC App 420 (2000)(trial court failed to make sufficient findings to show impact on the child of custodial parent's cohabitation with person of the opposite sex); *Ford v. Wright*, 170 NC App 89 (2005)(trial court's finding that father frequently used alcohol was not sufficient to support modification when trial court made no findings as to impact of alcohol use on the child's welfare); *Frey v. Best*, 189 NC App 622 (2008)(change in father's work schedule and living arrangements and increase in the age of the children were insufficient to support an increase in father's visitation time when findings failed to address how those changes affected the welfare of the children).

***Shipman* and "self-evident" impact**

While acknowledging the need for trial courts to explicitly state the link between the change in circumstances and the welfare of the child and warning that explicit findings are the only way to "avoid confusion", the supreme court in *Shipman v. Shipman*, 357 NC 471 (2003), held that where the effects of the change or changes on the child are "self-evident" and supported by substantial evidence, a trial court order will be upheld even if the findings do not "present a level of desired specificity" regarding the impact of the changes on the child.

In *Shipman*, the original custody order awarded primary physical custody to mom and visitation to dad. Upon motion by dad, the trial court concluded there had been a substantial change of circumstances, and modified custody to grant dad primary physical custody. The court of appeals upheld the trial court but a dissent argued that that the trial court order contained insufficient findings about the effect of the changes on the child.

The supreme court affirmed the court of appeals, holding that findings in the order supported the conclusion that there had been a substantial change of circumstances affecting the minor child even though the trial court did not make explicit findings about the effect of these changes on the minor child. (two Justices dissented on this issue).

The supreme court held there was substantial evidence in the record to support the trial court's findings that mom's living arrangements had been unstable during the nineteen months between the entry of the original order and the motion to modify, mom and child had lived with mom's boyfriend in violation of original custody order which prohibited either parent from allowing overnight guests of the opposite sex while the child was present, and mom had engaged in "deceitful denial of visitation" to father despite the fact that the child had a close relationship with the father and looked forward to seeing him. In addition, mom had failed to allow the child to maintain contact with the paternal grandparents, and dad had entered a stable relationship with a woman who could help care for the child and dad and the woman had bought a home with sufficient room for the child to reside.

According to the court, given the nature and cumulative impact of these changes, the link between the series of developments and the child was sufficiently "self-evident" to support the conclusion of the trial court that the changes affected the welfare of the child.

The court pointed out that most discreet changes, as opposed to a series of developments, do not have a self-evident impact on a child. Examples given by the court of changes where effect on a child is not "self-evident" include 1) a move on the part of one parent, 2) a parent's cohabitation, 3) a change in a parent's sexual orientation, 4) remarriage of one parent, and 5) improvement in a parent's financial status. When the effect of changes is not self-evident, the court held that a party must produce evidence demonstrating the connection between the changes and the welfare of the child. The court stated that such evidence might consist of assessments of the minor child's mental well-being by a qualified mental health professional, school records, or testimony from the child or a parent.

Court of appeals interpretation of self-evident impact

Two recent opinions from the court of appeals offer an opportunity to compare changes that have a self-evident impact to those that do not.

In *Fecteau v. Spier*, 858 SE2d 123 (April 20, 2021), the court held that father's evidence and the trial court findings of fact concerning the "series of developments" in his life were sufficient to show a substantial change that had a self-evident effect on the welfare of the child and "thus, evidence directly linking the changes and the welfare of the child was not required." The changes in father's life included new and stable employment that provided health insurance, paid vacation leave and more flexibility for father to spend more time with the child, and his marriage and the child's close relationship with the stepmother and her child. *See also Lang v. Lang*, 197 NC App 746 (2009)(changes in child's medical needs and one parent's willingness to provide for child's needs was a change with a self-evident impact on child's welfare).

However, in *Henderson v. Wittig*, NC App (July 6, 2021), the court of appeals vacated and remanded the trial court order because the trial court failed to make findings directly linking the changes identified to the welfare of the child. The changes identified by the trial court all related to the parents and the relationship between the parents. Findings in the order identified extensive disagreements between the parents regarding the child's schooling and healthcare, an overall lack of communication, difficulties in exchanges of the minor child, disagreements over vacation time, and changes in the parents' living arrangements. According to the court, "the trial court findings focus on the parents' role in these changes" and do not show that this was a case "where the facts supporting a finding that a substantial change had occurred show there was an obvious effect on the minor child." The case was remanded to the trial court with the instruction that the trial court findings "must directly link the substantial change of circumstances and their effect on the minor child." *See also Davis v. Davis*, 229 NC App 494 (2013)(single incident of inappropriate discipline and conflicts between parents over visitation schedules did not have a self-evident impact on welfare of child).

Relocation considerations; considering of parent's military obligations

- Trial court did not err when it failed make explicit findings as to the advantages and disadvantages of a proposed relocation on the child or as to the impact of the move on the child's relationship with the non-relocating parent. Trial court findings clearly showed trial court properly considered the welfare of the child in making the decision regarding relocation.
- Trial court did not err in considering mother's possible future military deployment when determining the appropriate allocation of custody between mother and father. GS 50-13.2(f) prohibits the court from making a custody decision based *only* on a consideration of future deployment, but it does not prohibit the court from considering future deployment along with all other factors in making a best interest determination.

Munoz v. Munoz, N.C. App. , S.E.2d (August 3, 2021). The trial court entered an order granting primary physical custody to father and secondary custody to mother. The order allowed the father to relocate to California with the child while mother remained in North Carolina. Mother was in the military, stationed at Fort Bragg. Mother appealed and the court of appeals affirmed the trial court.

Mother first argued that the trial court erred by not making specific findings regarding the relocation of the child to California as required by *Ramirez-Barker v. Barker*, 107 NC App 71 (1002). In that opinion, the court of appeals held that the trial court should consider:

- 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.

Specifically, mother argued on appeal that the trial court erred when it failed to make specific findings about the advantages of the move for the child and about the impact of the move on the child's relationship with mother.

The court of appeals held that "the *Ramirez-Barker* factors are not a mandatory checklist for trial courts" considering relocation in a child custody case and a court is not required to make explicit findings regarding each factor. Rather, the trial court must consider the overall welfare and best interests of the child and place the child in the home environment that will be most conducive to the full development of the child's physical, mental and moral faculties. In this case, the trial court focused extensively on the family support available to both parents because the parents had used family support to care for the child since the birth of the child. The court found that father would have family to help care for the child in California while mother's family lived several hours from her. Further, the family support that father had in California included a grandparent who had been involved of the care of the child since birth. The court of appeals held that the findings of fact clearly showed that the trial court properly considered the best interests of the child in making the decision that the child should live with father in California.

Mother also argued that the trial court violated GS 50-13.2(f) by considering that she was subject to being deployed in the future. That statute provides that "a court may not consider a parent's … possible future deployment as the only basis in determining the best interest of the child." The court of appeals held that this statute does not prohibit the court from considering possible deployment along with all other factors relating to a child's best interest and held that the court in this case properly considered mother's military service along with all other factors in making the best interest determination.

Contempt; attorney fees

- Where terms of consent custody order were ambiguous and father's interpretation of the terms was as reasonable as mother's conflicting interpretation, trial court erred in holding father in contempt for violating the custody order. Father demonstrated at the contempt hearing that he had a genuine, reasonable belief that he was complying with the terms of the order.
- Trial court erred in awarding mother attorney fees when father was not in civil contempt.

Walter v. Walter, N.C. App. , S.E.2d (August 17, 2021). Mother filed a motion seeking both civil and criminal contempt based on her allegation that father violated the visitation terms of a custody consent order by exercising an extra week of summer vacation without her agreement. The trial court held father in civil contempt after concluding that he did violate the order when he took a third week of summer vacation with the children over mom's objection. The trial court also ordered father to pay attorney fees.

The court of appeals vacated the trial court order of contempt, holding that the provisions of the consent agreement regarding summer vacation were ambiguous. The court held that father's interpretation of the agreement that would authorize his third week of vacation was just as

reasonable of an interpretation of the order as was mother's interpretation that the third week was prohibited. Because the father acted under his genuine and reasonable belief that his conduct was authorized by the agreement, he could not be held in contempt. The court of appeals also vacated the attorney fee order because, other than in a situation where a party is not in contempt only because the party complied with the order after the contempt proceeding was initiated but before the contempt hearing, a party cannot be ordered to pay attorney fees if not found to be in contempt.

Denying visitation to parent

- Trial court findings supported the conclusion that visitation with mother was not in the best interest of the children and substantial evidence in the record supported the trial court's findings of fact. Therefore, trial court did not err in limiting mother to one phone call or FaceTime call with child per week.
- Mother's history of hiding the child, evading and violating court orders, failing to comply with terms of supervised visitation, along with her threats to harm the child's father, the child and herself supported the trial court's conclusion that visitation with mother was not in the child's best interest.

Isom v. Duncan, N.C. App. , S.E.2d (September 7, 2021). Mother and father of child never married. Father did not meet child until child was over 5 years old, due to mother hiding the child from the father and mother's intentionally evading court orders. Based on her history of hiding the child and violating the terms of previous custody orders, as well as her threats to harm the father, the child and herself, the trial court granted full physical and legal custody to father and limited mom to one phone call or FaceTime call per week. Mother appealed and the court of appeals affirmed.

A trial court may not refuse visitation to a parent unless the court concludes the parent is unfit or that it is not in the best interest of the child to visit with the parent. GS 50-13.5(j). Limiting a parent to supervised visitation or to electronic visitation only is equivalent to denying visitation and cannot be done absent findings to support the conclusion that the parent is unfit or that visitation is not in the best interest of the child.

Mother argued on appeal that there was not sufficient evidence to support the trial court's findings of fact and that the findings did not support the conclusion that visitation was not in the best interest of the child. The court of appeals agreed with mother regarding the sufficiency of the evidence to support a couple of the facts found by the trial court but held that the remaining findings were sufficient to support the conclusion. The court of appeals held that the findings that mother demonstrated a proclivity and ability to avoid court orders, arrest warrants, and hearings during a 5-year period when she was hiding the child from the father, that she contemplated killing father, had access to a gun and has had homicidal and suicidal thoughts regarding the child and herself were sufficient to support the denial of visitation to mother.

UCCJEA, jurisdiction after all parties leave the state; Rule 7 requirements for making a motion; ordering visitation when DVPO prohibits contact; authentication of screenshots

- Trial court had jurisdiction to enter a custody order even though all parties left the state after the custody action was filed and before entry of the final order.
- Jurisdiction is determined at the time of filing. NC was the home state at the time of filing and the court keeps subject matter jurisdiction until the final adjudication of the custody claim.
- Letter written by mother and handed to the trial court during a hearing was not a proper motion pursuant to Rule 7 of the Rules of Civil procedure because it was not filed with the clerk or served on father and did not state a legal basis for the court to grant the relief requested.
- Order that parties communicate regarding visitation and the welfare of the child through the online platform Our Family Wizard did not violate the terms of a DVPO entered in New Jersey which prohibited all contact between the parties but ordered that visitation between father and the child be as provided by the NC court.
- Trial court did not err when it denied mother's request to introduce into evidence screenshots of Skype calls allegedly made between father and mother's sister where mother failed to properly authenticate the screenshots.

Waly v. Alkamary, N.C. App. , S.E.2d (August 17, 2021). Trial court entered a final custody order awarding primary physical custody to father and visitation to mom. The trial court also ordered that the parties have contact through Our Family Wizard to facilitate visitation and to discuss the welfare of the minor child despite the existence of a DVPO entered in the state of New Jersey prohibiting all contact between mother and father. Mother appealed, arguing that the NC court lost jurisdiction to enter a custody order when all parties left the state shortly after the complaint for custody was filed. Mother also argued that the trial court should have stayed the proceeding based on the convenience of the parties after everyone left NC, and she argued that the provisions of the final custody order allowing contact between the parties through Our Family Wizard violated the trial court's obligation to give full faith and credit to the New Jersey DVPO. Mother also argued that the trial court erred in denying her request to introduce into evidence screenshots of Skype calls she alleged were made between her sister and the father.

The court of appeals rejected mother's argument that the NC court lost jurisdiction when the parties left the state. The appellate court held that the complaint was a request for an initial custody determination and NC was the home state of the child at the time the complaint was filed. Therefore, the court had initial determination jurisdiction pursuant to GS 50A-201. Because subject matter jurisdiction is determined at the time of filing and "once jurisdiction attaches to a child custody matter, it exists for all time until the cause is fully and completely determined," the fact that both parties left the state while the action was pending had no impact on the jurisdiction of the court.

The appellate court also rejected mother's argument that the trial court should have stayed the NC proceeding after all parties left the state after concluding Mother did not make a motion for a stay before the trial court. Mother contended that she made the motion requesting a stay pursuant to GS 50A-207 (inconvenient forum) when during a hearing she handed the court a letter she had written addressed to the court that requested that the court stay the NC proceeding to allow

custody to be determined by a court in New Jersey. Although the trial court stated in that hearing that it was denying her request, the trial court did not enter a written order denying the request. The court of appeals held that the letter did not constitute a motion pursuant to Rule 7 of the Rules of Civil Procedure because it was not file stamped by the clerk, was not served on father's counsel, and did not identify any legal basis for the trial court to stay the proceeding. The appellate court also held that the trial court did not rule on mother's request because it did not enter a written order declining to stay the proceedings.

The court of appeals also rejected mother's argument that the provision of the custody order requiring the parties to communicate through Our Family Wizard to facilitate visitation and to discuss the welfare of the child violated the terms of a DVPO entered by a court in New Jersey that prohibited all contact between the parties but also ordered that visitation between the father and the minor child be as ordered by the NC court. Our Family Wizard is an on-line application that provides tools to facilitate contact between parents, including a messaging board and calendar. According to the court of appeals, Our Family Wizard does not require parties to communicate directly with each other. Rather, it provides a secure platform to post messages and the messages cannot be deleted or edited after they are posted. The court concluded that ordering communication through this platform did not violate the New Jersey order.

Finally, the court of appeals held that the trial court properly denied mother's request to enter into evidence screenshots mother contended were of Skype calls made between her sister and the father. The court of appeals held that screenshots must be authenticated by evidence that they are what they are purported to be. Mother's statement that they were screenshots of conversations between two other people was insufficient to authenticate the screenshots.

Civil contempt; delayed incarceration to allow compliance with purge

- Trial court notified father at the beginning of contempt hearing that he was being tried for civil contempt and show cause order gave father sufficient notice of the specific allegations supporting the show cause order.
- Evidence supported the trial court conclusion that father willfully violated the terms of the custody order regarding telephone contact between the children and mother when the children were in his custody.
- "Implicit in every custody order is the understanding that its terms will be honored in good faith and that the parties bound by it will act under the dictates of common sense and reasonableness."
- Purge condition imposed on father was appropriate and trial court had authority to delay his incarceration for civil contempt by 10 days to give him the opportunity to comply with the purge conditions before reporting to jail.
- Purge condition ordering father to set up children's iPad to facilitate FaceTime communication between mother and children was not an unlawful modification of the custody order which did not specify how telephone communication was to take place.

Blanchard v. Blanchard, N.C. App. , S.E.2d (September 21, 2021). Custody order provided that both parents were to have unrestricted but reasonable telephone contact with the minor children when the children were in the custody of the other parent and provided that each parent

would make the children available for phone or FaceTime contact between the non-custodial parent and the children each evening when the child was in their custody. Mother filed a motion for contempt asking that father be held in civil and/or criminal contempt for failure to comply with the telephone visitation provisions of the order. The trial court found father to be in civil contempt and father appealed.

Father first argued that the trial court violated his due process rights by denying his request to be notified before the hearing whether he would be tried for civil or criminal contempt. The court of appeals did not address the issue of whether a party moving for contempt must elect civil or criminal contempt before the beginning of a hearing because the appellate court held that the record showed the trial court did inform father at the beginning of the hearing that only mother's request for civil contempt would he tried. The court of appeals held that the order to show cause gave father sufficient notice of the basis for the civil contempt request and mother clearly elected to pursue civil at the beginning of the hearing.

The court of appeals also rejected father's argument that he had complied with the terms of the custody order by the time of the civil contempt hearing. Father testified that he made the children available to FaceTime their mother for a 30-minute time period every evening, but the trial court found that he did not communicate this fact to mother and he blocked her ability to contact him about visitation by calling his cell phone. The trial court found that father knew mother had been unable to contact the children by FaceTime or telephone but repeatedly ignored her requests for assistance in talking with them. While there was nothing in the custody order setting out the precise means by which each parent was to comply with the telephone visitation provisions of the order, the court of appeals held that there is "an implicit" requirement in all custody orders that the parties act in good faith and act "under the dictates of common sense and reasonableness."

After finding father in civil contempt, the trial court ordered that he purge contempt by unblocking his cell phone to allow mother to communicate with him about her telephone contact with the children and ordered father to ensure that the children's iPad was functioning properly, fully charged, connected to Wi-Fi, and set up to allow mother and children to FaceTime. The trial court ordered that father be incarcerated until he complied with the purge conditions but delayed his incarceration for approximately 10 days to give him the opportunity to avoid incarceration by compliance before the date he was ordered to report to jail. The trial court also ordered a review hearing to be held before his incarceration if he did not comply before that date.

Father argued this was an inappropriate purge for civil contempt, but the court of appeals disagreed. The appellate court held that father could purge before incarceration, or he could purge after incarceration by authorizing someone else to perform the purge conditions on his behalf.

Finally, the court of appeals rejected father's argument that the trial court unlawfully modified the custody order when it ordered him to allow mother to contact him by cell phone regarding the telephone visitation and by ordering that he set up the iPad to allow FaceTime visitation. The court of appeals held that although the custody order did not specify how the telephone contact

was to be facilitated, the order clearly provided for telephone visitation. The appellate court held that the trial court did not modify the order but only enforced the order by specifying the manner by which father was to comply with its terms.

Attorney fees/Custody action; Hearing after notice of appeal

- Trial Court heard request for attorney's fees from mother after contempt order in custody case was appealed and entered order for payment.
- NCGS 1-294 states: "When an appeal is perfected…..it stays all further proceedings in the court below upon the judgment appealed from …….but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from."
- Attorney fees in custody actions are not dependent on being the prevailing party and therefore not dependent upon the outcome of the appeal of the order.
- Court may 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" NCGS 50 – 13.6
- When 2 COA opinions conflict, the earlier opinion controls.

Blanchard v Blanchard, N.C. App., S.E.2d (September 21, 2021). Mother's contempt complaint in the above case included a request for attorney's fees. The contempt order reserved the issue of attorney fees to be heard later. Father appealed the contempt order. Court scheduled the attorney fees request for hearing and Father objected on the basis that the court was divested of jurisdiction by the appeal. Court proceeded to hearing and entered an order of attorney fees. Father appealed.

NCGS 1- 294 provides that "When an appeal is perfected …..it stays all further proceedings in the court below upon the judgment appealed from…..but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from."

The attorneys argued several different cases that appeared to have conflicting rulings. COA reminded that when 2 or more COA cases have conflicting opinions, the earliest opinion controls.

When the award of attorney's fees will not be affected by the ultimate decision in the appeal of the underlying action, regardless of which party prevails or how the issues are decided, the exception in NCGS 1 – 294 applies and jurisdiction to decide the issue of attorney's fees remains with the trial court even if the underlying action is appealed.

COA looked to provisions of NCGS 50 – 13.6, the attorney's fee provision in custody cases. That statute provides that attorney's fees are available to "an interested party acting in good faith who has insufficient means to defray the expenses of the suit". Based on the wording of the statute, the COA found that a party in a custody action does not have to be the prevailing party to be eligible for an award of attorney's fees and affirmed the hearing while order for contempt on appeal and the order of attorney's fees in this custody contempt case.

(But see Walter v Walter on page 6 - finding that attorney's fees are not available if respondent found not to be in contempt)

Child Support

Cases Decided Between June 16, 2021, and October 6, 2021

Previous Adjudication of Paternity; Request for Paternity Testing

- To set aside an order of paternity, moving party must allege under NCGS 49 - 14(h) that paternity order was entered as a result of fraud, duress, mutual mistake, or excusable neglect before the Court can order genetic testing.
- Motion challenging finding of paternity and requesting paternity testing under NCGS 49-14(h) not available for child born during wedlock.

Guilford County by and through its Child Support Enforcement Unit, ex.rel., Haleigh Mabe v Justin Mabe N.C. App. , S.E.2d (October 5, 2021). Agency filed an action on behalf of mother for child support in 2014. Defendant did not appear and a default judgment was entered establishing child support and including a finding of fact and conclusion of law that defendant was the father of the minor child. The order did not indicate that the parties were married at the time of the birth of the child but did indicate that the birth certificate blank for father indicated "husband information refused".

In February 2016, the agency filed a motion for order to show cause for defendant's failure to pay child support and an order to appear and show cause was entered. Additional show cause motions were filed thereafter. On September 23, 2019, Defendant filed a pro se motion to modify child support using AOC form 200 and identified the changed circumstances as "Recall Order for Arrest & Paternity". An order for arrest had been issued for the Defendant on December 12, 2017. At the hearing, the defendant argued his name was not on the birth certificate and he did not 'know nothing about the kid and she won't let me speak to him or nothing' as the basis for his challenge of paternity. On October 22,2019, the trial court recalled the order for arrest and on October 23, 2019, the trial court continued the hearing on the motion to modify/order to show cause and ordered that a paternity test be scheduled.

Agency appealed alleging that paternity had been previously established and was res judicata.

COA reviewed the provisions of NCGS 49-14(h) which allows an order of paternity to be set aside if the order was entered as a result of fraud, duress, mutual mistake, or excusable neglect and genetic tests establish the putative father is not the biological father of the child. The court shall order genetic testing upon proper motion alleging fraud, duress, mutual mistake, or excusable neglect. In this case, COA found that the defendant's statement did not raise any of the provisions in 49-14(h), therefore there was no proper motion under the statute and the Court could not enter an order for paternity testing.

COA further found that 49-14(h) only applies to children born out of wedlock and the record did not indicate if the child was born during the marriage of the parents.

Domestic Violence

Cases Decided Between June 16, 2021, and October 6, 2021

Personal jurisdiction; minimum contacts; cell phone calls

- Multiple phone calls made by defendant to plaintiff's cell phone were insufficient to establish the minimum contacts required by Due Process to allow a NC court to exercise personal jurisdiction over defendant.
- Where defendant had no knowledge of where plaintiff was located when he made the calls to her cell phone, defendant did not purposefully avail himself of the benefits and protections of North Carolina's laws.
- The status exception to the minimum contacts requirement should not be extended to Chapter 50B proceedings for protection from domestic violence.

Mucha v. Wagner, N.C. , 861 S.E.2d 501 (August 13, 2021), *reversing* 271 NC App 636, 845 SE2d 443 (2020). Defendant Wagner and Plaintiff Mucha were in a dating relationship. Mucha ended the relationship and asked Wagner not to contact her again. At the time, Mucha was a college student in South Carolina and Wagner lived in Connecticut. Mucha later moved to North Carolina and, the day she moved, Wagner called her 28 times on her cell phone.

In one of the early calls, Mucha answered and told Wagner not to call her again. In a later call, Wagner left a voice message. When Mucha listened to the message, she suffered a panic attack. The next day, she filed a complaint for a domestic violence protective order in North Carolina. Wagner appeared solely to contest personal jurisdiction. The trial court denied his motion to dismiss and entered a protective order. Wagner appealed.

The court of appeals concluded that the trial court properly determined that it could exercise personal jurisdiction over Wagner, stating:

"Although Wagner did not know at the time of the calls that Mucha moved from South Carolina to North Carolina that day, he knew that her semester of college had ended and she may no longer be residing there. Thus, his conduct—purposefully directed at Mucha—was sufficient for him to reasonably anticipate being haled into court wherever Mucha resided when she received the calls. Applying the due process factors established by the Supreme Court—the nature and context of Wagner's contacts within our State; our State's interest in protecting its residents from this sort of harmful interpersonal interaction; and the convenience to the parties, including Mucha's need to call witnesses of the events who were with her in North Carolina at the time—we hold that a North Carolina court properly could exercise personal jurisdiction over Wagner in this action."

The supreme court reversed the court of appeals, holding that the calls made by defendant to plaintiff's cell phone were insufficient to establish the minimum contacts required to satisfy due process. Because defendant had no knowledge of plaintiff's location at the time he made the calls, the court concluded he did not purposefully avail himself of the benefits and protections of North Carolina's laws.

The supreme court also rejected plaintiff's argument that the status exception to the minimum contacts requirement should be applied to Chapter 50B actions for domestic violence protection. The status exception applies in TPR proceedings, child custody proceedings and divorce proceedings. Because those proceedings "declare the status" or dissolve the status of a relationship rather than create a new status with new legal consequences, minimum contacts are not required for the exercise of personal jurisdiction. The supreme court held that proceedings for domestic violence protection do not dissolve a status but create a new legal status with significant legal consequences that impact substantial rights of the defendant. The court stated that "[T]he power and reach of a DVPO also heighten the fairness concerns which arise when a trial court chooses to act outside of the typical boundaries imposed by the Due Process Clause. For these reasons, we conclude that the status exception should not be extended to this case."

Orders denying DVPO

- Rule 52(a)(1) of the Rules of Civil Procedure requires that a trial court make findings of fact and conclusions of law to support the denial of a request for a Chapter 50B DVPO.

D.C. and J.M. v. D.C., N.C. App. , S.E.2d (September 21, 2021). Plaintiffs are minors who filed a complaint seeking a DVPO against defendant who is their father's wife. The trial court denied the request for the DVPO, concluding that plaintiffs failed to prove grounds for the issuance of a DVPO. The order contained no other findings of fact or conclusions of law. Plaintiffs appealed and the court of appeals vacated the order, holding that Rule 52(a)(1) of the Rules of Civil Procedure requires that the court make findings of fact and conclusions of law to support the denial of a request for a DVPO.

Equitable Distribution
Cases Decided Between June 16, 2021, and October 6, 2021

Statute of limitation on enforcement of ED judgment

- 10-year statute of limitation on actions to enforce a judgment found in GS 1-47(1) applied to bar defendant's request that the trial court hold plaintiff in contempt for his failure to transfer an ownership interest in a retirement account to plaintiff or to use Rule 70 to allow another person to execute documents to effectuate the transfer where ED judgment was entered more than 10 years prior to the filing of defendant motions.

Welch v. Welch, *unpublished opinion*, N.C. App. , S.E.2d (July 6, 2021). ED judgment entered in 2008 ordered that plaintiff transfer one-half of his ownership interest in an IRA to defendant. Plaintiff failed to make the transfer. In 2019, defendant filed a motion for contempt or, in the alternative, for a Rule 70 order directing another person to execute the documents to effectuate the transfer. The trial court dismissed defendant's motions after ruling that the 10-year statute of limitations in GS 1-47(1) barred all actions to enforce a judgment more than 10 years after its entry. Defendant appealed but the court of appeals agreed with the trial court. The court of appeals, however, specifically declined to address the authority of the trial court to enter a domestic relations order to effectuate the transfer.

Initiation of ED action by motion in the cause

- Trial court did not err in dismissing wife's ED claim in first case where wife filed the ED claim by motion in the cause after she had filed a voluntary dismissal of all of her pending claims. The action terminated when all claims were dismissed and wife needed to file a new complaint to initiate a new action.
- Trial court erred in dismissing wife's ED claim filed in second action where wife filed the claim by motion in the cause in the divorce action immediately before the court entered judgment on husband's claim for divorce.

Bradford v. Bradford, N.C. App. , S.E.2d (September 7, 2021). The court of appeals consolidated appeals from two separate court files.

First case: Husband filed for custody. Wife filed counterclaim for divorce from bed and board, custody child support, PPS and alimony, and equitable distribution. Trial court entered permanent custody order. Wife took a voluntary dismissal of all her counterclaims. Subsequently, she filed a motion in the cause for equitable distribution. The trial court dismissed her motion for ED after concluding there was no subject matter jurisdiction. The court of appeals agreed, holding that the voluntary dismissal terminated the action because no claims were left pending. To initiate a new claim for ED, wife needed to file a new action with a new complaint.

Second case: Husband filed a complaint for absolute divorce. Wife did not file an answer or counterclaim. On the day of the divorce trial, wife filed a motion in the cause for equitable distribution. The trial court dismissed wife's motion, concluding wife was required to assert the claim for ED by filing a counterclaim. The court of appeals disagreed and reversed the trial

court. According to the court of appeals, GS 50-11 requires that a claim for ED be "asserted" before entry of absolute divorce and GS 50-21(a) provides that ED can be filed as a separate civil claim or "together with any other action brought pursuant to Chapter 50." Because wife asserted her claim by motion in an action brought pursuant to Chapter 50 before entry of the final divorce judgment, the trial court had subject matter jurisdiction to consider her claim

Postseparation Support and Alimony
Cases Decided Between June 16, 2021, and October 6, 2021

Findings to show accustomed standard of living and reasonable monthly expenses

- Findings of fact in alimony order were sufficient to show the trial court properly considered the accustomed standard of living during the marriage in determining wife's reasonable expenses at the time of the alimony hearing and in determining the appropriate amount support.
- The trial court is not required to accept "at face value the assertion of [reasonable] living expenses offered by the litigants themselves." The court can rely on "common sense and every-day experiences in calculating reasonable needs and expenses. "
- A trial court is not required to explain or make findings of fact to support what it finds to be a reasonable need or expense.
- When evidence shows the parties established a pattern of saving during the marriage, findings of fact must show the trial court considered this pattern of savings in determining reasonable needs and expensed as well as the amount of alimony ordered.
- When the trial court properly considered and makes findings as to all factors set out in GS 50-16A about which evidence was offered, it did not abuse its discretion in setting amount of support.

Putnam v. Putnam, N.C. Ap. , S.E.2d (August 3, 2021). Trial court concluded wife was a dependent spouse and that husband was a supporting spouse and ordered husband to pay alimony. Wife appealed, arguing the trial court erred when it reduced her reasonable expenses without explaining the amount the court determined to be reasonable and by failing to make appropriate findings to show it had considered the accustomed standard of living when determining her reasonable expenses and when setting the amount of support. She also argued the trial court abused its discretion in setting the amount of support to be paid.

The court of appeals affirmed the alimony order of the trial court. The court rejected wife's argument that the trial court was required to explain why it reduced what she claimed to be her reasonable monthly expenses and to explain how it arrived at the amount it found to be reasonable expenses. Rather, the court of appeals held that a trial court is not required to accept a litigant's allegations regarding reasonable expenses and the court can use "common-sense and day-to-day experience" to calculate reasonable needs and expenses. The trial court is not required to make findings to explain the reductions it makes.

The court of appeals also held that the trial court findings of fact were sufficient to show the accustomed standard of living of the parties. The court made findings that the "parties were able to live an extravagant lifestyle during their marriage" and made findings that wife was able to stay with the children, about the types of cars the parties owned, the vacations they took, and the size of the houses they lived in, as well as findings about their pattern of saving for retirement. The court also made findings about the standard of living wife was able to maintain after separation and findings to show the trial court considered her ability to continue to save for retirement.

Finally, the court of appeals rejected wife's argument that the trial court abused its discretion in setting the amount of support. The court of appeals held that the alimony order contained findings of fact relating to all factors listed in GS 50A-16A about which the parties offered evidence. As long as a judge considers all of these statutory factors and makes findings of fact regarding them, the amount of alimony is within the discretion of the trial court.

Chapter 50C Civil No-Contact Orders
Cases Decided Between June 16, 2021, and October 6, 2021

Amending order *sua sponte*, ordering mental health evaluation

- Trial court did not err by amending the civil no-contact order *sua sponte* by checking box on the form order requiring defendant to cease stalking plaintiff. The failure to check the box at the entry of the original order was a clerical mistake so judge was authorized by Rule 60(a) to amend the order.
- Trial court did not err when it ordered defendant to obtain a mental health evaluation. GS 50C-5(b)(7) gives the court authority to order additional relief that the court deems necessary under the particular facts of the case as long as the order directs a defendant to act or to refrain from acting in relationship to the plaintiff. Because the order to obtain an evaluation was narrowly tailored and directly related to the facts in the case that raised concerns as to the mental health of defendant, and did not abridge defendant's fundamental constitutional rights, the trial court di not exceed the authority granted in Chapter 50C.

Angarita v. Edwards, N.C. Ap. , S.E.2d (August 3, 2021). The trial court entered a civil no-contact order after concluding defendant committed unlawful conduct by continuously harassing plaintiff and plaintiff's household members. Defendant and plaintiff are next-door neighbors and defendant became convinced that plaintiff was breaking into her home, putting damaging substance into her furnace lines, tampering with the food in her refrigerator, and putting white powder all over her house. Defendant accused plaintiff of being a "stinky criminal", yelled threatening and racist remarks to plaintiff and plaintiff's family members from her yard, posted notes on plaintiff's door and sent threatening and offensive texts to plaintiff. The trial court ordered defendant to not "visit, assault, molest, or otherwise interfere with" plaintiff, cease harassment of plaintiff, not injure or abuse plaintiff and not contact plaintiff by telephone or written communication. In addition, the court ordered Defendant to obtain a mental health evaluation and scheduled a review hearing. Following entry of the order, the trial court amended the order by checking the box ordering defendant to cease stalking plaintiff.

On appeal, defendant argued that the trial court erred in amending the order *sua sponte* without giving the parties notice and an opportunity to be heard. The court of appeals disagreed, holding that Rule 60(a) allows the court to correct clerical errors on its own motion. The court of appeals held that because the trial court findings in the original no-contact order and the testimony at trial reasonably supported a finding that defendant had stalked plaintiff, it was clear the trial court's failure to check the box prohibiting further stalking by defendant had been a clerical mistake on the part of the court.

Defendant also argued that the trial court had no authority under Chapter 50C to order her to obtain a mental health evaluation. The court appeals disagreed, holding that GS 50C-5(b)(7) gives the court the authority to order relief not specifically enumerated in the statute as the court deems necessary and appropriate under the specific facts of the case. Pointing to the holding in *Russel v. Wofford*, 260 NC App 88 (2018)(trial court has no authority to order surrender of firearms in a civil no-contact order), the court of appeals held that the trial court's authority is not unlimited; relief is limit to orders that direct a defendant to act or to refrain from acting in

relationship to the plaintiff and orders must not abridge a defendant's fundamental constitutional rights. In this case, the court of appeals held that the order was directly related to concerns regarding defendant's mental health raised by the facts of the case and her relationship with plaintiff, the court's order was narrowly tailored to address that concern, and the order did not interfere with defendant's constitutional rights.

Marriage of Minors
Legislation Between June 16, 2021, and October 6, 2021

S.L. 2021-119 (S 35). AN ACT TO AMEND THE LAWFUL AGE OF MARRIAGE TO SIXTEEN YEARS OF AGE OR OLDER AND TO PROVIDE A MAXIMUM FOUR-YEAR AGE DIFFERENCE FOR A SIXTEEN OR SEVENTEEN YEAR-OLD TO MARRY.

Effective August 18, 2021, and applicable to marriage licenses pending or issued on or after that date, this session law amends GS 51-2 to prohibit the marriage of any person under the age of 16. Other amendments to GS 51-2 prohibit persons who are 16 and 17 years old from marrying a person more than four years older and to prohibit persons who are 16 and 17 years old from marrying without a court order entered by a district court judge or consent from a custodian. Conforming amendments are made to GS 51.2.1 to provide that a district court judge can enter an order allowing the marriage of a 16- or 17-year-old to a person no more than four years older if the judge determines that the 16- or 17-year-old is capable of assuming the responsibilities of marriage and the marriage will serve the best interest of the underage party after considering all factors listed in the statute. There is a rebuttable presumption that the marriage will not serve the best interest of the minor when all living parents of the minor oppose the marriage.