Family Law Update
Cases Decided Between
October 5, 2021 and June 7, 2022

Cheryl Howell
School of Government
UNC Chapel Hill
howell@sog.unc.edu

Find the full text of these court opinions at www.nccourts.org

Custody
Cases Decided Between October 5, 2021 and June 7, 2022

Contempt

- Trial court erred in holding defendant in civil contempt for violating custody order where show cause order informed defendant that he was to appear and show cause as to why he should not be held in criminal contempt.
- Trial court may not *sua sponte* find a party in civil contempt when that party has not received at least five days' notice that civil contempt is being considered.
- Civil contempt is not a lesser form of criminal contempt.

Hirschler v. Hirschler, 868 S.E.2d 619 (N.C. App. Dec. 21, 2020). The trial court issued an order for defendant to appear and show cause as to why he should not be held in criminal contempt for the failure to abide by the terms of a custody order. Following a hearing, the trial court found the defendant to be in civil contempt and ordered that he be immediately incarcerated until he returned the child to the mother. Father appealed, arguing that the trial court had no authority to *sua sponte* find defendant to be in civil contempt without prior notice to him that civil contempt was being considered by the court.

The court of appeals agreed with defendant but dismissed the case as moot as the child reached the age of 18 while the case was pending before the court of appeals. Nevertheless, the court of appeals addressed the substance of defendant's argument. Citing GS 5A-23(a)-(a1), the court held that a respondent must be given at least 5-days' notice that civil contempt is being considered by the court. As the show cause order in this case mentioned only criminal contempt, and at the beginning of the hearing, both parties informed the court that criminal contempt was the only issue, the trial court erred in holding defendant in civil contempt.

The court of appeals also rejected the argument that the trial court had the authority to use civil contempt because civil contempt is a lesser form of criminal contempt. The court of appeals explained that civil and criminal contempt are separate, distinct procedures with different purposes.

Jurisdiction; denial of visitation to parent

- North Carolina had subject matter jurisdiction to modify a New York custody order where North Carolina was the home state of the child at the time the motion to modify was filed in North Carolina and the New York court entered an order finding North Carolina to be the more convenient forum to determine custody.
- Fact that father lived in North Carolina for only one year after informing the New York court that he planned to live in North Carolina at least until the children completed high school did not amount to "unjustifiable conduct" requiring the North Carolina court to decline to exercise jurisdiction.
- A trial court is not required to decline to exercise jurisdiction for unjustifiable conduct if the parties have acquiesced to the jurisdiction of the court.
- Both parents had acquiesced to the jurisdiction of the North Carolina court; the mother by filing a petition to register the New York order in North Carolina and father by asking the North Carolina court to modify the New York order.

- The constitutional rights of a parent relating to custody of their child are not relevant in a custody proceeding between two parents.
- Substantial evidence supported the trial court's conclusion that visitation with mother was not in the best interest of the children. Evidence of physical or sexual abuse or severe neglect is not required.

Malone-Pass v. Schultz, 868 S.E.2d 327 (N.C. App. Dec. 7, 2021). Both parents filed motions to modify a New York custody order that had been registered in North Carolina by mother. The New York order granted joint custody to the parents with the children living primarily with father. The New York order stated that the New York court was "relinquishing jurisdiction" because the parties were moving to North Carolina and ordered that the parties register the order in North Carolina so North Carolina could assume jurisdiction. The North Carolina trial court ultimately entered an order modifying the New York order by granting father sole physical and legal custody of the children and denying mother visitation after concluding that visitation with mother was not in the best interests of the children.

Mother appealed, arguing first that the trial court had no subject matter jurisdiction to modify the New York order pursuant to GS 50A-208(a) because "any subject matter jurisdiction the court might have obtained was the result of fraud" by father. GS 50A-208 provides:

"… if a court of this State has jurisdiction under this Article because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

(1) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;
(2) A court of the state otherwise having jurisdiction under G.S. 50A-201 through G.S. 50A-203 determines that this State is a more appropriate forum under G.S. 50A-207; or
(3) No court of any other state would have jurisdiction under the criteria specified in G.S. 50A-201 through G.S. 50A-203."

Specifically, mother alleged that father falsely represented to her and to the court in New York that he planned to live with the children in North Carolina at least until the children graduated from high school. However, father moved from North Carolina with the children to South Carolina after living in North Carolina for only a year and three months. He moved to South Carolina with the children while the North Carolina modification action was pending.

The court of appeals held that North Carolina had subject matter jurisdiction to modify the New York order because, as required by GS 50A-203, North Carolina was the home state of the child at the time the motion to modify was filed and the New York court had relinquished jurisdiction to North Carolina. The court of appeals acknowledged that GS 50A-208(a) requires a court to decline to exercise jurisdiction if the court has jurisdiction because a parent has "engaged in unjustifiable conduct," but held that the trial court correctly determined that father's statement that he planned to live in North Carolina indefinitely did not constitute fraud or any other type of unjustifiable conduct. The court stated that jurisdiction is based on where a parent lives at the time the action is commenced and not on where a parent intends to reside in the future.

The court of appeals also held that this action fell within the exceptions to the requirement in GS 50A-208 that a court decline jurisdiction when there is unjustifiable conduct. The court held that GS 50A-208(a)(1) applied because both parents had acquiesced to North Carolina jurisdiction; mother by filing the petition to register the New York order in North Carolina and father by filing the motion asking the North Carolina court to modify the New York order. In addition, GS 50A-208(a)(2) applied because New York determined that North Carolina is the more convenient forum.

Mother also argued that the trial court erred in concluding that she had acted inconsistently with her constitutionally protected status as a parent. The court of appeals did not address this argument. Citing *Routten v. Routten*, 374 NC 571 (2020), the court of appeals held that the constitutionally protected status of parents is "irrelevant in a custody proceeding between two parents."

The court did address mother's argument that the trial court erred in concluding that "it is not in the best interest of the children to force visitation [with mother] upon them." Pursuant to GS 50-13.5(i), the trial court can deny reasonable visitation to a parent only if the court concludes that the parent is unfit or that it is not in the best interest of the children to visit with the parent. The court of appeals affirmed the trial court decision, holding that there was substantial evidence to support the trial court's conclusion that visitation was not in the best interest of the children. The court of appeals rejected mother's argument that the trial court could not deny visitation absent evidence of physical or sexual abuse or severe neglect, holding that such evidence is not required pursuant to GS 50-13.5(i). The appellate court held that the trial court's denial of visitation was supported by findings regarding the strong preference of the 14- and 16-year-old children not to visit with mother because of the stress caused to them when visiting with her, the fact that she had taken them against their will and without permission from their father's home and kept them against the terms of the existing custody order, findings regarding her interference with the therapy sessions of the children, and findings that she questioned the children extensively regarding their conversations in chambers with the trial judge after being told not to do so. Substantial evidence supported the trial court's conclusions that mother's actions resulted in emotional harm to the children.

Grandparent standing for custody; motion to dismiss; conduct inconsistent with constitutionally protected status of parent

- To survive a motion to dismiss for lack of standing, grandparents must allege that they are the grandparents of the minor child and facts sufficient to demonstrate that the parent is unfit or has engaged in conduct inconsistent with their parental status.
- At the motion to dismiss stage of a proceeding, standing is determined by a review of the pleadings alone. Evidence is not required or appropriate.
- Trial court findings of fact established that mother acted inconsistent with her constitutionally protected status by failing to protect her child from harm caused to the child by the stepfather and by relinquishing to grandparents a share of her exclusive parental authority.

- Trial court had authority to prohibit mother from exercising her visitation rights in the presence of the stepfather.

Thomas v. Oxendine, 867 S.E.2d 728 (N.C. App. Dec. 7, 2021). The paternal grandparents filed a complaint seeking custody of their granddaughter, alleging mother had acted inconsistent with her constitutionally protected status as a parent by failing to protect the child from her stepfather. Mother filed a motion to dismiss, arguing the grandparents did not have standing to seek custody. The trial court denied mother's motion and, following trial, granted custody of child to paternal grandparents. The custody order granted Mother visitation but ordered that visitation would "immediately cease if [the stepfather] is/has been in the home during the visitation period." Mother appealed both the denial of her motion to dismiss the grandparents' complaint and the final custody order.

Regarding the motion to dismiss, mother argued that the trial court erred in concluding the grandparents had standing to seek custody. The court of appeals disagreed, holding that to establish standing, grandparents must allege that they are the grandparents of the child and allege facts sufficient to establish, if proven, that the parent has acted inconsistent with her constitutionally protected status. The court of appeals reviewed the allegations in the grandparents' complaint and held that they had sufficiently alleged that mother lost her constitutional protections by "repeatedly and willfully failing to protect [the child] from danger and harm caused by [the stepfather]." The appellate court also rejected mother's argument that the grandparents were required to prove the allegations in their complaint by clear and convincing evidence to establish standing. The court of appeals held that the mother confused the requirements at the motion to dismiss stage of the proceedings and the grandparents' burden of producing evidence during the trial of the custody matter. At the motion to dismiss stage, the trial court determines standing based on the pleadings alone.

Regarding mother's appeal of the final custody order, the court of appeals held that the findings of fact established clearly that mother failed to protect the child from the stepfather's abusive behavior and inappropriate discipline for many years. The court held that "this failure alone is conduct inconsistent with mother's protected status as a parent." In addition, the court held that the findings of fact established that mother had "relinquished otherwise exclusive parental authority to the grandparents" when she allowed the grandparents to care for and provide for the child for significant amounts of time to keep her away from the stepfather. The trial court found that mother had shared decision-making, care-taking, and financial responsibility for the child with the grandparents for a significant period of the child's life and allowed the grandparents to provide for the child's mental health treatments and care.

The court of appeals also held that the trial court findings were sufficient to support the determination that primary physical custody with the grandparents was in the best interest of the child. The findings established the abusive behavior of the stepfather, the mother's inability and failure to protect the child, and mother's unwillingness to separate from her husband. The findings also clearly established the impact of the abuse on the child and the child's strong, positive relationship with the grandparents. The court of appeals held that the trial court had the authority to condition mother's visitation on the stepfather's absence from her home during the

visitation period. The court stated that the trial court has broad authority to prohibit the presence of a third-party during visitation "if evidence demonstrates that exposure to the prohibited person would adversely affect the child."

Amendment of order appointing parenting coordinator

- GS 50-99 allows a court to modify an order appointing a parenting coordinator for good cause. The trial court can amend the order *sua sponte*.
- Good cause supported the trial court amendment of the original order appointing a PC where the lack of guidance in the original order significantly impaired the ability of the parties to participate in the parenting coordinator process.

Medina v. Medina, 870 S.E.2d 253, (N.C. App. Feb. 15, 2022). The trial court entered an order appointing a parenting coordinator (PC) that stated only that the PC was appointed and that the order was enforceable by contempt. The order did not state the issues to be addressed by the parenting coordinator or set out the authority of the PC, both of which are required by GS 50-92(a). After the parties continued to engage in contentious litigation, the trial court entered an amended order appointing a PC. The amended order made findings of fact to support the appointment of the PC and set forth in detail the issues for the PC to address and the authority of the PC. Father appealed, arguing that the trial court erred in amending the original PC order.

The court of appeals affirmed the trial court, concluding that GS 50-99 allows a trial court to *sua sponte* amend an order appointing a PC for good cause. In this case, the court of appeals held that the findings of fact in the amended order showed that the lack of guidance in the original order regarding the issues to be addressed by the trial court and the authority of the PC significantly impaired the ability of the parties to participate in the parenting coordinator process and to make reasonable progress on the issues the parties could not resolve themselves. These findings were sufficient to show the good cause necessary to support the amendment of the original order.

Modification, motion, changed circumstances

- Trial court had jurisdiction to modify custody even though several temporary orders were entered between the time father filed his motion to modify and the time of the hearing on the request for modification.
- A motion to modify is not required to give the trial court subject matter jurisdiction to modify custody if the conduct of the parties makes "the court aware of important new facts unknown to the court at the time of the prior custody decree."
- Trial court's findings regarding mother's mental health crisis and subsequent treatment that enabled her to resume caring for the minor child were sufficient to establish a substantial change in circumstances that affected the welfare of the minor child.
- Trial court was not required to make specific findings regarding child abuse where evidence showed isolated incidents of mother spanking or yelling at the child but there was no evidence that either the spanking or the yelling caused the child serious bodily injury, created a substantial risk of serious physical injury to the child, or caused serious emotional damage to the child.

Turner v. Oakley (Legge), _ S.E.2d _, (N.C. App. April 19, 2022). An initial custody order entered in 2013 awarded defendant mother primary physical custody of the child and secondary physical custody to plaintiff father. In 2018, father filed a motion requesting emergency

temporary custody and requesting modification of the 2013 custody order. Thereafter, the trial court entered a series of temporary orders. In 2020, the trial court entered a permanent custody order after concluding there had been a substantial change in circumstances affecting the welfare of the minor child. The trial court awarded the parties joint legal custody, mother primary physical custody and father significant visitation. Father appealed.

Father first argued that the trial court had no jurisdiction to modify custody because there was no motion to modify pending at the time the trial court entered the modified permanent custody order. The court of appeals disagreed with husband, holding that his motion to modify filed in 2018 remained pending. The orders entered in the case between the time he filed his motion and the time of the trial on that motion were all temporary, interlocutory orders that did not resolve his motion to modify. The court of appeals also stated that, even if his motion had not been pending, the lack of a motion does not affect the subject matter jurisdiction of the trial court to modify custody. The court stated that a motion to modify is not required "where the conduct of the parties …. make[s] the court aware of important new facts unknown to the court at the time of the prior custody decree." In this case, the court of appeals held that the parties had made the trial court aware of many important new facts regarding the child and the parties during the many hearings held between the time father filed his motion to modify and the time of the modification trial.

Father next argued that the trial court gave "far too much weight" to the testimony of a doctor who treated mother for depression and described mother as "cured" of her depression. The court of appeals rejected father's argument, holding that the weight to be given to the testimony of any witness is for the trial judge to determine.

Father also argued that the trial court erred by failing to find a nexus between the substantial change in circumstances and the welfare of the minor child and by failing to find that modification was in the best interest of the child. The court of appeals held that the trial court findings were sufficient in that the findings established that mother had a mental health crisis that affected her ability to care for herself and for the minor child; she was hospitalized and was successfully treated; following her treatment, she was again able to care for herself and the child.

Father then argued that the trial court was required to make specific findings regarding child abuse based on his evidence that the mother had spanked the child and had yelled at the child. The court of appeals held that a trial court is not required to specifically address allegations of child abuse unless there is evidence that the conduct caused the child serious physical injury or created a substantial risk of serious physical injury to the child, or evidence that the incidents "created serious emotional damage" to the child. As there was no evidence that the isolated incidents established by father's evidence caused injury to the child, the trial court was not required to make specific findings of fact regarding his allegation of abuse.

Finally, father argued that the trial court abused its discretion by not awarding him primary custody and by awarding him less visitation that he had under the original custody order. The court of appeals held that the trial court order was not "manifestly unsupported by reason" and pointed out that plaintiff's visitation under the 2020 order was very similar to the visitation

schedule set forth in the 2013 order. In addition, the trial court decision to grant mother primary custody was supported by the trial court findings regarding her improved mental health condition, her ability to care for the minor child, and father's "on-going difficulties in co-parenting" the child.

Security for award of attorney fees

- Trial court had no authority to create a lien on defendant's personal injury proceeds to secure the payment of attorney fees awarded to intervenors by the trial court.

Roark v. Yandle, _ S.E.2d _ (N.C. App. May 3, 2022). The trial court awarded temporary custody to intervenors and ordered defendant father to pay attorney fees to intervenors. The trial court order provided that if the attorney fees were not paid by a specific date, the attorney fees would be taken from the proceeds of a personal injury settlement received by defendant. Defendant appealed and the court of appeals held that the trial court had no authority to create a lien on the personal injury proceeds. The court of appeals stated that "[u]nder G.S. 50-13.6, the trial court may enter an order for reasonable attorney fees. It is not authorized to enter a civil judgment taxing the costs of attorney fees to a fund that is unrelated to the subject matter of the litigation."

Third party custody; conduct inconsistent with protected status

- A trial court determination that a parent has acted inconsistent with their protected status is a conclusion of law rather than a finding of fact.
- In determining whether a parent has waived their constitutional rights, the court should view evidence of a parent's conduct cumulatively, reviewing both past and present conduct.
- Mother acted inconsistent with her protected status by voluntarily ceding custody and care of her children to the grandmother for a period of three years, during which time mother made little contact with the children and did nothing to indicate that she intended the relinquishment of custody to be temporary.
- Mother's recent circumstances and relationship with the children were insufficient to overcome the effect of her prior decision to surrender custody of the children to the grandmother, particularly given the children's bond with the grandmother and their emotional difficulties when separated from grandmother.

In the Matter of B.R.W., B.G.W., 871 S.E.2d 764 (N.C., May 6, 2022). The trial court entered a permanency planning order awarding paternal grandmother guardianship of two minor children after concluding that mother waived her constitutional right to custody by being unfit and by acting inconsistent with her protected status and after concluding that guardianship with grandmother was in the best interest of the children. The trial court decided that even though mother had substantially complied with her family services plan, she had waived her constitutional right to custody by leaving the children in the care of paternal grandmother for a period of three years before the juvenile proceeding was commenced. The trial court found that during that three-year period, mother visited the children only on holidays and birthdays,

provided no financial support for the children and allowed grandmother to provide all caretaking for the children and to make all decisions regarding the children's care and welfare.

Mother appealed, arguing among other things, that the trial court erred in concluding she waived her constitutional right to custody of her children. The court of appeals held that the trial court's finding of fact did not support a conclusion that mother was unfit but did support the conclusion that she acted inconsistent with her protected status. The court of appeals also affirmed the trial court's conclusion that guardianship with grandmother was in the best interest of the children.

The supreme court affirmed the decision of the court of appeals.

Mother argued on appeal to the supreme court that the trial court's findings of fact did not support the conclusion that she acted inconsistent with her protected status as a parent. She contended that because the trial court found that she had substantially complied with her family services agreement and case plan by the time of the permanency planning hearing, the conclusion that she nevertheless acted inconsistent with her protected status was not supported by the facts found by the trial court.

The supreme court held that a trial court determination that a parent has waived their constitutional right to exclusive custody is a conclusion of law rather than a finding of fact. It is a determination that must be made on a case-by-case basis, and the court must view evidence of a parent's conduct cumulatively, considering both past and present behavior and circumstances. In this case, the court affirmed the trial court's conclusion that mother's voluntary relinquishment of custody of the children to grandmother for a period of three years, during which time the mother had little contact with the children and did nothing to indicate that it was her intention that the relinquishment was temporary, was conduct inconsistent with her protected status. After acknowledging that mother had much more contact with the children since the initiation of the juvenile proceeding, the court stated that the mother left the children with grandmother when they were one and four-years old and "induced the children and grandmother to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated." The court held that the fact that mother complied with the provisions of her family services agreement in the juvenile proceeding was not sufficient to overcome her prior decision to surrender care of her children to grandmother without indicating that the surrender was temporary and without making contact with the children during the period of surrender, particularly given the evidence of the strong bond between the children and the grandmother and the evidence of the emotional difficulties suffered by the children when they are away from the grandmother.

Child Support and Paternity
Cases Decided Between October 5, 2021 and June 7, 2022

GS 49-14(h) motion to set aside paternity adjudication

- Defendant's form motion requesting a modification of support and requesting that the court "recall order for arrest and paternity" was not a proper motion for relief from a paternity adjudication pursuant to GS 49-14(h).
- Moving party must allege that the paternity adjudication was entered as the result of fraud, duress, mutual mistake, or excusable neglect in order for motion to be proper pursuant to GS 49-14(h).
- GS 49-14(h) is applicable only to paternity adjudications involving children born out of wedlock; it cannot be used to set aside a paternity adjudication determining that a husband is the father of a child born during the marriage of the parties.

Guilford County ex rel Mabe v. Mabe, 279 N.C. App. 561, 866 S.E.2d 305 (2021). The trial court entered an order by default that established defendant's paternity and ordered him to pay child support. Several years later, following the issuance of a show cause order alleging defendant had failed to pay support as required by the order, defendant filed a motion requesting modification of support on AOC form CV-200. On the same form, defendant also requested that the court "recall order for arrest and paternity." The trial court ordered a paternity test and plaintiff appealed.

The court of appeals held that the trial court erred in ordering paternity testing because paternity had been established by the original child support order and defendant failed to file a proper motion pursuant to GS 49-14(h) requesting that the paternity adjudication be set aside. That statute allows the court to order DNA testing if the moving party alleges and proves that the paternity adjudication was entered as the result of fraud, duress, mutual mistake, or excusable neglect. As defendant in this case failed to make those allegations in his motion, the trial court had no authority to order testing or to consider setting aside the paternity adjudication. In addition, the court of appeals noted that there was no evidence in the record indicating whether the parties were married at the time of the child's birth. According to the court, because GS 49-14(h) is available only for paternity determinations regarding children born out of wedlock, that statute would not be available to defendant at all if he was married to plaintiff at the time of the child's birth.

Child support and custody, breach of contract, attorney fees

- Trial court must order child support as provided in an unincorporated separation agreement unless the party seeking a support order rebuts the presumption that the amount provided in the agreement is the amount necessary to meet the reasonable needs of the child at the time of the hearing.
- Where evidence presented to the trial court established expenses incurred by the parties on behalf of the child during several years before the hearing but did not establish the reasonable expenses of the child at the time of the hearing, trial court's conclusion that father failed to rebut the presumption of reasonableness was not supported by the evidence.

- Change in custody did not terminate father's obligation to pay child support pursuant to the terms of the separation agreement.
- Where separation agreement provided attorney fees could be awarded to a party who prevailed in an action to enforce the agreement, father was not entitled to fees after the trial court concluded he breached the agreement and owed damages to mother.

Jackson v. Jackson, 280 N.C. App. 325, 868 S.E.2d 104 (2021). The parties entered into a separation agreement which provided they would share equal physical custody of their three children and defendant father would pay $1,500 per month in child support to mother. The agreement provided father's support obligation would end when the youngest child turned 18 or graduated high school, whichever occurred last, or when the children were emancipated or died, or when father died, or when a court entered an order modifying or terminating child support. The agreement was not incorporated.

Father filed a motion in the cause for child support after the two oldest children reached majority and the youngest child was living solely with father. Plaintiff mother filed a complaint alleging father had breached the separation agreement by failing to pay child support in accordance with the agreement and requested specific performance and attorney fees. The two actions were consolidated. The trial court denied father's request for child support after concluding he had failed to rebut the presumption set forth in *Pataky v. Pataky*, 160 NC App 289 (2003), that the support provisions in the separation agreement were reasonable and found that he had breached the separation agreement by failing to pay support as required by the agreement. The trial court awarded plaintiff mother damages in the amount of the unpaid support and awarded her attorney fees after concluding that the agreement provided that a prevailing party in a breach of contract action was entitled to attorney fees.

On appeal, husband argued first that the trial court should not have applied the *Pataky* presumption that child support should be set by the court as provided in an unincorporated separation agreement because his child support obligation under the separation agreement ended when the youngest child of the parties began living exclusively with him. The court of appeals rejected his argument, concluding that the separation agreement set forth the exclusive grounds for termination of the support obligation. As a change in custody was not one of the listed grounds, his obligation to pay $1,500 per month was not terminated by the change in custody.

However, the court of appeals held that the trial court's findings of fact were insufficient to support the conclusion that father had failed to rebut the presumption set forth in *Pataky.* To rebut that presumption, father was required to show that the amount of support provided in the agreement, at the time of the hearing, substantially exceeds or fails to meet the reasonable needs of the child. The trial court is required to consider evidence of the child's actual present reasonable needs to determine whether the presumption has been rebutted. The court of appeals held that the evidence considered by the trial court in this case addressed expenses incurred by the parties on behalf of the child during the several years preceding the trial but failed to address expenses at the time of trial. The court remanded this issue to the trial court for further consideration.

. **Extraordinary expenses; life insurance policy as security for arrears**

- Trial court is not required to make findings of fact to support extraordinary expenses included in an award of Guideline child support.
- Life insurance policy was not security for husband's alimony or child support obligation, so the trial court erred in ordering husband to maintain the policy on his life for the duration of his 20-year alimony obligation.
- Attorney fee order was remanded where attorney billing affidavit used to calculate the amount of attorney fees included fees for work on the equitable distribution action between the parties.

Wadsworth v. Wadsworth, 868 S.E.2d 636 (Dec. 21, 2021). The trial court entered a child support and alimony order. The trial court ordered husband to pay alimony in the amount of $1,900.00 a month for 20 years, prospective monthly child support, and an $18,026.75 child support arrearage. The court also ordered husband to maintain a life insurance policy with a $550,000.00 death benefit as "security for" the child support arrearage and for the alimony award. In addition, the trial court ordered husband to pay attorney fees to wife. Husband appealed.

The court of appeals rejected husband's argument that the trial court's findings regarding the day care expenses of the children and the extraordinary expenses included in the trial court calculation of prospective child support were not supported by the evidence. The appellate court held that wife's testimony and financial affidavit supported the day care expenses and held that the trial court was not required to make findings of fact to support amounts included for extraordinary expenses.

However, the court of appeals agreed with husband's argument that the trial court erred when it ordered that he maintain a life insurance policy in the amount of $550,000 with proceeds payable to wife for as long as he was obligated to pay alimony. The appellate court acknowledged that GS 50-16.7(b) allows the court to secure the payment of support "by means of a bond, mortgage, or deed of trust, or other means ordinarily used to secure an obligation to pay money," but held that the life insurance ordered by the court in this case was not security within the meaning of the statute.

First, the court held that the order to maintain the life insurance policy violated the statutory requirement that the alimony obligation of husband terminate upon his death. As the life insurance would be paid only upon his death, the trial court order required husband's obligation to continue after his death. Second, the amount of the life insurance policy was more than husband's total potential obligation for support and child support arrears. Assuming he survived the entire 20 years of the alimony award, the parties never reconciled, and the wife never remarried, husband would owe only a total of $474,026.75 for that 20-year period. Finally, the life insurance policy was not security for the amount husband owed because the amount of the life insurance policy remained static throughout the 20-year term. If husband died, wife would receive $550,000, regardless of how much husband had paid before his death. The court explained that should husband pay all he owes pursuant to the court order but die the day before his last alimony payment was due, wife would receive all he had paid plus an additional

$550,000 payment. The court of appeals referred to this as a "windfall" to wife, more than doubling the amount awarded to her by the trial court.

The court of appeals remanded the award of attorney fees after concluding that the attorney fee affidavit used to support the award included fees charged for work on the equitable distribution proceeding between the parties. Attorney fees are authorized by statutes for child support and alimony but there is no statutory authority for an award of fees in equitable distribution cases.

Modification; imputing income; extraordinary expenses; attorney fees

- A trial court cannot impute income to a parent unless there is evidence sufficient to establish that the parent is suppressing his income in deliberate bad faith disregard of his child support obligation.
- Father's decision to leave a job and enroll in law school was not sufficient to establish that he was acting in bad faith where evidence showed that medical conditions made it physically impossible for him to continue to do the work required by his previous employment.
- A trial court is not required consider extraordinary expenses of the children when setting Guideline support and has the discretion to refuse to hear evidence about such expenses.
- Trial court did not err in denying mother's request for attorney fees where mother had the financial means to defray the cost of the litigation and father had not failed to provide support adequate under the circumstances at the time of the institution of the modification proceeding.

Mendez v. Mendez, 868 S.E.2d 612 (N.C. App. Dec. 21, 2021). Defendant mother filed a motion to modify support, alleging that the changing needs of the children and their enrollment in new activities constituted a substantial change in circumstances. After a hearing, the trial court found that the income of plaintiff father had been reduced due to his physical inability to do some of the work he had been doing at the time of the initial child support order. Father planned to leave the job that he was no longer physically able to perform and enroll in law school. The trial court modified child support by reducing plaintiff father's monthly obligation, and the trial court denied mother's request for attorney fees after concluding that father had not failed to make adequate payments under the circumstances. Defendant mother appealed.

Mother first argued that the trial court erred by failing to impute income to plaintiff father in the amount that his income had been reduced due to his decision to leave one of his jobs and attend law school. The court of appeals held that the trial court findings regarding plaintiff's medical problems which caused him to be unable to continue to perform the work required by his previous employment were sufficient to support the conclusion that he did not reduce his income in bad faith.

Mother also argued that the trial court erred by refusing to allow her to present evidence of the costs associated with the extracurricular activities of the children. The court of appeals rejected her argument, holding that the trial court has the discretion to include extraordinary expenses in an award of Guideline support but also has the discretion to deny a request to include the expenses. Because the decision is completely within the discretion of the trial court, the trial

court did not err in refusing to allow mother to present evidence of the expenses. The court of appeals stated that "[t]he trial court had no duty to consider the extraordinary expenses."

Finally, the court of appeals upheld the trial court decision to deny mother's request for attorney fees. Because this was a support only case, an award of fees is proper pursuant to GS 50-13.6 only if the trial court concludes that the moving party has insufficient means to defray the expense of the suit and that the party ordered to pay support refused to provide support that was adequate under the circumstances at the time of the institution of the modification proceeding. The court of appeals held that the trial court findings established that mother had the financial means to defray the cost of the modification proceeding and established that father paid all support owed under the existing child support order while the modification proceeding was pending.

Modification, sufficiency of motion to modify

- Father's motion to modify was sufficient to state a claim for relief.
- There is a presumption that there has been a substantial change in circumstances when a support order is more than 3 years-old and application of the Guidelines will result in at least a 15% change in child support. Therefore, father's statement in the motion that the order was 3 years old and that application of the Guidelines to the parties "current income and circumstances" will result in at least a 15% change in child support was sufficient to state a claim for modification.
- There is no requirement that a party requesting modification include in the motion to modify the actual income of the parties or any other detailed financial information.

Barus v. Coffey, 868 S.E.2d 655 (N.C. App. Jan. 4, 2022). Plaintiff father filed a motion to modify his support obligation, using the AOC form CV- 600, "Motion and Notice of Hearing for Modification of Child Support Obligation." Defendant mother made a motion to dismiss father's motion based on the failure to state a claim, arguing that the "minimal allegations" in the motion regarding the parties' current income and circumstances were insufficient to give her adequate notice of the basis for father's motion to modify. The trial court agreed with mother and dismissed father's motion.

The court of appeals reversed, holding that the form motion filed by father was sufficient to state a claim for modification. According to the appellate court, the form referenced both GS 50-13.7 and 13.10, and alleged that there had been a substantial change in circumstances since the entry of the last child support order. In addition, in the space provided on the form motion, father wrote the following:

> "More than three years have elapsed since the entry of the prior order and there is a difference of 15% or more between the amount of child support payable under the existing order and the amount of child support resulting from application of the guidelines based on the parents' current incomes and circumstances."

The court of appeals held that because there is a presumption that there has been a substantial change in circumstances when an order is at least 3 years old and application of the Guidelines

will result in at least a 15% change in the amount of support, the father's motion was sufficient to give mother notice of the basis for father's request for modification. The court held that a party moving for modification is not required to allege the actual income of the parties or provide any other detailed financial information in the motion to modify.

Domestic Violence
Cases Decided Between October 5, 2021 and June 7, 2022

Jurisdiction; act of domestic violence

- Trial court had jurisdiction to enter a DVPO protecting a child who was a minor at the time the motion for a DVPO was filed but turned 18 while the action was pending.
- Fact that summons was not issued when plaintiff filed her motion requesting a DVPO did not deprive the trial court of jurisdiction where defendant appeared at the hearing and participated voluntarily.
- Evidence did not support the trial court's conclusion that defendant committed an act of domestic violence.

Walker-Snyder v. Snyder, 870 S.E.2d 139 (N.C. App. Feb. 15, 2022). Plaintiff mother filed a motion seeking a DVPO to protect herself and her daughter. Defendant is the father of the daughter. The child was 17 years-old when the action was filed but turned 18 while the action was pending. The trial court denied mother's request for protection for herself but granted a DVPO protecting the daughter after concluding defendant committed an act of domestic violence. Defendant appealed.

Father first argued that the trial court lacked subject matter jurisdiction to enter the DVPO for two reasons; one, because the child turned 18 before the DVPO was entered and two, because no summons was issued when mother filed the motion requesting the DVPO. The court of appeals rejected both arguments. The court held that because plaintiff filed her motion seeking protection for the daughter while the daughter was a still a minor, the trial court had subject matter jurisdiction to adjudicate the case. The court of appeals acknowledged that GS 50B-2(a) provides that "any action for a domestic violence protective order requires that a summons be issued and served," but held that the trial court had jurisdiction because defendant appeared at and participated in the hearing voluntarily.

Father next argued that the evidence did not support the trial court's conclusion that he committed an act of domestic violence and the court of appeals agreed. The child testified that the father sent her texts about litigation between the father and the mother and about not being able to pay for her college or for her car. She testified that the texts were "hurtful" and made her "anxious and upset." The court of appeals held that her testimony did not support the trial court's conclusion that defendant placed her in fear of continued harassment that rises to such a level as to inflict severe emotional distress.

Trial court discretion to grant equitable relief; statutory definition of dating relationship unconstitutional as applied

- Trial court had subject matter jurisdiction to consider self-represented plaintiff's request for a DVPO pursuant to Chapter 50B even though plaintiff filed a voluntary dismissal of the 50B complaint before the hearing on her request, where plaintiff withdrew the

dismissal within 39 minutes of filing it by writing across the dismissal form "I do not want to dismiss this action."

- It was within the discretion of the trial court to treat self-represented plaintiff's amendment of the voluntary dismissal as a request for relief from the dismissal pursuant to Rule 60(b) and to treat plaintiff's subsequent amendment of the original 50B complaint as a refiling of plaintiff's 50B complaint.
- Denial of domestic violence protection order to plaintiff on the sole basis that she was in a same-sex dating relationship with defendant rather than a heterosexual relationship violated both the US and the NC Constitution.
- Trial courts are instructed to define personal relationship as applied in Chapter 50B proceedings to include all persons who are in or have been in a dating relationship, whether they are persons of the same sex or of the opposite sex.

M.E. v. T.J., 380 N.C. 539, 869 S.E.2d 624 (2022), modifying and affirming 275 N.C. App. 528, 854 S.E.2d 74 (2020). Plaintiff M.E. filed a complaint seeking both an ex parte and a permanent DVPO pursuant to Chapter 50B, alleging defendant T.J. had committed acts of domestic violence against her. When plaintiff appeared in court for a hearing on her request for ex parte relief, the trial court informed her that the court could not grant her request because plaintiff did not have a personal relationship with defendant as required by Chapter 50B. While plaintiff and defendant had been in a dating relationship, they were of the same sex and G.S. 50B-1(b)(6) does not include same-sex persons in a dating relationship in the definition of personal relationship. The court informed plaintiff that she could seek a civil no-contact order pursuant to Chapter 50C.

Following this interaction with the trial court, plaintiff went to the office of the clerk of court. She was given forms to allow her to file a complaint for 50C protection and a form to dismiss the previously filed 50B action. Plaintiff filed the voluntary dismissal of the 50B action and filed the 50C complaint. However, 39 minutes later, she informed staff in the clerk's office that she did not want to dismiss the 50B action and she wrote on the previously filed dismissal form "I do not want to dismiss this action."

Plaintiff thereafter returned to the trial court for a hearing on her requests for ex parte relief. The trial court denied plaintiff's request for ex parte relief pursuant to Chapter 50B, stating in the order that although plaintiff's allegations of violence were "significant", the trial court could not grant the ex parte DVPO because plaintiff did not establish a personal relationship with defendant. The trial court granted ex parte relief pursuant to Chapter 50C.

At the subsequent hearing on plaintiff's request for permanent relief pursuant to Chapter 50B and 50C, plaintiff amended her 50B complaint to specifically allege that she was in a same-sex dating relationship with defendant. Defendant consented to the amendment. Plaintiff's counsel then argued to the trial court that it would be unconstitutional to deny relief pursuant to Chapter 50B because she was in a same-sex relationship. The trial court entered an order denying plaintiff's request for 50B relief, stating in the order that:

> "[P]laintiff has failed to state a claim upon which relief can be granted pursuant to the statute, due to the lack of statutorily defined personal relationship. …[H]ad the parties

> been of opposite genders, th[e] facts [presented] would have supported the entry of a Domestic Violence Protective Order (50B)."

Plaintiff appealed, arguing that the denial of her requests for both an ex parte DVPO and a permanent DVPO because she was in a same-sex relationship with defendant "violated her 14th amendment and state constitutional rights to due process and equal protection of the laws." The court of appeals agreed, concluding that "[n]o matter the [level of constitutional] review applied, N.C.G.S. § 50B-1(b)(6) does not survive Plaintiff's due process and equal protection challenges under either the North Carolina Constitution or the Constitution of the United States."

The court of appeals held:

> "We therefore reverse the trial court's denial of Plaintiff's complaint for a Chapter 50B DVPO, and remand for entry of an appropriate order under Chapter 50B. **The trial court shall apply N.C.G.S. § 50B-1(b)(6) as stating: "Are persons who are in a dating relationship or have been in a dating relationship." The holdings in this opinion shall apply to all those similarly situated with Plaintiff who are seeking a DVPO pursuant to Chapter 50B; that is, the "same-sex" or "opposite-sex" nature of their "dating relationships" shall not be a factor in the decision to grant or deny a petitioner's DVPO claim under the Act."**

Judge Tyson dissented, arguing, among other things, that the trial court and the court of appeals had no jurisdiction to consider plaintiff's request for relief pursuant to Chapter 50B because plaintiff dismissed the 50B complaint before the trial court entered the order denying her request for ex parte relief pursuant to Chapter 50B.

The supreme court disagreed with the dissent in the court of appeals and held that the trial court properly exercised its discretion to treat plaintiff's handwritten "amendment" to the filed notice of voluntary dismissal as a motion for equitable relief under Rule 60(b) and to treat her subsequent amendment of the 50B complaint with defendant's consent as a refiling of her 50B complaint. The court noted that the "remedies of N.C.G.S. Chapter 50B are specifically written with ease of access for pro se complainants in mind" because "survivors of domestic violence who turn to the courts for protection typically do so shortly after enduring physical or psychological trauma, and without assistance of legal counsel." According to the supreme court, to limit the trial court's discretion to grant equitable relief in this situation would violate the policy supporting the Rules of Civil Procedure that controversies should be resolved on the merits rather than on technicalities of pleadings and "would be to exalt the form over substance." Because the supreme court interpreted the trial court actions as setting aside the voluntary dismissal pursuant to Rule 60(b) and allowing the refiling of plaintiff's complaint, the court held that the trial court and the court of appeals had subject matter jurisdiction to consider plaintiff's request for relief pursuant to Chapter 50B.

The supreme court then noted that defendant did not challenge on appeal the substantive ruling of the court of appeals on the merits of the constitutional issue. Therefore, the court held that the portion of the court of appeals' opinion ruling that Chapter 50B's exclusion of complainants in

same-sex relationships from DVPO protection is unconstitutional as applied to plaintiff and those similarly situation "stands undisturbed."

Renewal of protective order

- Trial court order renewing a DVPO with the consent of the parties was not void due to the failure of the parties to indicate in writing that they consented to the entry of the order without findings of fact and conclusions of law.
- Evidence in the record was sufficient to support the trial court's finding that plaintiff remained in fear of defendant.
- Trial court order renewing a DVPO was not void due to the trial court's failure to check the box on the form renewal order (AOC CV-314) concluding there was good cause to renew the order where both parties had consented to the renewal of the DVPO, and the order contained a finding of fact that plaintiff continued to fear defendant.
- The only jurisdictional requirement for the renewal of a DVPO is that a party seeking renewal file the motion asking for renewal before the expiration of the existing order.

Jabari v. Jabari, _S.E.2d_ (N.C. App. June 7, 2022). The parties consented to the entry of a DVPO. In the consent order, the parties agreed in writing that no findings of fact or conclusions of law would be included. Shortly before the DVPO was set to expire, plaintiff filed a motion to renew the DVPO. At the hearing on the renewal motion, defendant stipulated to an extension of the protective order regarding plaintiff but requested that the court enter a new order concerning custody. Following a hearing, the trial court entered a new DVPO that "attached and incorporated by reference" the original DVPO, found that both parties consented to the entry of renewal order, and specifically found that plaintiff remained in fear of defendant. The trial court used the AOC form for renewal of a DVPO (AOC CV-314) but did not check the box in the Conclusion of Law section of the form order stating there was good cause to renew the DVPO.

Defendant subsequently filed a Rule 60(b) motion asking that the renewed DVPO be set aside as void. The trial court denied the motion and defendant appealed the denial of the Rule 60(b) motion.

Defendant argued on appeal that the trial court erred when it denied his request to set the order aside pursuant to Rule 60(b). He argued that the consent DVPO was void due to a lack of findings of fact and conclusions of law that there was good cause to renew the DVPO, and that the consent of the parties was not sufficient to cure that defect because the parties did not agree in writing that the renewal order would be entered without findings and conclusions of law, as required by GS 50B-3(b1).

The court of appeals first held that, because the renewed DVPO incorporated the original DVPO by reference, and the parties did agree in writing in the original DVPO that no findings of fact or conclusions of law would be included, the renewed DVPO did contain the written agreement of the parties. The provisions and terms of the original DVPO became part of the renewed order due to the incorporation language in the renewed order. Further, the appellate court held that defendant could not complain on appeal about the lack of findings and conclusions because defendant stipulated several times during the renewal hearing that he agreed to the entry of the

renewed order, defendant knew that the original order did not contain findings and conclusions, and the original order was entered without findings and conclusions concerning domestic violence for the benefit of defendant who was facing criminal charges arising out of the same incidents that caused plaintiff to file for the original DVPO.

The court of appeals also held that renewed DVPO established that good cause exited to renew the original DVPO because the trial court wrote on the form order that plaintiff continued to fear defendant. The court of appeals rejected defendant's argument that the evidence did not support this finding, holding that plaintiff's testimony that defendant had stalked her, was intimidating, and that on at least one occasion, she thought he "was going to hit her" was sufficient to establish she remained in fear of defendant.

The court of appeals also rejected defendant's contention that the renewal order failed to conclude that there was good cause to renew the order because the trial court did not check the box in the conclusion section of the form order. The court held that the conclusion was not necessary because the order was entered by consent but also held that the order was sufficient to show there was good cause because the trial court included in the order findings that plaintiff continued to fear defendant and the parties both stipulated to the renewal. The failure of the trial court to check the box on the form order was therefore, at most, a clerical error.

Perhaps most significantly, at the end of this appellate opinion, the court of appeals held that because the trial court had subject matter jurisdiction, the renewed DVPO was not void. The court explained that the *only* (italics in the opinion) jurisdictional requirement in the statute authorizing renewal orders is that the motion requesting renewal be filed before the expiration of the existing order. While there may be many legal errors a trial court can commit that would result in the reversal of an order on appeal, a renewed DVPO will not be void for lack of subject matter jurisdiction as long as the motion to renew was filed before the expiration of the existing DVPO.

Equitable Distribution
Cases Decided Between October 5, 2021 and June 7, 2022

Marital debt; student loans incurred for adult child

- Marital debt is debt incurred during the marriage by either or both spouses for the joint benefit of the parties.
- The party seeking a marital classification of debt has the burden of proving the amount of debt owed on the date of separation and of proving that the debt was incurred for the joint benefit of the parties.
- Fact that student loans incurred during the marriage to pay expenses of a college education for the adult daughter of the parties were in the sole name of the husband did not establish that the debt was his separate property.
- Trial court did not err in concluding that student loans were incurred for the joint benefit of the parties where the parties agreed to take out the loans for the daughter, both parties actively participated in obtaining the loans, and both agreed that they wanted to provide their daughter a college education.

Purvis v. Purvis, 280 N.C. App. 345, 867 S.E.2d 700 (2021). During the marriage, the daughter of the parties attended Sweet Brier College. To pay for the expense of her education, the daughter incurred student loans in her name and husband incurred student loans in his name. The loan proceeds incurred by husband were paid directly to Sweet Brier College and were used by the daughter for tuition, books and living expenses. The parties made a joint decision to incur the loans to help the daughter, but they decided that the loans would be in the sole name of the husband due to discrepancies in the credit scores of the parties. The parties made payments on the loan during the marriage using funds from their joint checking account. On the date of separation, the outstanding debt for the loans incurred by husband was $164,163.00.

In the equitable distribution proceeding, wife moved for summary judgment on the issue of the classification of the loan debt, arguing that the loans were the separate debt of husband. The trial court denied her motion and ruled that the loan balance was a marital debt. Wife appealed, arguing that husband failed to establish that the debt was incurred for the joint benefit of the parties.

The court of appeals affirmed the trial court after concluding that the student loan debt was incurred for the joint benefit of the parties. The court explained:

"Here, the parties do not dispute that there was a joint agreement to incur the debt. Nor do the parties dispute that Defendant actively participated in obtaining the loans. The parties' affidavits demonstrate there was a joint benefit, in that their daughter's tuition, books, and living expenses were covered by the loan rather than out-of-pocket expenses. Further, "providing [their] daughter with a formal education was something that [they] both wanted and agreed, to do."

The court distinguished appellate decisions from Nebraska and Rhode Island that classified student loan debt for adult children as separate debt, explaining that those cases involved

situations where one spouse did not know about the debts at the time they were incurred and did not consent to the loans at the time they were incurred.

Divisible property; unequal distribution

- Passive postseparation appreciation of marital property is divisible property. Passive postseparation appreciation of an account containing both marital and separate funds is divisible only to the extent that the appreciation is attributable to the marital component of the account.
- As long as the trial court considers and makes findings of fact regarding all distribution factors listed in GS 50-20(c) about which evidence is admitted, the trial court has discretion to determine whether an equal distribution of marital property is equitable.

Asare v. Asare, 869 S.E.2d 6 (N.C. App. Jan. 4, 2022). Husband appealed trial court order for alimony (holdings regarding the alimony award are discussed below in Alimony section) and equitable distribution.

Divisible property. The trial court classified husband's Vanguard retirement account as part marital property and part separate property but classified all postseparation appreciation of the account as divisible property. Husband argued that the trial court erred in concluding that all postseparation appreciation of the account was appreciation of marital property because part of the account was separate property, and testimony from his expert established that a portion of the passive postseparation appreciation was attributable to the separate property in the account. The court of appeals agreed with husband, concluding that the testimony from the expert clearly established the portion of the passive appreciation attributable to the separate property in the account.

Unequal distribution. Husband also argued that the trial court erred in making an unequal division of marital property, allocating 57% of the marital estate to wife and 43% to husband. The court of appeals rejected his argument, holding that because the trial court made detailed findings of fact regarding each of the distribution factors listed in GS 50-20(c), the trial court had discretion to determine that an equal distribution was not equitable.

Distributive award, unequal division

- Trial court did not err in ordering payment of distributive award where trial court determined that an in-kind distribution was not practical because the marital dental practice and office suite needed to be distributed to defendant and other marital assets were not sufficient to offset the value of those assets.
- The trial court did not err in ordering husband to refinance mortgage on dental office suite to pay the distributive award where findings of fact showed husband had "sufficient ownership, control, and equity interest in the [property] to allow him to refinance the [property]."
- Trial court did not err in distributing bank accounts to husband as his personal property rather than including the accounts in the value of the dental practice where the accounts were not included in the valuation expert's valuation of the dental practice.

- Trial court is not required to make findings regarding the weight assigned by it to any distribution factor.

Brady v. Brady, 871 S.E.2d 565 (N.C. App. April 5, 2022). The trial court entered an equitable distribution judgment, ordering an unequal division in favor of wife and ordering husband to pay a distributive award to wife. Husband appealed.

Husband first argued that the trial court erred by ordering him to pay a distributive award to wife. The court of appeals rejected his argument, holding that the trial court's findings of fact supported the conclusion that the presumption in favor of an in-kind distribution had been rebutted. The trial court found that the husband's dental practice and dental office suite were marital assets that needed to be distributed to husband and found that other marital assets were not sufficient to offset the distribution of the practice and office suite to husband.

Husband also argued that the trial court erred by ordering him to refinance the mortgage on the dental office suite to pay the distributive award because there was no evidence that he had the ability to refinance the mortgage. The court of appeals rejected husband's argument, holding that the trial court's findings regarding husband's ownership of and equity in the dental office suite were sufficient to show he had the ability to refinance the loan.

Husband then argued that the trial court erred in distributing bank accounts to him as his personal property rather than including those accounts in the value of the marital dental practice. The court of appeals also rejected this argument, holding that the record showed that husband's valuation expert did not include the accounts as assets of the dental practice.

Finally, husband argued that the trial court findings of fact did not support the unequal division in favor of wife because the findings did not show how the trial court weighed the distribution factors identified in the judgment. The court of appeals affirmed the unequal division, holding that a trial court is not required to reveal the exact weight assigned to any given distribution factor.

Postseparation Support and Alimony
Cases Decided Between October 5, 2021 and June 7, 2022

Extraordinary expenses; life insurance policy as security for arrears

- Trial court is not required to make findings of fact to support extraordinary expenses included in an award of Guideline child support.
- Life insurance policy was not security for husband's alimony or child support obligation, so the trial court erred in ordering husband to maintain the policy on his life for the duration of his 20-year alimony obligation.
- Attorney fee order was remanded where attorney billing affidavit used to calculate the amount of attorney fees included fees for work on the equitable distribution action between the parties.

Wadsworth v. Wadsworth, 868 S.E.2d 636 (N.C. App. Dec. 21, 2021). The trial court entered a child support and alimony order. The trial court ordered husband to pay alimony in the amount of $1,900.00 a month for 20 years, prospective monthly child support, and an $18,026.75 child support arrearage. The court also ordered husband to maintain a life insurance policy with a $550,000.00 death benefit as "security for" the child support arrearage and for the alimony award. In addition, the trial court ordered husband to pay attorney fees to wife. Husband appealed.

The court of appeals rejected husband's argument that the trial court's findings regarding the day care expenses of the children and the extraordinary expenses included in the trial court calculation of prospective child support were not supported by the evidence. The appellate court held that wife's testimony and financial affidavit supported the day care expenses and held that the trial court was not required to make findings of fact to support amounts included for extraordinary expenses.

However, the court of appeals agreed with husband's argument that the trial court erred when it ordered that he maintain a life insurance policy in the amount of $550,000 with proceeds payable to wife for as long as he was obligated to pay alimony. The appellate court acknowledged that GS 50-16.7(b) allows the court to secure the payment of support "by means of a bond, mortgage, or deed of trust, or other means ordinarily used to secure an obligation to pay money," but held that the life insurance ordered by the court in this case was not security within the meaning of the statute.

First, the court held that the order to maintain the life insurance policy violated the statutory requirement that the alimony obligation of husband terminate upon his death. As the life insurance would be paid only upon his death, the trial court order required husband's obligation to continue after his death. Second, the amount of the life insurance policy was more than husband's total potential obligation for support and child support arrears. Assuming he survived the entire 20 years of the alimony award, the parties never reconciled, and the wife never remarried, husband would owe only a total of $474,026.75 for that 20-year period. Finally, the life insurance policy was not security for the amount husband owed because the amount of the

life insurance policy remained static throughout the 20-year term. If husband died, wife would receive $550,000, regardless of how much husband had paid before his death. The court explained that should husband pay all he owes pursuant to the court order but die the day before his last alimony payment was due, wife would receive all he had paid plus an additional $550,000 payment. The court of appeals referred to this as a "windfall" to wife, more than doubling the amount awarded to her by the trial court.

The court of appeals remanded the award of attorney fees after concluding that the attorney fee affidavit used to support the award included fees charged for work on the equitable distribution proceeding between the parties. Attorney fees are authorized by statutes for child support and alimony but there is no statutory authority for an award of fees in equitable distribution cases.

Imputing income; form of payment

- An award of alimony is based on the income and financial circumstances of the parties at the time of the alimony hearing.
- Trial court did not err when it imputed income to husband after finding that he deliberately depressed his income to avoid paying alimony and to impact the equitable distribution proceeding.
- Trial court's detailed findings of fact regarding the factors listed in GS 50-16.3A(b) were sufficient to explain the amount and duration of the alimony award.
- The trial court has authority to order both a lump sum and periodic payments of alimony.

Asare v. Asare, 869 S.E.2d 6 (N.C. App. Jan. 4, 2022). Husband appealed trial court order for alimony and equitable distribution (holdings regarding equitable distribution are discussed in Equitable Distribution section above).

Imputing income. Husband argued that the trial court erred in ordering him to pay alimony when he testified that his income decreased substantially between the date of separation and the date of the alimony trial. The court of appeals held that alimony is determined based on the income and financial circumstances at the time of the alimony hearing but rejected husband's argument that evidence showed his income had decreased. Rather, the court of appeals held that the trial court imputed income to husband after concluding that he depressed his income and assets in bad faith to avoid paying alimony and to impact the equitable distribution proceeding. The trial court finding that the husband's "lack of employment and lack candor [with the court]….. [was a] strategy designed to minimize potential ramifications or obligations pertaining to alimony and equitable distribution" was sufficient to support the trial court's decision to impute income to husband.

Explanation of amount and duration of award. The court of appeals also rejected husband's argument that the trial court failed to adequately explain the amount and duration of alimony awarded. The court of appeals held that the trial court's findings as to the factors listed in GS 50-16.3A(b) regarding the earnings and earning capacities of the parties; the ages and physical, mental and emotion conditions of the spouses; contributions of the parties to the education, training, or earning power of the other; the relative needs of the parties; the standard of living during the marriage; and other considerations relating to the economic circumstances of

the parties were sufficient to provide the required reasoning for the amount and duration of the award.

Award of both lump sum and periodic payments. Husband also argued that the trial court erred in ordering that he pay lump sum alimony in the amount of $72,000 as well as a monthly payment of $1,200 for 5 years. He argued that GS 50-16.7(a) authorizes a court to order only one form of payment, but the court of appeals disagreed, citing other appellate opinions affirming combinations of lump sum and monthly payment awards. The court of appeals held that the trial court findings regarding the potential difficulty of enforcing periodic payments due to the fact that husband lives in a foreign country, as well as his lack of credibility as to his assets and financial circumstances, were sufficient to support the trial court's decision to order both forms of payment.

Findings to support amount and duration of award

- Trial court erred by failing to make a specific finding as to the amount of the supporting spouse's reasonable monthly expenses.
- Trial court erred in failing to consider supporting spouse's monthly child support obligation as part of his reasonable monthly expenses.

Brady v. Brady, 871 S.E.2d 565 (N.C. App. April 5, 2022). The trial court ordered husband to pay wife alimony in the amount of $5,250 per month for 10 years. Husband appealed, arguing that the trial court findings of fact were not supported by the evidence. The court of appeals held that the findings of fact supported by the evidence were sufficient to support the trial court's decision that wife was a dependent spouse and entitled to alimony for a period of ten years (findings included 20-year marriage, illicit sexual behavior by husband, wife was stay-at-home parent of four children), but held that the trial court's findings of fact regarding husband's ability to pay the amount of support ordered were insufficient. The trial court concluded that husband's claimed monthly expenses in the amount of $11,974.00 were not reasonable but failed to make findings to show what the trial court determined his reasonable expenses to be. In addition, the court of appeals held that the trial court should have included husband's monthly child support obligation in the calculation of his reasonable monthly expenses.

.

Spousal Agreements
Cases Decided Between October 5, 2021 and June 7, 2022

Interpretation of premarital agreement; gifts; real property in foreign country

- Trial court erred in concluding wife did not provide consideration for the acquisition of property where she personally guaranteed the loans obtained to acquire the assets.
- A valid unconditional gift occurs when there is donative intent and actual or constructive delivery.
- An unconditional gift does not occur if a transfer is made with the intent that the title transferred will be held in trust for the grantor.
- A gift can be conditional and create a trust such that a gifted interest will revert to the donor upon certain conditions, such as a separation of the parties.
- Trial court erred in concluding that the language of the premarital agreement established husband's lack of intent to gift property acquired during the marriage to wife.
- Where one spouse allows his separate property to be used to acquire property titled as tenants by the entirety or titled in the name of the other spouse during the marriage, there is a common law presumption that exists outside of the context of equitable distribution that the transfer was an unconditional gift to the marriage. The presumption can be rebutted only with clear, cogent and convincing evidence.
- Trial court has jurisdiction to order parties to transfer title to real property located in a foreign country.

Poythress v. Poythress, 280 N.C. App. 193, 865 S.E.2d 892 (2021). *<u>This opinion replaces opinion filed December 31, 2020, 275 N.C. App. 651, 854 S.E.2d 27 (2020)</u>**

Husband brought action to enforce the terms of a premarital agreement between the parties, requesting that the court declare certain properties acquired during the marriage to be his sole property even though the properties were titled in the names of both husband and wife. The premarital agreement provided that property owned by husband prior to marriage would remain his sole property and that all property he acquired during the marriage with his separate assets would also be his sole property and would remain his sole property upon the separation of the parties. However, the agreement also provided that husband could make gifts to the wife and to the marital estate. The trial court concluded husband was the sole owner of all the contested properties and ordered wife to execute all documents required to transfer title to him alone. The trial court concluded that husband provided all the consideration for the properties acquired during the marriage and that he did not make a gift of any of the properties to the wife, despite titling the property in their joint names. Wife appealed.

The court of appeals held that the trial court erred by concluding that one asset, an LLC owned by both parties, was husband's sole property pursuant to the terms of the agreement based on the trial court's finding that he provided all the consideration used to acquire the properties held by the LLC. The court of appeals disagreed with this finding and held that wife also provided consideration when she executed personal guarantees for loans and lines of credit used to acquire the properties.

The court of appeals also held that the trial court erred in concluding husband did not make a gift to wife of the LLC and the properties titled in the name of the LLC. The court of appeals held that there is a common law presumption that an unconditional gift to the marriage is intended whenever one spouse allows his separate property to be used to acquire property held as tenants by the entirety or held in the name of the other spouse. This presumption exists outside of equitable distribution and the presumption can be rebutted only by clear, cogent and convincing evidence. The court held that the trial court erred in concluding husband had rebutted the presumption.

First, the court of appeals held that the trial court erred in concluding that the language of the premarital agreement itself established by clear, cogent and convincing evidence that husband did not intend to make a gift to wife or to the marriage when the assets acquired during the marriage were titled in the joint names of the parties. According to the court of appeals, while the agreement clearly stated the intent that all properties acquired by him during the marriage would be his sole property, the agreement also clearly stated that he could make gifts of his separate property to wife and to the marriage that would then become wife's property.

Second, the court of appeals held that the fact that wife provided the personal guarantees for the loans used to acquire the assets held by the LLC was strong evidence that husband intended to gift the property or an interest in it to wife. In addition, the court pointed to other evidence indicating husband intended wife to be a joint owner at the time the LLC was created.

The court of appeals explained that a gift is established by evidence of donative intent and delivery of title, and the court noted that the transfers would have created a trust for husband's benefit rather than a gift to wife if husband intended that wife only hold his interest for his benefit. The court also pointed out that the transfers could have been a gift but a conditional gift, meaning husband intended all interest gifted to wife would be returned to him upon a condition, such as separation. However, the court concluded there was no evidence that husband intended to create a trust at the time of transfer and the gift presumption was not rebutted by the evidence.

The court of appeals also held the trial court erred in concluding that a beach house acquired by husband during the marriage but titled as tenants by the entirety was not gifted to the wife. However, because there was some evidence indicating husband may have intended to create a trust at the time he transferred title rather than an unconditional gift, the court remanded the issue to the trial court for a determination of whether there was clear, cogent and convincing evidence that a conditional gift rather than an unconditional gift was intended at the time of transfer.

Finally, the court of appeals rejected wife's argument that the trial court had no jurisdiction to declare husband the owner of real property located in Peru. The court held that because the NC court had jurisdiction over the parties, the court had jurisdiction to order the parties to transfer title to real property located in another country. However, the court remanded the issue of ownership of the properties to the trial court for a determination of the ownership of the properties under Peruvian law and for a determination of how ownership was acquired.

Child support and custody, breach of contract, attorney fees

- Trial court must order child support as provided in an unincorporated separation agreement unless the party seeking an order for support rebuts the presumption that the amount provided in the agreement is the amount necessary to meet the reasonable needs of the child at the time of the hearing.
- Where evidence presented to the trial court established expenses incurred by the parties on behalf of the child during several years before the hearing but did not establish the reasonable expenses of the child at the time of the hearing, trial court's conclusion that father had failed to rebut the presumption of reasonableness was not supported by the evidence.
- Change in custody did not terminate father's obligation to pay child support pursuant to the terms of the separation agreement.
- Where separation agreement provided attorney fees could be awarded to a party who prevailed in an action to enforce the agreement, father was not entitled to fees after the trial court concluded he breached the agreement and owed damages to mother.

Jackson v. Jackson, 280 N.C. App. 325, 868 S.E.2d 104 (Nov. 16, 2021). The parties entered into a separation agreement which provided they would share equal physical custody of their three children and defendant father would pay $1,500 per month in child support to mother. The agreement provided father's support obligation would end when the youngest child turned 18 or graduated high school, whichever occurred last, or when the children were emancipated or died, or when father died, or when a court entered an order modifying or terminating child support. The agreement was not incorporated.

Father filed a motion in the cause for child support after the two oldest children reached majority and the youngest child was living solely with father. Plaintiff mother filed a complaint alleging father had breached the separation agreement by failing to pay child support in accordance with the agreement and requested specific performance and attorney fees. The two actions were consolidated. The trial court denied father's request for child support after concluding he had failed to rebut the presumption set forth in *Pataky v. Pataky,* 160 NC App 289 (2003), that the support provisions in the separation agreement were reasonable and found that he had breached the separation agreement by failing to pay support as required by the agreement. The trial court awarded plaintiff mother damages in the amount of the unpaid support and awarded her attorney fees after concluding that the agreement provided that a prevailing party in a breach of contract action was entitled to attorney fees.

On appeal, husband argued first that the trial court should not have applied the *Pataky* presumption that child support should be set by the court as provided in an unincorporated separation agreement because his child support obligation under the separation agreement ended when the youngest child of the parties began living exclusively with him. The court of appeals rejected his argument, concluding that the separation agreement set forth the exclusive grounds for termination of the support obligation. As a change in custody was not one of the listed grounds, his obligation to pay $1,500 per month was not terminated by the change in custody.

However, the court of appeals held that the trial court's findings of fact were insufficient to support the conclusion that father had failed to rebut the presumption set forth in *Pataky.* To

rebut that presumption, father was required to show that the amount of support provided in the agreement, at the time of the hearing, substantially exceeds or fails to meet the reasonable needs of the child. The trial court is required to consider evidence of the child's actual present reasonable needs to determine whether the presumption has been rebutted. The court of appeals held that the evidence considered by the trial court in this case addressed expenses incurred by the parties on behalf of the child during the several years preceding the trial but failed to address expenses at the time of trial. The court remanded this issue to the trial court for further consideration.