UNC SCHOOL OF GOVERNMENT

NORTH CAROLINA Judicial COLLEGE

Family Law for District Court Judges: Part 2

July 19-21, 2023
UNC School of Government, Chapel Hill, N.C.

Wednesday, July 19

1:00pm **Welcome, Class Overview, and Introductions**
Cheryl Howell, School of Government

1:15pm **Child Custody: Jurisdiction** [1.25 CJE]
Cheryl Howell

2:30pm **Break**

2:45pm **Child Custody: Procedural issues and temporary orders** [1.0 CJE]
Chery Howell

3:45pm **Break**

4:00pm **Third Party Custody** [1.5 CJE]
Cheryl Howell

5:30pm **Adjourn**

Thursday, July 20

9:00am **Determining Best Interest** [2.0 CJE]
Cheryl Howell
Chief Judge Beth Heath, Kinston

11:00am **Break**

11:15am **Child Custody: Modification** [1.25 CJE]
Cheryl Howell and Judge Heath

12:30pm **Lunch at School of Government**

1:30pm **Setting Child Support: Guidelines, Worksheets and Deviation** [2.0 CJE]
Cheryl Howell and Judge Caroline Burnette

3:30pm **Break**

3:45pm **Child Support: Determining Income** [1.5 CJE]
Cheryl Howell and Judge Burnette

5:15pm **Adjourn**

Friday, July 21

9:00am **Child Support: Modification** [1.5 CJE]
Cheryl Howell and Judge Burnette

10:30am **Break**

10:45am **Child Support Enforcement** [2.25 CJE]
Cheryl Howell and Judge Burnette

1:00pm **Adjourn**

This program will have **14.25 hours** of instruction, all of which will qualify for general continuing judicial education credit under Rule II.C of Continuing Judicial Education. All hours count towards Family Court Hours

Tab:
Custody Jurisdiction

Child Custody Jurisdiction

Cheryl Howell
July 2023

1

Subject Matter Jurisdiction

- Cannot be conferred by consent or waiver
  - *Foley*, 156 NC App 409 (2003)
- Trial and appellate courts can review on own motion
  - *In re N.R.M.*, 598 SE2d 147 (2004)
- Order needs findings to support jurisdiction
  - *Foley; Brewington v. Serrato,* 77 NC App 726 (1985); *In Matter of E.J.*, (NC App 2013)

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Subject Matter Jurisdiction is Determined at Time of Filing

3

Personal Jurisdiction

- Long-arm statute and "minimum contacts" generally not required for custody
  - *Harris*, 104 NC App 574 (1991)
  - *Matter of F.S.T.Y.,* 374 NC 532 (2020)(no minimum contacts required for TPR)

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Statutes

- PKPA: Parental Kidnapping Prevention Act
  - 28 U.S.C. sec. 1738A
- UCCJEA: Uniform Child Custody Jurisdiction and Enforcement Act
  - G.S. 50A effective October 1, 1999
  - Incorporates PKPA requirements
  - Adopted in all states

5

Key Concepts from Statutes

- Priority of Home State Jurisdiction
- Limitation of Modification Jurisdiction
  - *Even if* original order entered in NC

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So What?

- Orders entered without subject matter jurisdiction are void *ab initio*
- Orders not entered in substantial conformity with jurisdictional requirements of PKPA and UCCJEA are not entitled to recognition in other states

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"Custody Determination"

- 50A-102(3)
  - Any order or judgment providing for legal or physical custody or visitation of a child
  - Includes permanent, temporary and modification orders

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"Custody Proceeding"

- Proceeding where custody is at issue
- Includes:
  - Divorce and separation
  - Neglect, abuse and dependency
  - Guardianship
  - TPR
  - Paternity
  - Domestic Violence Protection (50B)

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Custody Jurisdiction

- Based primarily upon past and present location of the child and the parties
- Every pleading, petition and motion in the cause dealing with custody must have information required by GS 50A-209

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Type of Proceeding Determines Jurisdiction Analysis

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3Types of Proceedings

- Initial determination
- Modification
- Enforcement

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Does NC have jurisdiction?

- Mom, dad and kids live in Florida for years
- Florida court enters custody order
- Mom and kids move to NC
- 3 weeks later, dad asks NC court to enforce visitation provisions in Florida order
  - Does NC Have Jurisdiction to Enforce the Florida order?

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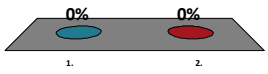
Does NC have jurisdiction?

1. Yes
2. No



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Enforcement is Easy

- States Always Have Jurisdiction to Enforce
  - Chapter 50A, Part 3 has procedure
    - AOC forms
    - CV-660 through CV-668

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No Registration Required

- There is no statute or appellate case indicating registration is required before order can be enforced
- *And see* Official Comment, GS 50A-305
  - Purpose of registration process is to allow parent to send order to state before sending child to state

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Child 'Pick-Up' Orders

- Requires a warrant pursuant to GS 50A-311
  - Goal of statute is to limit use of law enforcement
  - AOC form CV-667
- No warrant can be issued without:
  - Verified motion
  - Sworn testimony
  - Findings of fact showing:
    - Child is likely to suffer serious physical harm, or
    - Child is likely to be removed from state

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Initial Determinations

- G.S. 50A-201. NC can enter an initial order if:
  - N.C. has "Home State" jurisdiction, or
  - There is no "Home State" and NC has significant connection/substantial evidence jurisdiction, or
  - State with jurisdiction decides NC is the more convenient forum, or
  - No state has jurisdiction (default)

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Home State Jurisdiction

- State where child lived for **at least six months** immediately before the filing of the action
  - G.S. 50A-102(7)
- **Or,** state that was the home state within six months of filing, **and** one parent or person acting as a parent continues to reside in the state
  - G.S. 50A-201(a)(1)

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Significant Connection Jurisdiction

- The child and the child's parent (or person acting as a parent) have **significant connection** with the state other than physical presence, *and*
- **Substantial evidence** is available in the state concerning the child's care, protection, training and personal relationships
  - *Pheasant v, McKibben*, 100 NC App 379
  - *Holland v. Holland*, 56 NC App 96

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Initial Orders

- If NC is not the home state – need to be very cautious about jurisdiction
- If NC has jurisdiction, NC court can "give" jurisdiction:
  - To a **"more convenient forum"** G.S. 50A-207, or
  - To another state if NC court finds **"unjustifiable conduct".** G.S. 50A-208

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"More Convenient Forum"

- GS 50A-207. Court with jurisdiction may **stay** proceedings and allow another state the **opportunity to act** if upon considering statutory factors, court determines other state is the more convenient forum within which to litigate custody
- DO NOT EVER 'TRANSFER' CASE TO ANOTHER STATE

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Practice

- 2 children born in Tennessee.
- Dad moved to NC 8 months ago.
- Children "live" with mom in Tennessee:
  - attend school in Tennessee
  - spend most weekends and most holidays in NC with father and father's parents.
  - receive medical treatment both in NC and Tenn.
  - Go to church, have friends and play sports in both states.

Does NC have jurisdiction to make a custody determination?

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Does NC have jurisdiction?

1. Yes
2. No

24

Home state priority

- No
  - *Potter v. Potter*, 131 N.C. App. 1 (1998)
- Tennessee is home state, and has priority over NC's significant connection/substantial evidence

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Practice

Amy and Scott were born in South Carolina.

When Amy was 10 and Scott was 8, mom moved to NC and brought Amy with her.

Scott stayed with his father in SC.

Mom has been living in NC for 8 months.

Does NC have jurisdiction to make a custody determination?

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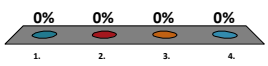
Does NC have jurisdiction

1. Yes
2. No
3. Yes for Amy but no for Scott
4. Maybe



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Practice

- Jurisdiction determined for each individual child
- NC is home state for Amy
- SC is home state for Scott
- *Beck v. Beck*, 123 N.C. App. 629 (1996)
  - But perhaps SC is the more convenient forum?

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Amy and Scott

- What if mom brought both kids to NC
- Dad stays in SC
- After 5 months, mom files in NC
  - Does NC have jurisdiction?

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Does NC have jurisdiction?

1. Yes
2. No

30

Amy and Scott

- No
  - SC remains home state for 6 months after kids leave if one parent stays in that state

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Amy and Scott

- What if mom brought both kids with her to NC
- Dad leaves SC and moves to Kentucky
- After mom is in NC for 5 months, she files for custody
  - Does NC have jurisdiction?

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Maybe?

- If NC has significant connection/substantial evidence jurisdiction, or
- SC enters order concluding NC is the more convenient forum
- Or, other grounds??

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Significant Connection Jurisdiction

- The child and the child's parent (or person acting as a parent) have significant connection with the state other than physical presence, *and*
- Substantial evidence is available in the state concerning the child's care, protection, training and personal relationships

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One more Amy and Scott

- Mom, Dad, Amy and Scott leave SC and come to NC
- After living in NC for 5 years, Mom files for custody in NC
- Mom and Dad go to mediation but nothing is resolved
- Dad moves to Kentucky; Mom and kids go back to SC
- 8 months later, dad schedules custody trial
  - Can the NC case proceed to trial?

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Can NC court proceed with trial?

1. Yes
2. No

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- Yes

Subject Matter Jurisdiction is Determined at Time of Filing

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Baby

- Child born in New York in Nov. 2004
- Mom and child move to NC in March 2005
- Dad stays in New York
- Mom files custody in NC in April 2005
  - Does North Carolina have jurisdiction?

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Infants

- 50A-102(7): for a child less than 6 months old, home state is where the child has lived since birth
- New York has home state jurisdiction because dad still there
- What if dad had left New York?

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Significant Connection Jurisdiction

- The child and the child's parent (or person acting as a parent) have significant connection with the state other than physical presence, *and*
- Substantial evidence is available in the state concerning the child's care, protection, training and personal relationships

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More practice

- Mom and dad have 3 children in custody of Virginia DSS following an adjudication of serious neglect by Virginia court.
- Mom moves to NC to live with her sister.
- Child #4 is born in NC less than a month after she moves to NC.
- When child is 2 months old, NC DSS files petition alleging neglect.
  - Does NC have jurisdiction?

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Does NC have jurisdiction?

1. Yes
2. No

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Yes

- Initial determination for this child
- NC is home state
  - Child less than 6 months, home state is where child has lived since birth

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Practice

- Both children born in NC while dad stationed at Fort Bragg. Children lived in NC several years.
- August 2005: mom and kids move to Vermont. Dad remains at Fort Bragg.
- January 2006: mom and kids come to Fort Bragg so mom and dad can have free marriage counseling.
- February 2006 (6 weeks later): mom returns to Vermont with kids. Dad then moves to Vermont.
- July 2006: mom brings kids back to NC.
- Mom files for custody in NC in November 2006 – jurisdiction ?

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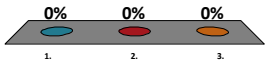
Does NC have jurisdiction

1. Yes
2. No
3. I'm confused



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Temporary absences

- Trial court and COA said No
- Vermont is home state.
- 6 weeks in NC was "temporary absence"
  - GS 50A-102(7)
  - Totality of circumstances test
- *Chick v. Chick*, 164 NC App 444 (2004); *Pheasant v. McKibben*, 100 NC App 379 (1990); *Hammond v. Hammond,* 209 NC App 616 (2012)

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Another Practice

- Pro se custody case filed in NC
- Pleadings say kids in NC 1 year
- During testimony, mom shows you a "temporary custody" order from Vermont entered 1 year ago awarding custody to her
- What do you do?

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Simultaneous Proceedings GS 50A-206

- NC court may not proceed if another state is litigating custody "in substantial conformity with" the UCCJEA
  - *Jones v. Whimper*, 736 SE2d 170 (NC 2012)
- NC court "shall stay proceedings and immediately communicate with court in other state"
- NC must dismiss unless other court determines NC is more convenient forum

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Communication Between Judges GS 50A-110

- Parties may be allowed to participate in discretion of judge
- If parties do not participate, parties must be allowed "to present facts and argument" before jurisdiction decision is made
- "Record" must be made of all communications unless dealing only with court records or scheduling

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Question

- Child born in Kentucky.
- When child is 3 months old, mom brings child to NC and dad stays in Kentucky.
- When child is 5 months old, NC DSS files petition alleging abuse and requests nonsecure custody order.
- Does NC have jurisdiction?

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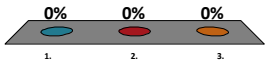
Does NC have jurisdiction

1. Yes
2. No
3. Of course, it's juvenile court



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Home state priority

- Kentucky is home state
- NC has no jurisdiction unless Kentucky decides NC is more convenient forum
- But what about protection of child?

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Emergency Jurisdiction: Grounds

- NC may exercise TEMPORARY jurisdiction if child is present in NC and:
  - Child has been abandoned, or
  - It is necessary in an emergency to protect the child because the child, *or a sibling or parent of the child*, is subjected to or threatened with mistreatment or abuse
    - GS 50A-204

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Emergency Jurisdiction: Process

- If state with jurisdiction has acted or is acting:
  - NC order must be of limited duration
  - NC court must communicate "immediately" with that court to resolve the emergency
  - "Court" means the judge and not DSS or attorney
    See In re: J.W.S., 194 NC App 439 (2008); *In re: Malone,* 129 NC App 338 (1998)
- Failure to contact immediately results in loss of subject matter jurisdiction
  - *See In re: J.W.S.,* 194 NC App 439 (2008)

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Emergency Jurisdiction: Process

- If state with jurisdiction has not acted and does not act:
  - NC order may become permanent "if it so provides".
    - *See In re M.B.*, 635 NC App 8 (2006)
  - Statute does not require communication
    - *But see Van Kooten,* 126 NC App 764

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Back to the Question

- Child born in Kentucky.
- When child is 3 months old, mom brings child to NC and dad stays in Kentucky.
- When child is 5 months old, NC DSS files petition alleging abuse and requests nonsecure custody order.
  - Does NC have jurisdiction?

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Emergency Jurisdiction

- Child is present in the state
- It is necessary in an emergency to protect the child from abuse
- Kentucky is the home state
- Kentucky is not acting and has not acted
- So temporary order can be entered
  - Include provision for order to "become permanent"?

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Emergency Jurisdiction

- Nonsecure custody order is a temporary emergency order
- Can court **adjudicate** with temporary emergency jurisdiction?
  - *Van Kooten*, 126 NC App 764 (1998)
  - *Brode*, 151 NC App 690 (2002)
  - *In re E.J.*, 738 SE2d 204 (NC App 2013)
  - *But see In re M.B.*, 179 NC App 572 (2006)???

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Amy and Scott Again…

- Amy, Scott, Mom and Dad live in SC for several years.
- Mom and dad separate; SC enters custody order
- Mom and kids move to NC
- Dad stays in SC
- After mom and kids in NC for 2 years, mom files motion to modify custody in NC
  - Does NC have jurisdiction?

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Does NC have jurisdiction?

1. Yes
2. No

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Modification Jurisdiction

- State entering initial order keeps continuing, exclusive jurisdiction until:
  - *That state* determines it no longer has significant connection/substantial evidence jurisdiction **or**
  - The parents and the child do not reside in that state
    - G.S. 50A-202 and 203

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Modification G.S 50A-203

- NC Court cannot modify order from *another state* unless:
  - No other state has continuing exclusive jurisdiction – or state with continuing jurisdiction decides NC is the more convenient forum – **AND**
  - NC has a basis for jurisdiction under GS 50A-201(a)(1)(home state) or (a)(2)(significant connection/substantial evidence)

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Amy and Scott Again…

- Amy, Scott, Mom and Dad live in SC for several years.
- Mom and dad separate; SC enters custody order
- Mom and kids move to NC
- Dad stays in SC
- After mom and kids in NC for 2 years, mom files motion to modify custody in NC
  - Does NC have jurisdiction?

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Amy and Scott

- No
- NC has no modification jurisdiction because SC has CEJ
- But, NC can modify if SC determines NC is a more convenient forum because NC now is home state

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Another Question

- Florida court declared child dependent and placed him in custody of foster parents; closed juvenile case
- Foster parents move to NC with the child. Dad remained in Florida.
- 7 months after moving to NC, foster parents file TPR petition against father in NC.
  - Does NC have jurisdiction to proceed?

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Does NC have jurisdiction?

1. Yes
2. No

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Modification

- No
- TPR would modify Florida order
- Florida has continuing exclusive jurisdiction because dad still lives there
  - *In re Bean;* 132 NC App 363 (1999); *In the Matter of N.R.M., T.F.M.,* 165 N.C. App. 294 (2004).

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What about……..

- Child born in NC
- When child is 6 years old, mom and dad begin litigating custody in NC; original custody order modified a couple of times
- Last modification entered when child is 10 years old (5 months ago)
- After last modification, mom takes child and moves to Germany; dad moves to Tennessee
- Dad files motion to modify in NC, arguing move to Germany is changed circumstances

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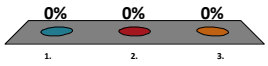
Can NC modify?

1. Of course, it's a NC order
2. No
3. Probably



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Modification G.S. 50A-202(b)

- NC court cannot modify a NC order unless:
  - NC has continuing exclusive jurisdiction (meaning party resides here and there is significant connection/substantial evidence jurisdiction) or
  - NC has initial determination jurisdiction under G.S. 50A-201

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Initial Determinations

- G.S. 50A-201. NC can enter an initial order if:
  - N.C. has "Home State" jurisdiction, or
  - There is no "Home State" and NC has significant connection/substantial evidence jurisdiction, or
  - State with jurisdiction decides NC is the more convenient forum, or
  - No state has jurisdiction (default)

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What about……..

- Child born in NC
- When child is 6 years old, mom and dad begin litigating custody in NC; original custody order modified a couple of times
- Last modification entered when child is 10 years old (5 months ago)
- After last modification, mom takes child and moves to Germany; dad moves to Tennessee
- Dad files motion to modify in NC, arguing move to Germany is changed circumstances

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??????

- NC does not have CEJ because no one lives here
- So, does NC have initial jurisdiction?
  - Is there a home state?
  - No, so we can consider significant connection/substantial evidence jurisdiction
  - Probably, but would need to make findings to support

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And another "What if"???

- What if modification motion was filed in NC after mom and kids had lived in Germany for 7 months?

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Does NC have jurisdiction to modify?

1. Yes
2. No

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Germany is the home state

- So, no modification jurisdiction in NC
- But dad argues NC the more convenient forum under GS 50A-207?
  - Will that work?

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More Convenient Forum

- Only the 'state' with jurisdiction can decide to stay its proceedings and allow another 'state' to litigate
- So, only Germany can make decision in this case because it is the home state
- STATE WITH JURISDICTION DOES NOT TRANSFER CASE TO STATE THAT IS THE MORE CONVENIENT FORUM

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Final Question

- 1996: Child born in Iowa.
- 1998: Family moved to Colorado.
- 1999: Colorado divorce judgment gives dad custody.
- 1999: Dad to Iowa with child, mom to NC.
- 2004: Child visits NC; diagnosed with post traumatic stress syndrome due to abuse by dad. Mom reports to NC DSS.
  - Can NC enter nonsecure?

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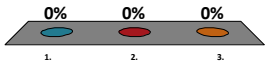
Can NC court enter nonsecure?

1. Yes
2. Yes, but only if judge calls Iowa
3. No



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Van Kooten, 126 NC App 764

- Modification
- Colorado does not have continuing exclusive jurisdiction
- But Iowa is home state
- NC can exercise emergency jurisdiction
- COA said NC court should contact Iowa to determine if Iowa willing to proceed
  - *But cf* GS 50A-204 (

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Cheryl Howell

June 2023

Child Custody Jurisdiction

Script for Online Module

https://unc.ncgovconnect.com/p65354876/

Custody Jurisdiction (1/41)
This session is intended to be an introduction to and an overview of the law relating to the subject matter jurisdiction of a North Carolina court to make a child custody determination. The law regarding subject matter jurisdiction is the same whether the child custody determination is made within the context of a child custody case filed pursuant to North Carolina General Statutes **Chapter 50,** a **juvenile abuse, neglect or dependency proceeding** brought pursuant to General Statutes Chapter 7B, a **termination of parental rights proceeding,** a **guardianship** proceeding or a request for an award of temporary child custody as part of a domestic violence protective order in a **Chapter 50B proceeding**.

Navigating the Course (2/41)
You navigate through this course using the arrows at the bottom of the screen to pause, go forward and go back. The menu to the right of the screen also allows you to move through the course. The menu to the right also allows you to read the text of this presentation if you prefer to read while you listen or if you prefer to read only and not listen to the audio. You can access the written text by clicking the "notes" button under my picture, in the top left hand corner of your screen.

Course Objectives (3/41)
It is my hope that, at the end of this program, you will be able to do each of the following:

> First, **identify the state and federal statutes** which define when a North Carolina court has subject matter jurisdiction to enter a child custody determination and when that determination will be entitled to full faith and credit by other states.
>
> Second, recognize that **North Carolina courts *always* have jurisdiction to *enforce* a child custody determination that was validly entered.**
>
> Third, identify when a North Carolina court has subject matter jurisdiction to enter an ***initial* child custody determination** regarding a particular child.

Fourth, identify when a North Carolina court has subject matter jurisdiction to ***modify*** **an existing child custody determination**.

Fifth, and finally, **exercise *emergency custody jurisdiction* in compliance with the law**.

Subject Matter vs. Personal Jurisdiction (4/41)

As we begin our discussion about child custody jurisdiction, it is important to remind ourselves about the difference between ***subject matter*** jurisdiction and ***personal*** jurisdiction. Subject matter jurisdiction defines a court's authority to exercise jurisdiction over *a particular case*, while personal jurisdiction defines a court's authority to exercise jurisdiction over *a particular person.* Generally speaking a court must have both subject matter and personal jurisdiction in a case in order for a judgment entered by the court to be valid.

Subject Matter Jurisdiction Generally (5/41)

As stated by the Court of Appeals in the case *Foley v Foley*, subject matter jurisdiction is granted by statute and generally *cannot* be conferred upon the court by the consent of the parties and parties cannot waive objection to a court's lack of subject matter jurisdiction. Orders entered without subject matter jurisdiction are void and can be vacated at any time. For example, in the case of *In Re N.R.M*., the Court of Appeals vacated a custody determination due to a lack of subject matter jurisdiction even though no party ever raised the issue of jurisdiction during the proceeding in the trial court or when the case was on appeal. According to that opinion, the Court of Appeals has the authority and *the responsibility* to review subject matter jurisdiction in every case. This means that a *trial judge* also must remember to question subject matter jurisdiction in *every* case, even if the parties are not bringing the issue to the attention of the court. In addition, all child custody orders entered by the court should contain **findings of fact** to support the conclusion of law that the court does, in fact, have subject matter jurisdiction in the case. In *Brewington v Serrato*, for example, the Court of Appeals held that orders entered without such findings of fact are not entitled to full faith and credit; other courts need to be able to see from the text of the order itself that the order was entered by a court with appropriate jurisdiction.

Subject Matter Jurisdiction - Cases (6/41)

For your reference, these are the citations to the cases I just mentioned regarding subject matter jurisdiction: *Foley v Foley*, 156 N.C. App. 409 (2003), *In Re N.R.M*., 165 N.C. App. 294 (2004) and *Brewington v Serrato*, 77 N.C. App 726 (1985).

Personal Jurisdiction Generally (7/41)

Personal jurisdiction involves both statutory and constitutional law. A court generally needs three things in order to exercise personal jurisdiction over a litigant:

> First, there must be *service of process* on the litigant in accordance with the statutory rules of civil procedure.
>
> Second, there must be specific authority to exercise jurisdiction over the litigant granted by *a long arm statute*.
>
> Third, the exercise of jurisdiction over the person must comply with the requirements of the *due process clause* of the Constitution of the United States. This due process clause requirement often is referred to as the *minimum contacts test*.

Unlike subject matter jurisdiction, a court *can* obtain personal jurisdiction over a litigant by the consent of that litigant. Similarly, a litigant can waive the right to object to personal jurisdiction by failing to object to personal jurisdiction before making a formal appearance in the case. If a litigant consents to personal jurisdiction or waives the right to object to a court's lack of personal jurisdiction, the court can proceed to litigate the case and any resulting judgment will be valid even in the absence of valid service of process, authority granted by a long-arm statute, or minimum contacts between the litigant and the state.

Personal Jurisdiction in Custody Cases (8/41)

As in all other civil cases, personal jurisdiction rules require that parties in a child custody case be served with process in accordance with the rules of civil procedure. However, the North Carolina Court of Appeals first held in the case of *Hart v. Hart*, 74 NC App 1 (1985), that the other two normal requirements for personal jurisdiction, the long arm statute and the constitutional minimum contacts test, *do not apply* in most child custody determination cases. The vast majority of courts in other states have ruled similarly. *See also* Official Comment, GS 50A-201("neither minimum contacts nor service within the state is required for the court to have jurisdiction to make a child custody determination."). [Note: Deleted 2 sentences}

Summary of Personal Jurisdiction (9/41)

So personal jurisdiction in most child custody determinations is relatively uncomplicated. As long as a party is served with process appropriately or waives service of process, requirements for personal jurisdiction are satisfied.

Subject Matter Jurisdiction (10/41)

Subject matter jurisdiction is more complicated. The remaining portion of this presentation will relate only to subject matter jurisdiction. When does a court have subject matter jurisdiction to make a child custody determination? Remember, *subject matter jurisdiction cannot be conferred upon the court by the consent of the parties*. Therefore, the consent of the parties, or the failure of the parties to object to jurisdiction, will not allow the court to enter a child custody determination when the law does not give that court jurisdiction.

State and Federal Statues (11/41)

So, where do we find the law relating to subject matter jurisdiction in custody cases? There is a uniform state law and a federal statute. The uniform state law is the **Uniform Child Custody Jurisdiction and Enforcement Act**, which I will refer to as the **UCCJEA**. The UCCJEA became law in North Carolina on October 1, 1999, and is found in North Carolina General Statues Chapter 50A, parts 1 through 3. The relevant federal statute is the **Federal Kidnapping Prevention Act**, found at 28 US Code Annotated Section 1738A. I will refer to this statue from here on out as the **PKPA.**

Federal PKPA (12/41)

The Federal PKPA is a **full faith and credit statute**. In other words, the federal statute provides the rules that must be followed in order for a child custody determination made by a court in one state to be entitled to full faith and credit in another state. The PKPA is *not* a subject matter jurisdiction statute. However, if a court order is entered in violation of the PKPA, a court in another state is not required to honor or even consider that order when the court in the other state subsequently is asked to consider custody of the child at issue.

UCCJEA (13/41)

The UCCJEA defines subject matter jurisdiction. The statute is called a *uniform law* because it is substantially similar if not identical to a model statute created by a national organization called the Uniform Laws Commissioners. As the name of the group implies, the Uniform Laws Commissioners create model statutes to address areas of the law where it is particularly important to have uniformity in the laws of the various states in order to serve a common interest. For custody determinations, uniform laws were created to discourage parents from forum shopping, running from one state to another with children in hopes of obtaining a more favorable custody decision. The goal of this particular uniform law is to designate clearly and uniformly when a state court can act in a custody matter and when it must defer to a court in another state.

PKPA (16/41)

Let's talk about the PKPA first. Congress enacted the PKPA in 1980 in response to a concern over forum shopping by parents and inconsistent custody judgments involving the same children from judges in different states. The federal act does not attempt to define the jurisdiction of state courts. However, the PKPA does provide that if its provisions are not followed, the resulting state court judgment is not

entitled to full faith and credit. The PKPA sets two primary rules: First, a state with ***home state jurisdiction*** has priority jurisdiction to enter an **initial** custody determination with regard to a particular child. It is only when there is no home state that a state court can look to the alternative grounds for exercising jurisdiction. Second, a state that enters a custody order in accordance with the provisions of the PKPA retains ***continuing exclusive jurisdiction*** to **modify** that order until certain conditions occur that will allow another state to act with regard to the child.

UCCJEA (17/41)

In 1997, the Uniform Laws Commissioners adopted the *UCCJEA* to replace an earlier version of the uniform law called the Uniform Child Custody and Jurisdiction Act, or the UCCJA. The new uniform act – the UCCJEA - incorporates and conforms to the provisions of the PKPA, something the UCCJA did not do. North Carolina adopted the UCCJEA in 1999, and *all other states* have now adopted the statute as well. It is important to remember that the UCCJEA complies with the PKPA. **The rules regarding jurisdiction and full faith & credit are now essentially the same.** For that reason and for ease of reference throughout the rest of this course, I will refer only to the provisions of the UCCJEA. Because custody cases frequently require judges in North Carolina to communicate with judges in other states, it is important to remember that all states have adopted the UCCJEA . While there may be minor differences in the statutes of various states, it is relatively safe for you to assume the law of the other state is substantially the same as the law of North Carolina.

UCCJEA (18/41)

The UCCJEA is found in **Chapter 50A** of the NC General Statues. 50A -102(3) and (4) provide a broad scope for the act by defining the term **"custody determination"** to include *any* "**judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child, including permanent, temporary, initial, and modification orders,"** and by defining the term "**child custody proceeding**" to include *any* proceeding "**in which legal custody, physical custody, or visitation with respect to a child is at issue."** The statute specifies that the term "custody proceeding" includes proceedings for **divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence.**

UCCJEA Subject Matter Jurisdiction (19/41)

Subject matter jurisdiction is determined under the UCCJEA primarily by the **past and present physical location of the child and the parties.** Because factual information regarding the past and present location of the child and the parties is necessary for a court to determine whether it has jurisdiction to proceed in particular case, GS 50A-209 requires that *every* pleading requesting a custody determination contain the information set out in that statue. The North Carolina Administration Office of the Courts has developed a form entitled **"Affidavit as to the Status of Minor Child**" to be used in custody cases to be sure the court receives all required information. This form is available online and in the clerk's office

in every county. It is Form number AOC-CV-609. Parties are not required to use the form, and many attorneys choose to include the required information in the pleading itself.

Required Information (20/41)

The following information is required by 50A-209:

the child's present address

places where the child has lived the last five years, and

the names and present addresses of the persons with whom the child has lived during that period.

In addition, the party filing the pleading must state:

whether he or she has participated in any other proceeding involving this child,

knows of any other proceeding that could affect the current proceedings, or

knows the names and addresses of any person not a party to the present action who claims right to custody.

Types of Proceedings (21/41)

The jurisdictional analysis applicable to a particular case depends on whether the party filing the pleading is requesting an ***initial determination*** of custody, ***modification*** of an existing custody determination, or ***enforcement*** of an existing custody order

Enforcement (22/41)

The analysis for enforcement is the most simple. This is because North Carolina, like every other state, **always** has subject matter jurisdiction to ***enforce*** a custody order that was validly entered, regardless of where that order was entered. The UCCJEA states this rule in G.S. 50A-303. **Part 3 of the UCCJEA** is the section of the act addressing enforcement of custody determinations and it contains detailed procedures to be used when a party wants to *register* an order from another state and detailed procedures to be used when a party wishes to *enforce* of an order from another state. The procedures for enforcement are beyond the scope of this presentation. What is important to remember at this point is that *every* state has the jurisdiction and *the obligation* to enforce orders from other states, as long as

those orders were validly entered. Validly entered means entered in accordance with the uniform jurisdictional rules of the UCCJEA and the PKPA.

Initial Determinations (23/41)

An initial proceeding is defined in GS 50A-202(8) as the *first* child custody determination regarding a particular child. 50A-201 provides that North Carolina courts have jurisdiction to enter an initial custody determination if:

> NC is the home state of the child, or was the home state of the child within six months of the filing of the action and a parent or person acting as a parent continues to reside in the state; or
>
> There is no home state and NC has significant connection substantial evidence jurisdiction; or
>
> A state with jurisdiction decides NC is a more convenient forum; or
>
> No state has jurisdiction. This is referred to as default jurisdiction.

In compliance with the PKPA, the UCCJEA sets out a clear preference that jurisdiction be exercised by the child's home state.

Home State (24/41)

Home state is defined as the state **where the child has lived at least six months immediately before the filing of the action**. GS 50A-102(7). The six month residence requirement is designed to be bright-line easy to apply rule to determine jurisdiction. The second part of the definition of home state jurisdiction found in GS 50A-201(a)(1) ["or was the home state of the child within six months of the filing of the action and a parent or person acting as a parent continues to reside in the state"] is sometimes referred to as the extended home-state rule. A state that has attained home state status for a child will remain home state for a period of time sufficient to allow a new state to attain home-state status. However, both the UCCJEA and the PKPA provide for the extended home state jurisdiction **only if one parent remains in the home state**.

No Home State (25/41)

If there is state with no home state jurisdiction in a particular case either because the child has not lived in any particular state for 6 months or because all parties have left the previous state, the court can nevertheless exercise jurisdiction if there **is no other state with home state status and North Carolina has significant connection substantial evidence jurisdiction pursuant to 50A-201(a)(2)**. To meet this jurisdiction standard the court must find two things:

> First, the child and the child's parents or person acting as a parent have **significant connections** with the state other than physical presence, and

Second there is **substantial evidence** in the state concerning the child's care, protection, training and personal relationships.

This standard is much more *subjective* than home state jurisdiction. Remember that it can only be considered if the court first concludes the child has no home state.

Appellate Opinions (26/41)

North Carolina has only two appellate opinions examining the application of significant connection/substantial evidence jurisdiction. In *Pheasent v. McKibben*, 100 NC App 379 (1990), the court found that North Carolina did have significant connection jurisdiction in a situation where the child had lived in North Carolina with his mother for 14 out of the previous 24 months. In *Holland v. Holland,* 56 NC App 96 (1982), the court determined that North Carolina did not have significant connection/substantial evidence jurisdiction where the 11-year-old child had spend the last 6 years in Georgia. In the *Holland* case, the court held that before exercising significant connection/substantial evidence jurisdiction, the trial court should conclude there is evidence in the state **beyond "the declarations of competing parents" and that there are resources of information in the state that address aspects of the child's "present or future care, protection, training, and personal relationships".**

More Convenient Forum

When a state does not have home state jurisdiction or significant connection/substantial evidence jurisdiction, the state nevertheless may obtain jurisdiction from a state with jurisdiction if the state with jurisdiction determines that the other state is the more appropriate forum within which to litigate the custody dispute. G.S. 50A-207 allows a court with jurisdiction to "decline" to exercise jurisdiction when that court determines based on factors set out in that statute that it is more appropriate for a court in another state to hear and decide the custody matter. So for example, if Tennessee is the home state of a child because the child lived in Tennessee for more than six months, but moved to North Carolina less than six months ago with mom, and dad remains in Tennessee, the Tennessee court may decide that it is more appropriate to allow North Carolina to litigate the custody issue. The Tennessee court may base that decision on number of factors, including the relative financial situations of the parties and the location of the evidence that will be necessary in a custody trial. If Tennessee makes such a determination, North Carolina will have jurisdiction to decide custody, even though Tennessee is the home state of the child.

Test Yourself (27/41)

Modification Jurisdiction (28/41)

A modification proceeding is defined by 50A-102(11) as a "custody determination that changes, replaces, or supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination."

Continuing Exclusive Jurisdiction (29/41)

The key concept in modification jurisdiction is the concept of **continuing exclusive jurisdiction** or **CEJ** for short. The concept of CEJ was created in order to limit the ability of state courts to modify custody orders validly entered in another state. **GS 50A-203 prohibits a North Carolina court from modifying an order of another state, unless the North Carolina court first determines that the state which entered the order no longer has CEJ, or the state has CEJ but has entered an order concluding North Carolina should exercise jurisdiction because it is a more convenient forum.**

CEJ (30/41)

So when does a court have CEJ? CEJ is defined in GS 50A-202. That statute provides that when a state enters an initial order, that state retains the continuing exclusive jurisdiction to modify that order until:

> ***that state*** **determines it no longer has significant connection/substantial evidence jurisdiction, or**
>
> ***any state*** **determines that none of the parties to the initial custody order or the child continue to reside in the state that entered the initial order.**

This means simply that once a court makes a custody determination, that state retains the exclusive authority to make all decisions about jurisdiction as long as one party or the child resides in that state. This doesn't necessarily mean that the state will in fact have jurisdiction in a particular case, but rather it means that the state will be the only state with authority to make a jurisdictional decision. Once all the parties and the child leave the state however, then other courts can determine if they have jurisdiction to modify an order. [Note: Deleted 2 words]

Modification Jurisdiction Example

So, for example, suppose New York entered an initial custody order regarding a child in 2010. Immediately thereafter, mom and child move to North Carolina and dad moves to Tennessee. If any action is filed seeking modification of that 2010 New York custody order, the New York court will not have CEJ because both parties and the child have left New York. However, if dad had stayed in New York rather than moving to Tennessee, the New York court would have CEJ, meaning the New York court would have the exclusive right to determine whether New York still has grounds to exercise jurisdiction at the time the motion to modify is filed. No other state court would have the authority to make that determination, as long as dad resides in New York. [deleted two words]

Modification Jurisdiction for Orders Entered in Other States (31/41)

G.S. 50A-203 provides that a North Carolina court can modify an order entered in another state only if the North Carolina judge determines:

First, that **no other state has CEJ**, or that the state with CEJ has decided North Carolina is the more convenient forum pursuant to GS 50A-207 which we discussed earlier in the context of initial jurisdiction - **and**

Second, NC **has a basis for jurisdiction under GS 50A-201(a)(1) or (a)(2)** , meaning North Carolina now is the home state, or there is no home state and North Carolina has significant connection/substantial evidence jurisdiction.

Modification Jurisdiction Example

So, returning to our previous example where the New York court entered an initial custody order in 2010. Suppose that after entry of the custody order, mom and child move to North Carolina and dad moves to Tennessee. When mom and child have lived in North Carolina for one year, mom files a motion to modify the New York custody order in a North Carolina court. In this situation, North Carolina has modification jurisdiction because first, New York does not have CEJ because all parties and the child have left that state. And second, North Carolina is now the home state of the child because the child has lived in this state for more than 6 months. The answer would be different however, if dad had stayed in New York. If dad was still in New York when mom filed the request for modification, North Carolina would not have subject matter jurisdiction to consider the modification request because New York has CEJ. In that situation, New York could decide, pursuant to the terms of GS 50A-207, that North Carolina is the more convenient forum to litigate the modification hearing. If New York declines jurisdiction in this way, North Carolina will have subject matter jurisdiction to consider the modification request.

Modification of North Carolina Orders (32/41)

A North Carolina court must consider modification jurisdiction rules even if the initial custody order was entered by a North Carolina court. GS 50A-202(b) prohibits modification of a North Carolina order by a North Carolina court unless the North Carolina court first determines that North Carolina has CEJ, meaning at least one party or the child resides here *and t*here is significant connection/substantial evidence jurisdiction. North Carolina also may have modification jurisdiction even if it does not have CEJ if North Carolina is the home state at the time the modification request is filed in North Carolina, or if there is no home state and North Carolina has significant connection/substantial evidence jurisdiction. And, as always, North Carolina can exercise jurisdiction if a state with jurisdiction has entered an order stating North Carolina is more appropriate forum for deciding custody.

Test Yourself (33/41)

Emergency Jurisdiction (34/41)

As do all laws dealing with the custody of children, the UCCJEA recognizes that there will be times when a court must be able to act to protect a child from harm, even if that court does not have jurisdiction to enter an initial order or modify an existing order. GS 50A-204 allows a court to exercise **temporary emergency jurisdiction** in certain circumstances. The official comments to that statute state that

emergency jurisdiction is ***an extraordinary jurisdiction reserved for extraordinary circumstances.*** GS 50A-204(a) allows a NC court to exercise emergency jurisdiction if two circumstances are present:

> **First**, the child is present in NC*,* and
>
> **Second**, the court determines *either* that the child has been abandoned or it is necessary in an emergency to protect child because child or sibling or parent of the child is subjected to or threatened with abuse.

Test Yourself (35/41)

Emergency Jurisdiction (36/41)

So, how does a court exercise temporary emergency jurisdiction? The procedure is set out in detail in GS 50A-204. If a state with "real" jurisdiction has acted or is acting with regard to the child, the North Carolina judge being asked to assume emergency jurisdiction must immediately communicate with the court in the other state to resolve the emergency. Returning to our earlier example, suppose New York has acted by entering a custody order in 2010 and dad remains in New York while mom and child have moved to North Carolina. Before sending child to New York to visit with dad, mom discovers child was abused by dad's new girlfriend the last time child visited New York. Mom files an action in North Carolina asking the court to modify the visitation provisions in the New York custody order. In this situation, New York has CEJ so North Carolina does not have jurisdiction to modify the New York custody order. However, based on the allegations of possible abuse and the fact that the child is present in North Carolina when the modification request was filed, the North Carolina court can exercise temporary emergency jurisdiction if the court thinks it is necessary to do so to protect the child. However, because New York has entered a custody order, meaning it "has acted" in the past and still has jurisdiction, the North Carolina court must **immediately communicate** with the New York court to determine how to best "resolve the emergency" and return the custody issue to the court with appropriate jurisdiction, in this case New York. The conversation between the North Carolina judge and the judge in New York must focus on how to protect the safety of the parties and the child and determine a period of time for the duration of the temporary emergency order. It is critical that the North Carolina judge contact the New York court as soon as possible. In the case of *In re J.W.S*, 194 NC App 439 (2008), the North Carolina Court of Appeals held that an adjudication order in a juvenile case entered by North Carolina judge was void for lack of subject matter jurisdiction where the record showed that the North Carolina judge did not make immediate contact with a New York court that had entered a temporary custody order with regard to the same child six years earlier. Also, North Carolina appellate courts have made it clear in cases such as *In re Malone*, 129 NC App 338 (1998), that *the judge* must make contact with the other court. An attorney or representative from the Department of Social Services may not perform this task on behalf of the judge.

Emergency Jurisdiction (37/41)

Any emergency order entered by a North Carolina judge after talking with a judge in the state with jurisdiction must be of limited duration. The North Carolina order must specify a period of time the court considers adequate for the person asking for emergency relief to schedule a hearing before the court in the state with jurisdiction. So returning to our example, any order entered by the North Carolina judge must expire by its own terms on a date specified in the order. The North Carolina judge will set this expiration date based on information obtained from the New York judge concerning when the New York judge will be able to hear mom's modification request.

Emergency jurisdiction (38/41)

The process is much less complicated if the state with jurisdiction has not acted in the past and is not acting at the present time. In that case, if the judge determines 1) the child is present in North Carolina, 2) there is a basis for exercising emergency jurisdiction and 3) there is no previous or ongoing custody matter in the state with jurisdiction, the North Carolina judge has no obligation to make contact with the judge in the other state, and the order entered by the North Carolina judge is not required to contain a clear termination date. GS 50A-204(b) states that a custody determination made pursuant to emergency jurisdiction when the state with jurisdiction has not acted and is not acting at present may "become a final determination if it so provides, and this state becomes the home state of the child." However, if the court with jurisdiction acts at any time before North Carolina becomes home state, then the North Carolina judge must immediately communicate with the other court. This requirement is found in 50A-204(d).

Test Yourself (39/41)

Emergency Jurisdiction (40/41)

Emergency jurisdiction is invoked most frequently in juvenile cases and most of the time in these cases a North Carolina court will have the authority to enter orders necessary to protect children. However, recent appellate case law in North Carolina has made it clear that the procedures set forth in the UCCJEA must be followed closely in order for these emergency orders to be valid in North Carolina and subject to recognition by other states.

Wrap Up (41/41)

This presentation was intended to be an introduction to the law relating to jurisdiction in court proceedings involving child custody. This is a very technical area of the law, but answers to most questions can be found within the statutory provisions of chapter 50A, the UCCJEA. In addition for your reference, a flow chart outline of this jurisdictional analysis can be found at the link below. As always, if you have any questions, feel free to contact me at the phone number or email address on the screen.

Child Custody: We Can't "Change Venue" to Another State; Determining NC is an inconvenient forum

**This is a post from October 28, 2016 that I decided to post again, with a couple of appellate case updates, due to the frequency with which I receive questions about this procedure.

I received a call once from a clerk of court asking what she should do with a voluminous court file received in the mail from a court in another state. It was a large box containing all of the pleadings, motions, reports and other filings for a custody case that had been litigated in another state for several years, accompanied by a court order signed by a judge in that other state "transferring venue" of the case to North Carolina, citing as authority that state's version of the Uniform Child Custody and Jurisdiction Act (the "UCCJEA").

Does the UCCJEA allow a judge to transfer a custody case to another state? When that clerk received the file and the order from the other state, is the North Carolina court required to act in the custody proceeding?

The answer to both of those question is no. Nothing in the UCCJEA or any other law allows a judge in one state to transfer a custody case to another state. However, we all tend to use the words 'change venue' when we are talking about GS 50A-207. That is the provision in North Carolina's version of the UCCJEA that allows a court to decline to exercise jurisdiction when it determines that North Carolina is an 'inconvenient forum' in which to litigate a pending custody issue and that another state is a more appropriate forum. A determination by a court with jurisdiction that it is an inconvenient forum has the effect of granting a basis for exercising jurisdiction to another state that would not otherwise have jurisdiction to act. *See for example,* GS 50A-201(a)(3)(North Carolina has jurisdiction to make an initial custody determination, even when it is not home state, if a court with jurisdiction determines NC is the more appropriate forum).

Similarly, GS 50A-208 also allows a court to decline to exercise jurisdiction when the court has jurisdiction due to the "unjustifiable conduct" of one party. That section will be the subject of a future blog post.

As my call from the clerk indicates, our lack of care in accurately describing the authority granted in GS 50A-207 can result in confusion and annoyance, especially to court personnel who receive the physical court files. But significant legal errors also can occur. For example, I received another call regarding a situation where a court believed that because it was transferring venue of the custody matter, it also was required to transfer all of the other issues pending in the case to the other state. This resulted in the court attempting to send claims for equitable distribution, child support and alimony to another state along with the custody matter because all of the claims had been filed in

the same action.

What does GS 50A-207 actually authorize a court to do?

A court with jurisdiction to make a child custody determination "may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum." GS 50A-207. A court may consider declining jurisdiction pursuant to GS 50A-207 when requested by a party or on the court's own motion, or when requested by the court of another State. GS 50A-207(a).

If the court declines to exercise jurisdiction, GS 50A-207(c) states that the court "*shall stay the proceeding* upon the condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper." (italics added).

The Official Comment to GS 50A-207 explains:

"[T]he court may not simply dismiss the action. To do so would leave the case in limbo. Rather the court shall stay the case and direct the parties to file in the State that has been found to be the more convenient forum. The court is also authorized to impose any other conditions it considers appropriate. This might include the issuance of temporary custody orders during the time necessary to commence a proceeding in the designated State, dismissing the case if the custody proceeding is not commenced in the other State or resuming jurisdiction if a court of the other State refuses to take the case."

See also In the Matter of M.M., 230 NC App 225 (2013) (the "shall" in GS 50A-207 means the stay is the mandatory procedure when the court determines NC is an inconvenient forum; dismissal of the case is inappropriate).

When is North Carolina an inconvenient forum?

North Carolina is an inconvenient forum when the court rules that North Carolina is an inconvenient forum and determines that another State is a more appropriate forum. GS 50A-207(b) sets forth the factors the court is required to consider to make these determinations. That statute requires that the court consider "all relevant factors", specifically including the following:

(1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(2) The length of time the child has resided outside this State;

(3) The distance between the court in this State and the court in the state that would assume

jurisdiction;

(4) The relative financial circumstances of the parties;

(5) Any agreement of the parties as to which state should assume jurisdiction;

(6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(8) The familiarity of the court of each state with the facts and issues in the pending litigation.

In order to support a determination that North Carolina is an inconvenient forum, the court must make sufficient findings of fact regarding these statutory factors. *In the Matter of M.M.*, 230 NC App 225 (2013). *See also* *Halili v. Ramnishta*, 848 S.E.2d 542 (September 1, 2020)(these statutory factors do not include the requirement that the trial court conclude litigation in another state would be in the best interest of the child).

While the court must have evidence upon which to base these findings of fact, the North Carolina Court of Appeals has held that the trial court can rely on evidence presented in the form of affidavits or verified motions to support the required findings of fact. Harter v. Eggeston, 847 S.E.2d 444 (Aug. 4, 2020).

The Official Comment to GS 50A-207 reminds us that when making this decision, the court "may communicate, in accordance with [GS 50A-110], with a court in another State and exchange information pertinent to the assumption of jurisdiction by either court."

Can a court determine NC is an inconvenient forum when there is no custody claim pending?

What if, after a custody trial is conducted in North Carolina and the court enters a custody order, one party files a motion asking that the court determine North Carolina is an inconvenient forum for any future custody issue that may arise, such as a motion to modify? Can a court determine North Carolina is an inconvenient forum outside of the context of a pending custody issue?

Our appellate courts have not answered this specific question, and GS 50A-207(a) states that the court may decline to exercise jurisdiction "at any time" it determines North Carolina is an inconvenient forum. *See also* *Halili v. Ramnishta*, 848 S.E.2d 542 (September 1, 2020)(the trial court can consider post-filing occurrences to determine that another state is a more convenient forum because the court can make this determination at any time during a pending custody action).

However, GS 50A-207 indicates that a decision about the most appropriate forum should be made only in the context of a pending request for a custody determination. The Official Comment to the statute states that the purpose of the statute is to authorize the court "to decide that another state is in a better position to make *the* custody determination*,* taking into consideration the relative circumstances of the parties." It seems obvious the drafters mean the circumstances of the parties at the time the custody determination is to be made. Similarly, several of the factors the court must consider specifically reference a pending issue; for example, (6) "the nature and location of evidence needed to resolve *the pending issue*," (7) the ability of the court of each state to *decide the issue* expeditiously," and "the familiarity if the court of each state with the facts and issues in the *pending litigation*."

Anyone familiar with custody litigation knows that it is impossible to anticipate what the circumstances of the parties will be by the time they need to return to court. The decision about the appropriate forum for litigation needs to made based upon consideration of the facts at the time the court is being asked to act.

Tab: Custody Procedural and Temp Orders

Custody Cases

Procedure and Temporary Orders

1

Custody and Child Support

- **GS 50-13.5:**
- **.....**
- "(d) Service of Process; Notice; Interlocutory Orders. -
- (1) Service of process in civil actions for the custody of minor children shall be as in other civil actions. Motions for support of a minor child in a pending action may be made on 10 days notice to the other parties and compliance with G.S. 50-13.5(e). Motions for custody of a minor child in a pending action may be made on 10 days notice to the other parties and after compliance with G.S. 50A-205.
- (2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.
- (3) A temporary order for custody which changes the living arrangements of a child or changes custody shall not be entered ex parte and prior to service of process or notice, unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse or that there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts."

2

Notice of Hearing

- **GS 50-13.5:**
- ……
- (d)(1) Service of process in civil actions for the custody of minor children shall be as in other civil actions. Motions for support of a minor child in a pending action may be made on 10 days notice to the other parties and compliance with G.S. 50-13.5(e). Motions for custody of a minor child in a pending action may be made on 10 days notice to the other parties and after compliance with G.S. 50A-205.

3

Temporary Custody

- **GS 50-13.5:**
- ……
- "(d)
- (2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.

4

Temporary Custody

- Establish the rights of parties to custody pending resolution of the claim for permanent custody
  - *Regan v. Smith* , 131 NC App 851 (1998)
- Entered when the court deems it appropriate when an action for custody is pending
  - GS 50-13.5(d)(2)
- Can be heard on affidavits alone
  - *Story v. Story*, 57 NC App 509 (1982)

5

Temporary Custody

- Trial court has authority to order physical and psychological assessment of the parties and the child pursuant to Rule 35 of the Rule of Civil Procedure, before making a final custody determination
- The court of appeals has held that the court has no authority to order assessment or counseling as part of a 'final' custody order
  - *Jones v. Patience*, 121 NC App 434 (1996)(problems after entry of final order may be grounds for modification)
  - *But cf. Maxwell v. Maxwell*, 212 NC App 614 (2011)(trial court has broad authority to order mental health evaluation of parent before ordering visitation for a parent when there is evidence of domestic violence)

6

Consider……

- Complaint filed by mom for custody of child
- Mom asks for temporary and permanent custody
- Also requests ex parte "status quo" order, telling you she has primary physical custody of child
- Do you grant her request?????????

7

Custody and Child Support

- **GS 50-13.5:**
- **……**
- "(d) Service of Process; Notice; Interlocutory Orders. -
- (1) Service of process in civil actions for the custody of minor children shall be as in other civil actions. Motions for support of a minor child in a pending action may be made on 10 days notice to the other parties and compliance with G.S. 50-13.5(e). Motions for custody of a minor child in a pending action may be made on 10 days notice to the other parties and after compliance with G.S. 50A-205.
- (2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.
- (3) A temporary order for custody which changes the living arrangements of a child or changes custody shall not be entered ex parte and prior to service of process or notice, unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse or that there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts."

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Ex Parte Custody

- "(3) A temporary order for custody which changes the living arrangements of a child or changes custody shall not be entered ex parte and prior to service of process or notice, unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse or that there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts."

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Ex parte Custody

- "Temporary orders may be entered ex parte under appropriate circumstances."
  - *Regan v. Smith*, 131 NC App 851 (1998)
  - *Brandon v. Brandon*, 10 NC App 457 (1971)(okay when mom shown "not suitable to exercise custody")
  - *Story v. Story*, 57 NC App 509 (1982)

10

Hearing after *ex parte*???

- Yes, definitely
  - Due Process
- No time set in statute or case law
- Ex parte custody is not a Rule 65 TRO – it does not expire after 10 days unless it explicitly states that it does
  - *Campen v. Featherstone*, 150 NC App 692 (2002)
- What do you do at the hearing?
  - *Ex parte* order is a temporary order pursuant to authority in GS 50-13.5(d)
  - Court to enter temporary order "as circumstances render appropriate"
  - Order entered after hearing is not ex *parte*

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

- "§ 50-13.5. Procedure in actions for custody or support of minor children.

  (d) Service of Process; Notice; Interlocutory Orders. – ….

  - (3) … **A temporary custody order that requires a law enforcement officer to take physical custody of a minor child shall be accompanied by a warrant to take physical custody of a minor child as set forth in G.S. 50A-311**."

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Duration/Number of Orders

- "It is the public policy of this State that in all cases where it is practicable, child custody orders should entered as permanent or final to avoid the turmoil and insecurity that children face from constant litigation of their custody status"
  - *Simmons v. Arriola*, 160 NC App 671, 675 (2003)

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Consider…….

- Order states that 'permanent' primary physical custody is with mom
- No future hearing scheduled or contemplated
- Dad ordered to have psychological evaluation
- No visitation schedule to be set until after evaluation
- After evaluation, dad files motion to modify primary physical custody
- ??????????????

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Temporary or Final?

- Temporary orders can be modified for any reason
  - 'Final' order modified only upon substantial change in circumstances
- Temporary orders cannot be appealed
  - Permanent order can be appealed immediately
- Temporary orders go away if case is dismissed
  - 'Final' orders cannot be dismissed by parties
- UCCJEA jurisdiction
  - If last order was 'final', need modification jurisdiction

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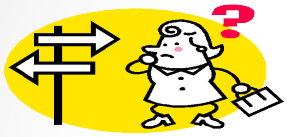
Is it temporary or final?



- It doesn't matter what it says it is……..
- If it resolves all issues and has no "reconvening date," it is not temporary
- Temporary if:
  - Entered "without prejudice" to either party
  - States reconvening time in the relatively near future, or
  - Does not resolve all issues

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Temporary may not remain temporary……

- Temporary custody "is not designed to remain in effect for extensive periods of time or indefinitely."
  - *LaValley v. LaValley*, 151 NC App 290 (2002)
- Temporary order will 'convert' to a final order if neither party seeks a final determination within a reasonable time after entry of the temporary order
  - 'reasonable' time determined on a case-by-case basis
  - Cases listed on Bench Book, Family Law, p. 4-20 through 4-21

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Deployed Parents Custody and Visitation Act

- GS 50A-350, et. seq.
- Effective October 1, 2013
- Allows temporary custody during deployment
  - By agreement of the parties
    - If it modifies existing court order, agreement must be filed
  - By court order
  - Both terminate upon end of deployment

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Help in Custody Cases

- Custody mediation
  - Whenever it appears to the court there is an issue regarding custody
    - GS 50-13.1
  - Results in "Parenting Agreement"
- Physical and psychological examinations
  - Rule 35 of Rules of Civil Procedure
- Rule 17 GAL for the child
  - Must give instructions to the GAL
- Appointment of experts
  - Custody evaluations
  - Rule of Evidence 706
- Parenting Coordinators
  - GS 50-91

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Hearing from the kids….

- In chambers interview
  - Only if both parents agree
  - Court can make findings based on conversation
    - Dreyer v. Goodson, 163 NC App 155
- In court
  - Can consider child's preference for custody if child is of suitable age
  - Should give preference of child 'considerable weight', but……
  - Court has discretion to refuse to hear from child

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Appeals

- Interlocutory appeal
  - Inappropriate interlocutory appeal does not take away jurisdiction
  - But appropriate interlocutory appeal does
    - *See Smith v. Barbour*, 154 NC App 402 (2004)
- Can enforce custody order during an appeal
  - GS 50-13.3(a)

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Other issues…..

- Attorney fees
  - GS 50-13.6
    - Reasonable fee allowed to party acting in good faith who has insufficient means to defray the expense of the suit
  - Blog post: https://civil.sog.unc.edu/attorney-fees-in-custody-actions/
- Enforcement
  - GS 50-13.3
    - Custody order is enforced by civil contempt; violation of order is punished by criminal contempt
  - Blog post: https://civil.sog.unc.edu/enforcing-custody-orders-civil-contempt-is-not-always-the-appropriate-remedy/

22

§ 50-13.5. Procedure in actions for custody or support of minor children.

(a) Procedure. - The procedure in actions for custody and support of minor children shall be as in civil actions, except as provided in this section and in G.S. 50-19. In this G.S. 50-13.5 the words "custody and support" shall be deemed to include custody or support, or both.

(b) Type of Action. - An action brought under the provisions of this section may be maintained as follows:

(1) As a civil action.

(2) Repealed by Session Laws 1979, c. 110, s. 12.

(3) Joined with an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(4) As a cross action in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(5) By motion in the cause in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(6) Upon the court's own motion in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(7) In any of the foregoing the judge may issue an order requiring that the body of the minor child be brought before him.

(c) Jurisdiction in Actions or Proceedings for Child Support and Child Custody. -

(1) The jurisdiction of the courts of this State to enter orders providing for the support of a minor child shall be as in actions or proceedings for the payment of money or the transfer of property.

(2) The courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child under the provisions of G.S. 50A-201, 50A-202, and 50A-204.

(3) to (6) Repealed by Session Laws 1979, c. 110, s. 12.

(d) Service of Process; Notice; Interlocutory Orders. -

(1) Service of process in civil actions for the custody of minor children shall be as in other civil actions. Motions for support of a minor child in a pending action may be made on 10 days notice to the other parties and compliance with G.S. 50-13.5(e). Motions for custody of a minor child in a pending action may be made on 10 days notice to the other parties and after compliance with G.S. 50A-205.

(2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.

(3) A temporary order for custody which changes the living arrangements of a child or changes custody shall not be entered ex parte and prior to service of process or notice, unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse or that there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts. A temporary custody order that requires a law enforcement officer to take physical custody of a minor child shall be accompanied by a warrant to take physical custody of a minor child as set forth in G.S. 50A-311.

(e) Notice to Additional Persons in Support Actions and Proceedings; Intervention. -

(1) The parents of the minor child whose addresses are reasonably ascertainable; any person, agency, organization or institution having actual care, control, or custody of a minor child; and any person, agency, organization or institution required by court order to provide for the support of a minor child, either in whole or in part, not named as parties and served with process in an action or proceeding for the support of such child, shall be given notice by the party raising the issue of support.

(2) The notice herein required shall be in the manner provided by the Rules of Civil Procedure for the service of notices in actions. Such notice shall advise the person to be notified of the

name of the child, the names of the parties to the action or proceeding, the court in which the action or proceeding was instituted, and the date thereof.

(3) In the discretion of the court, failure of such service of notice shall not affect the validity of any order or judgment entered in such action or proceeding.

(4) Any person required to be given notice as herein provided may intervene in an action or proceeding for support of a minor child by filing in apt time notice of appearance or other appropriate pleadings.

(f) Venue. - An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides, except as hereinafter provided. If an action for annulment, for divorce, either absolute or from bed and board, or for alimony without divorce has been previously instituted in this State, until there has been a final judgment in such case, any action or proceeding for custody and support of the minor children of the marriage shall be joined with such action or be by motion in the cause in such action. If an action or proceeding for the custody and support of a minor child has been instituted and an action for annulment or for divorce, either absolute or from bed and board, or for alimony without divorce is subsequently instituted in the same or another county, the court having jurisdiction of the prior action or proceeding may, in its discretion direct that the action or proceeding for custody and support of a minor child be consolidated with such subsequent action, and in the event consolidation is ordered, shall determine in which court such consolidated action or proceeding shall be heard.

(g) Custody and Support Irrespective of Parents' Rights Inter Partes. - Orders for custody and support of minor children may be entered when the matter is before the court as provided by this section, irrespective of the rights of the wife and the husband as between themselves in an action for annulment or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(h) Court Having Jurisdiction. - When a district court having jurisdiction of the matter shall have been established, actions or proceedings for custody and support of minor children shall be heard without a jury by the judge of such district court, and may be heard at any time.

(i) District Court; Denial of Parental Visitation Right; Written Finding of Fact. - In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

(j) Custody and Visitation Rights of Grandparents. - In any action in which the custody of a minor child has been determined, upon a motion in the cause and a showing of changed circumstances pursuant to G.S. 50-13.7, the grandparents of the child are entitled to such custody or visitation rights as the court, in its discretion, deems appropriate. As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights. (1858-9, c. 53, s. 2; 1871-2, c. 193, ss. 39, 46; Code, ss. 1292, 1296, 1570, 1662; Rev., ss. 1567, 1570, 1854; 1919, c. 24; C.S., ss. 1664, 1667, 2242; 1921, c. 13; 1923, c. 52; 1939, c. 115; 1941, c. 120; 1943, c. 194; 1949, c. 1010; 1951, c. 893, s. 3; 1953, cc. 813, 925; 1955, cc. 814, 1189; 1957, c. 545; 1965, c. 310, s. 2; 1967, c. 1153, s. 2; 1971, c. 1185, s. 24; 1973, c. 751; 1979, c. 110, s. 12; c. 563; c. 709, s. 3; 1981, c. 735, s. 3; 1983, c. 587; 1985, c. 575, s. 4; 1987 (Reg. Sess., 1988), c. 893, s. 3.1; 1999-223, ss. 11, 12; 2017-22, s. 2.)

Attorney Fees in Child Custody Actions

As I mentioned in an earlier post, parties to civil actions are responsible for paying their own attorneys' fees unless a statute specifically permits fee shifting. In child custody actions, G.S. 50-13.6 allows a court to shift some or all of one party's fees to the other party under certain circumstances. The statute provides that:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit.

If the grounds for entitlement are met, awarding the fee is still in the court's discretion, as is the amount awarded. Our courts have made clear, however, that fee orders will be remanded if they do not include specific findings of fact as to both entitlement and reasonableness. I discuss the required findings below.

Policy. The purpose of the fee-shifting provision in 50-13.6 is not to act as sanction against the party ordered to pay the other's fees. Instead, it is to help level the playing field for a party at a financial disadvantage in litigating custody of a child. As our Supreme Court has said, the statute helps make it possible for a party "to employ adequate counsel to enable [him or her], as litigant, to meet [the other party] in the suit." *Taylor v. Taylor*, 343 N.C. 50 (1996). For this reason, fee eligibility does not depend on the outcome of the case. Fees are available even to a party who does not prevail, as long as he or she participated in good faith. *Hausle v. Hausle*, 226 N.C. App. 241 (2013).

Scope. The statute applies in custody and child support actions and actions to modify or revoke existing orders in such cases. The Court of Appeals has also applied it in contempt actions brought to enforce child custody and support orders. *Wiggins v. Bright*, 198 N.C. App. 692 (2009). An award can also include fees incurred during appeal of these matters. *McKinney v. McKinney*, 228 N.C. App. 300 (2013).

***Required Findings*.** There are specific findings of fact that must be included in the attorney fee order. There must be findings to show the movant's entitlement to the fee, and then the court must make findings to support the reasonableness of the amount awarded. *Cunningham v. Cunningham*, 171 N.C. App. 550 (2005). If the judge opts to deny an attorney fee, the court must still make findings of fact adequate to show the basis for its denial. *Diehl v. Diehl*, 177 N.C. App. 642 (2006). [Note: Those of you already familiar with G.S. 50-13.6 will recall that the statute goes on to require an additional finding about adequate support. That finding applies in *child support only* cases, which are not the focus of this blog post.]

Entitlement to Fees. Fees may only be awarded to "an interested party acting in good faith who has insufficient means to defray the expense of the suit." A court's determination of these factors is reviewed *de novo* on appeal. *Hudson v. Hudson*, 299 N.C. 465 (1980).

- *"Interested party*". In most cases the "interested party" will be one parent or the other, but it also applies to intervenors, such as the grandparents seeking to enforce visitation in *Smith v. Barbour*, 195 N.C. App. 244 (2009), and to the custody-seeking foster parents in *In re Baby Boy Scearce*, 81 N.C. App. 662 (1986).

- *"Acting in good faith"*. In most custody actions this issue will not be hotly contested, and a straightforward finding that the movant was "acting in good faith" in seeking custody is likely to suffice. The Court of Appeals has said that a party acts in good faith in a custody action "by demonstrating that he or she seeks custody in a genuine dispute with the other party." *Setzler v. Setzler*, 781 S.E.2d 64 (2015). In *Setzler*, the Court of Appeals rejected an argument that a movant lacked good faith in seeking more time with her children merely because she had struggled with drug addiction and "should know that she is a poor parent." The court explained that, "[t]o support such an outcome would be to negate the efforts made by parents, such as defendant, to correct previous mistakes and become better parents and would serve to bar such parents from bringing custody actions." *Id.* at 66.

- *"Hav[ing] insufficient means to defray expense of suit"*. It is not enough for the order to make a conclusory statement reflecting this statutory language. *See Dixon v. Gordon*, 223 N.C. App. 365 (2012). The order must include specific findings that show how the court reached its determination, and those findings must be supported by evidence in the record. If the record does not already include detailed financial information about the movant (such as in a custody-only action), that information should be included with the fee motion. The court should start by examining the movant's income and expenses. *See Hinshaw v. Kuntz*, 234 N.C. App 502 (2014) (movant's monthly surplus of $4400 was enough to show she was able to pay attorney fees). If the income/expense figures show that the movant cannot pay fees, the court must also look to whether the movant has a separate estate or other assets that could be used to cover them. *See, e.g.*, *Respess v. Respess*, 232 N.C. App. 611 (2014) (error not to consider movant's estate and assets); *Bookholt Bookholt*, 136 N.C. App. 247 (1999) (error not to consider movant's separate $88,000 estate). If there is indeed a separate estate, the question for the court is whether it would be "unreasonably depleted" by paying the fees. Total depletion is not required. *Taylor*, 343 N.C. 50 (1996). In assessing unreasonable depletion, the court is *not* required to consider and make findings about the *non-movant's* assets and estate. *Id.*; *Loosvelt v. Brown*, 235 N.C. App. 88 (2014). But neither is the judge "placed in a straightjacket" in this respect, and in appropriate circumstances the judge is permitted to make this comparison if necessary. *Van Every v. McGuire*, 343 N.C. 58 (1998).

Reasonableness of Fees. The amount of reasonable attorney fees awarded is reviewed for abuse of discretion. It is clear, however, that in supporting a "reasonable" fee award, the court must make findings of fact as to the nature and scope of legal services rendered; attorney skill and time required; and the attorney's hourly rate and reasonableness in comparison to others. *Simpson v. Simpson*, 209 N.C. App. 320 (2011). A judge who witnessed hearings or the trial of a custody matter is in a good position to assess the skill and effectiveness of the attorney. But in almost every case, the trial court will also require the attorney for the movant to submit an affidavit that sets out facts to support each of the reasonableness factors. If an affidavit fails to state that the attorney's hourly rate is reasonable in comparison to other rates in the area, the judge is permitted—although by no means required—to take judicial notice of a reasonable rate (if the judge in fact has such knowledge). The Court of Appeals has "stress[ed], nonetheless, that the better practice is for parties to provide evidence of the customary local rate[.]" *Id*. And what if the attorney's affidavit does make the proper averment, but the court is unconvinced? The judge of course is not required to accept the statement on its face. Some judges may also require supporting affidavits from other local attorneys, and those affidavits will be similarly scrutinized. In the end, a judge may effectively reduce the hourly rate by calculating a fee based on a rate the judge knows to be reasonable.

Accompanying a fee affidavit should also be a detailed timesheet or invoice that breaks down the work performed, when, and by whom. A timesheet that merely set forth dates and hours spent working for the movant, but which provided no descriptions of the work performed, was not adequate to support a fee award. *Davignon v. Davignon*, 782 S.E.2d 391 (2016).

An award under this statute may include *only* fees incurred in pursuing the child custody and support claims. *See Robinson v. Robinson*, 210 N.C. App. 319 (2011) (error not to cull out fees related to equitable distribution claim); *Cunningham*, 171 N.C. App. 550 (2005) (error to include fees related to TPR action). At a minimum, then, the movant in a multi-claim action should provide time records that allow the court to see what time was spent on the relevant claims.

If a party seeks fees for paralegal time spent doing legal work, the court has discretion to award such fees as part of the attorney fees, but the court is not required to do so. (See my post about this here.)

And finally, a fee is not unreasonable merely because the movant's fees exceeded the other party's. The court's order should be based on the reasonableness factors listed above, and should not "gauge[d] by the fees charged to the other side." *Kuttner v. Kuttner*, 193 N.C. App. 158 (2008).

What the law says about ex parte custody orders

While there are no doubt numerous *ex parte* custody orders entered by North Carolina courts daily throughout the state, there is very little appellate guidance regarding the circumstances under which such orders are appropriate and regarding the procedure that should be followed after such an order has been entered. Because these orders are interlocutory and not subject to immediate appeal, we probably never will have much case law to direct us.

What we do know - an *ex parte* order is a temporary custody order

It may seem obvious, but it is important to recognize that *ex parte* custody orders simply are temporary custody orders entered as the result of an *ex parte* procedure. *See Campen v. Featherstone*, 150 NC App 692 (2002)(*ex parte* custody order is not a Rule 65 TRO; it is a temporary custody order authorized by GS 50-13.5(d)). Temporary custody orders are orders that establish a party's right to custody pending the resolution of a claim for permanent custody. *Regan v. Smith*, 131 NC App 851 (1998).

This means there is not an independent cause of action for emergency *ex parte* custody outside of the context of a custody action brought pursuant to GS 50. [The authority of a court to issue *ex parte* orders in juvenile or Chapter 50B domestic violence proceedings is beyond the scope of this post]. In other words, a court has no authority to consider a request for an *ex parte* custody order unless a party has filed a complaint for custody or a motion to modify an existing custody order.

An *ex parte* procedure is a procedure conducted with fewer than all the parties to the lawsuit having the opportunity to participate. *See* Black's Law Dictionary. Because of principals of basic due process*, ex parte* procedures are not favored in the law. *See generally Peace v. Employment Sec. Comm'n*, 349 NC 315 (1998)("The fundamental premise of procedural due process is notice and the opportunity to be heard."). The Code of Judicial Conduct prohibits judges from engaging in *ex parte* procedures unless expressly authorized by law. Code of Judicial Conduct, Canon 3A(4).

Statutory authorization for temporary orders

G.S. 50-13.5, titled "Procedure in actions for custody or support of minor children," contains the only statutory authority for temporary custody orders in Chapter 50 custody cases. The statute states in part:

"(d) Service of Process; Notice; Interlocutory Orders. -

(1) Service of process in civil actions for the custody of minor children shall be as in other civil actions. … Motions for custody of a minor child in a pending action may be made on 10 days notice to the other parties and after compliance with G.S. 50A-205.

(2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided."

The court of appeals has held that section (b)(2) of GS 50-13.5 authorizes the court to enter temporary custody orders. *Regan v. Smith*, 131 NC App 851 (1998); *Story v. Story*, 57 NC App 509 (1982); *Brandon v. Brandon,* 10 NC App 457 (1971).

The court of appeals also has held that GS 50-13.5(b)(2) authorizes the court to enter temporary orders *ex parte* under certain circumstances. *Story v. Story*, 57 NC App 509 (1982) and *Brandon v. Brandon,* 10 NC App 457 (1971).

When can a court issue a temporary order?

GS 50-13.5(d)(2) allows the entry of a temporary custody order whenever the court has "gain[ed] jurisdiction of the minor child" and the court determines that "the circumstances of the case render it appropriate." The statute appears to be broad; granting the court authority to issue temporary orders any time a custody issue is pending before the court (so the court has gained jurisdiction over the child) and the court determines it appropriate to do so.

A court can enter a temporary custody order on affidavits alone. *Story v. Story*, 57 NC App 509 (1982). A court can alter or amend a temporary order whenever the court determines it is in the best interest of the child(ren) to do so, *Gary v. Bright*, 231 NC App 207 (2013)(the court is not required to find there has been a substantial change in circumstances before modifying a temporary order), and there is no limit on the number of temporary orders a court can enter in an individual custody case.

When can a court issue a temporary order *ex parte*?

The court of appeals stated in *Brandon v. Brandon,* 10 NC App 457 (1971), and again in *Story v. Story*, 57 NC App 509 (1982), that the general authority for temporary orders found in GS 50-13.5(d)(2) also authorizes the court to enter temporary orders *ex parte* in certain circumstances. *Story* does not offer any guidance on when it is appropriate for the court to act *ex parte*, but the court in *Brandon* held that an *ex parte* order entered in that case was appropriate where father alleged in his complaint for custody facts indicating mom was not suitable to exercise custody of the child.

Neither of these cases nor any other appellate opinions offer guidance on whether the law authorizes "status quo" *ex parte* custody orders common in some judicial districts in North Carolina. A "status quo" *ex parte* custody order is one where the court grants temporary custody *ex parte* to the party filing an initial complaint for custody when that party asks the court for a temporary order to maintain the existing custody arrangement of the parties while the custody claim is litigated.

These requests generally do not include allegations of exigent circumstances requiring immediate action other than the requesting party's desire to maintain what the party contends is the 'status quo' custody arrangement.

GS 50-13.5(d)(2) clearly gives the court broad authority to enter temporary orders whenever the court determines "the circumstances of the case render it appropriate." However, the general rule that *ex parte* procedures are not favored in the law absent exigent circumstances suggests such 'status quo' *ex parte* orders are not appropriate absent some allegation of circumstances related to the welfare of the child(ren) that justify the entry of an order before offering all parties the opportunity to be heard on the request for temporary custody.

Explicit limitation on *ex parte* orders that change the child's living arrangement

In S.L. 1987 sec. 893, effective October 1, 1988, the General Assembly added the following section to GS 50-13.5(d):

(3) A temporary order for custody which changes the living arrangements of a child or changes custody shall not be entered ex parte and prior to service of process or notice, unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse or that there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts. A temporary custody order that requires a law enforcement officer to take physical custody of a minor child shall be accompanied by a warrant to take physical custody of a minor child as set forth in G.S. 50A-311." [the last sentence relating to law enforcement was added by S.L. 2017-22, s.2].

While there are no appellate opinions interpreting this provision in the statute, the intent of the amendment clearly was to restrict the court's ability to enter temporary orders *ex parte* that change a child's living arrangement or change custody of a child to allow for such orders only under the circumstances set forth in the statute.

How long do *ex parte* orders last?

The court of appeals has rejected an argument that an *ex parte* custody order expires automatically after 10 days. In *Campen v. Featherstone*, 150 NC App 692 (2002), father argued that a court's authority to enter an *ex parte* custody order is based on Rule 65 of the Rules of Civil Procedure which authorizes *ex parte* temporary restraining orders. Because Rule 65 specifies that *ex parte* TROs expire after 10 days, father argued that *ex parte* custody orders also expire. The court of appeals rejected his argument, holding that *ex parte* custody orders are not Rule 65 TROS but are temporary custody orders entered pursuant to GS 50-13.5(d). As that statute contains no explicit expiration date for these orders, there is no automatic expiration. Presumably this means the order entered *ex parte* will remain in effect until the trial court terminates it or modifies it with a new temporary custody order entered after all parties have been given an opportunity to be heard.

What is the issue before the court at the hearing held after the entry of an *ex parte* order?

While an *ex parte* custody order does not automatically expire, due process requires that the court provide all parties with notice and an opportunity to be heard on the issue of temporary custody as soon as possible after an *ex parte* is entered. *See Peace v. Employment Sec. Comm'n*, 349 NC 315 (1998)("The fundamental premise of procedural due process is notice and the opportunity to be heard."). Many districts in North Carolina schedule "return" hearings within 10 days after an *ex parte* order has been issued.

The only issue before the court at this hearing is the moving party's request for a temporary custody order. There simply is no reason related to the custody matter to return to the issue of whether circumstances justified the issuance of the *ex parte* order as the court already addressed that issue when the court issued the *ex parte* order. [Of course, the court may examine the circumstances under which the *ex parte* order was entered for other reasons. *See for example Lamm v. Lamm*, 210 NC App 181 (2011)(Rule 11 sanctions upheld where mother obtained an *ex parte* custody order based on allegations found to have no basis in fact).]

Instead, once all parties to the custody case have been afforded notice of the request for temporary custody and the opportunity to be heard on the request, the court can proceed to determine whether the entry of a temporary order is appropriate under the circumstances pursuant to GS 50-13.5(d)(2).

More on Law Enforcement Involvement in Custody Cases

More on Law Enforcement Involvement in Custody Cases

In my earlier blog post, Ordering Law Enforcement Officers to Enforce a Child Custody Order, Jan. 15, 2016, I discussed North Carolina case law indicating that a trial court's authority to order law enforcement to assist in the enforcement of a child custody order is very limited. The General Assembly recently enacted legislation to clarify that the warrant provision in GS 50A-311 is a tool available to trial court judges seeking to enforce North Carolina custody orders as well as orders issued in other states and countries.

NC Case Law

In re Bhatti, 98 NC App 493 (1990) and *Chick v Chick*, 164 NC App 444 (2004), both reversed trial court orders requiring that law enforcement officers "assist" in the enforcement of a custody order. In both of those situations, the custody orders being enforced were issued by courts in other states. The court of appeals held in both cases that the trial court had no authority to order law enforcement to assist, noting that GS 50-13.3 provides that custody orders are enforceable through "traditional contempt proceedings." The court in *Chick* acknowledged GS 50A-311, a provision in the Uniform Child Custody Jurisdiction and Enforcement Act (the UCCJEA) which allows a court to issue a warrant directing law enforcement to take physical custody of a child when a child is in imminent danger or likely to be removed from the state, but held that the trial court in that case had not made the findings of fact required to invoke the authority in that statute. In both *Bhatti* and *Chick* the court of appeals stated "we [are] unaware of any statutory basis for invoking the participation of law enforcement officers in producing the children."

GS 50A-311 Warrant for Physical Custody

In that earlier blog post, I suggested that the warrant provision in GS 50A-311 could be interpreted to apply to cases involving North Carolina custody orders rather than limited to the enforcement of out of state orders. However, many attorneys, judges, and law enforcement officers remained uncertain that this provision in Part 3 of the UCCJEA, the part of the UCCJEA clearly addressing primarily the enforcement of custody orders from other states and countries, could be read broadly to apply to North Carolina orders. This lack of clarity was especially troubling to law enforcement officers, who need to know their authority to act in these cases is unambiguous and firmly grounded in the law. The recent legislative amendment appears to resolve the issue.

The Legislative Amendment

S.L. 2017-22 (S53) applies to orders entered on or after Oct. 1, 2017 and amends GS 50-13.5(d)(3) to state that:

"A temporary custody order that requires a law enforcement officer to take physical custody of a minor child shall be accompanied by a warrant to take physical custody of the child as set forth in GS 50A-311."

In addition, the legislation also amends GS 50A-311 to clarify that:

"An officer executing a warrant to take physical custody of the child, that is complete and regular on its face, is not required to inquire into the regularity and continued validity of the order. An officer executing the warrant pursuant to this section shall not incur criminal or civil liability for its due service."

The process for issuing a GS 50A-311 warrant

The amendment appears to provide that a trial court can order law enforcement to take physical custody of a child to enforce a temporary custody order if the court issues a warrant pursuant to the provisions in GS 50A-311. That statute provides that a petitioner seeking enforcement of a child custody determination "may file a verified application for the issuance of a warrant to take physical custody of the child if the child is immediately likely to suffer serious physical harm or be removed from this State." The warrant may be issued "[i]f the court, ***upon the testimony*** of the petitioner or other witness, finds that ***the child is imminently likely to suffer serious physical harm or be removed from this State***".

So the statute does not allow the warrant to be issued upon affidavits or verified pleadings alone. Instead, the court must receive actual testimony about the need for the warrant and the warrant may issue only if the court concludes the child is in imminent danger of serious physical harm or removal from the state.

If the warrant is issued, GS 50A-311 appears to require an expedited hearing. The statute states that upon issuance of the warrant, the petition seeking enforcement of the custody order "must be heard on the next judicial day after the warrant is executed unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible."

The warrant itself must:

"(1) Recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based;

(2) Direct law enforcement officers to take physical custody of the child immediately; and

(3) Provide for the placement of the child pending final relief."

In addition, the warrant can order "conditions upon placement of a child to ensure the appearance

of the child and the child's custodian."

The statute provides that a warrant to take physical custody of a child is enforceable throughout this State and specifies that "[i]f the court finds on the basis of the testimony of the petitioner or other witness that a less intrusive remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law enforcement officers to make a forcible entry at any hour."

Enforcing custody orders: civil contempt is not always the appropriate remedy

GS 50-13.3 provides that an order for custody is enforced by civil contempt and its disobedience is punished by criminal contempt. This statute mirrors case law regarding contempt; civil contempt is to force present compliance with an order and criminal contempt is to punish a past failure to comply and to discourage future noncompliance.

This distinction between civil and criminal contempt has been described by appellate courts as "murky at best," and recent cases from the North Carolina Court of Appeals illustrate that contempt can be particularly difficult to apply correctly in custody cases. Most importantly however, these cases indicate that civil contempt probably is not an appropriate remedy for the most common enforcement issues that arise in custody cases.

Civil vs. Criminal Contempt: Kolczak v. Johnson

In theory, civil contempt is straightforward. The court orders a party to act but the party willfully fails to act. The court holds the party in civil contempt, ordering the party incarcerated until civil contempt is lifted by the party's compliance with the court order. The only remedy authorized by GS 5A-21 for civil contempt is incarceration until compliance. Civil contempt is appropriate only when the party has the actual present ability to comply with the terms of the court order at the time the court holds the party in civil contempt. In other words, the party held in civil contempt must "hold the keys to the jail" so he can free himself at any point in time simply by complying with the court order.

In Kolczak v. Johnson, 817 SE2d 861 (NC App July 3, 2018), the trial court held mother in civil contempt for violating terms of a custody order. The court of appeals held that the findings of fact and evidence supported the trial court's conclusion that mother had willfully violated the terms of the order by:

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

Despite agreeing with the trial court that mother willfully violated the custody order, the court of appeals reversed the civil contempt order because it did not contain a purge condition indicating

how mother could take herself out of civil contempt. Significantly, the court of appeals refused to remand the case to the trial court for the imposition of a purge condition because the court concluded that it was not "apparent how an appropriate civil purge condition could coerce the defendant to comply with the court order as opposed to punishing her for a past violation." In other words, the trial court could not order mother incarcerated until she complies with these provisions in the custody order because they were not things she could do immediately to take herself out of contempt. In a footnote, the court of appeals stated that this situation was more appropriate for criminal contempt than civil.

When children refuse to visit

Appellate opinions also illustrate that it can be extremely difficult to find a parent in civil contempt when it is the child rather than the parent who refuses to comply with the terms of the custody order. In such cases, a parent generally cannot be shown to be willfully refusing to comply with an explicit provision or directive to that parent in the custody order. S*ee e.g. McKinney v. McKinney,*799 SE2d 280 (NC App 2017); *Hancock v. Hancock,* 122 NC App 518 (1996). Even if a parent has failed to comply with a specific directive in the past, those situations more often resemble the situation in *Kolczak* where criminal contempt is the more appropriate remedy.

In the most recent case involving a child's refusal to comply with the custody order, Grissom v. Cohen, _ N.C. App. _, S.E.2d (October 2, 2018), mother alleged that her 17 year-old daughter refused to return to her custody due to father's failure to impose consequences on the child for refusing to return to mother and due to his alienating behavior. Along with other remedies, mother requested that the court hold father in civil contempt.

The trial court concluded father was not in civil contempt and the court of appeals affirmed. Both courts rejected mother's argument that the custody order contained an "implied" directive that father take action to force the child to visit mother. Without a showing of a violation of an explicit provision in the custody order, the court of appeals cited *Hancock* as requiring "a showing that the custodial parent deliberately interfered with or frustrated the noncustodial parent's visitation before the custodial parent's actions can be considered willful." There was no evidence in this case that father acted deliberately to keep the child away from the mother.

Even if there had been evidence of father's past violation of a specific provision in the order, Kolczak indicates the remedy for a noncustodial parent would be criminal contempt rather than civil contempt.

Parent's obligation to 'encourage' child to comply with order

The court of appeals in Grissom does not reject the argument that a parent has an obligation to do everything the parent reasonably can do to encourage the child to comply with the custody order even if the custody order does not explicitly require action. In this case, the trial court found that the

teenage daughter suffered from depression, engaged in self-cutting and refused to return to her mother's home. The trial court further found that father encouraged the daughter to return to her mother or at least to visit with mother, but the child refused. He drove the child to the mother's home "almost daily" but the child refused to stay, and he also encouraged mother to visit the daughter at his home. The trial court concluded father did everything he reasonably could do to encourage the child to comply with the custody order.

Mother argued on appeal that the trial court erred in finding father did all he could do to force the child to comply with the custody order, pointing out that father allowed the girl to have her cell phone, to spend time with her friends, to travel out of town and to shop and socialize regularly. The court of appeals rejected mother's argument, holding that the trial court's findings established that the father did all he could do to encourage the child to visit her mother without resorting to actions that would likely to be harmful to the daughter. According to the court of appeals, "father was dealing with a depressed teenage girl who was self-harming" and "isolating her from friends or locking her in the house would likely exacerbate her condition." The court held that the trial court appropriately considered the welfare of the child when determining whether father complied with the terms of the custody order.

Again, however, even if the father had not acted in the past to do all he reasonably could do, Kolczak indicates the remedy should be criminal rather than civil contempt.

Compliance orders rather than civil contempt

The court of appeals in Grissom engages in a lengthy discussion about orders to "force visitation" and indicates that such orders are the more appropriate way to address these difficult situations when children refuse to visit. Rather than immediately considering civil contempt, *Grissom* holds that a trial court has the authority to enter orders directing a parent to take specific actions to encourage a child to comply with a custody order. If a parent refuses to comply with the specific directives, then contempt is available to enforce compliance with the specific directives.

The court of appeals held that mother in Grissom properly requested such an order by filing motions along with her request for contempt:

"She asked for a mandatory preliminary injunction requiring father to return [the child] to her home and to "exert his parental influence" to make her stay there. She also asked for "judicial assistance" in the form of mandated reunification therapy. If these motions are not requests for "forced visitation" orders, it is hard to imagine what a forced visitation request would include."

The court of appeals stressed that an order to encourage visitation must include findings of fact regarding the needs of the child. Based on those findings, the trial court should direct "what action a parent should reasonably take to force visitation, consistent with the best interest of the child." The appellate court affirmed the trial court's refusal to force visitation in this case because the trial

court concluded based on the findings of fact regarding the emotional state of the teenage child that forced visitation would not be in her best interest.

Servicemembers' Civil Relief Act Applies to Family Cases Too

In January we were reminded by the North Carolina Supreme Court in *In Re J.B.* that:

1) We have military personnel living throughout our state, not just in districts with military facilities, and

2) The federal Servicemember's Civil Relief Act, 50 U.S.C. app. sec. 501, et. seq., (SCRA) applies to **all non-criminal judicial and administrative proceedings** involving service personnel, including domestic and juvenile cases.

The Act contains *no exception* for any civil proceeding. So it covers custody, divorce, support, equitable distribution, 50B and 50C cases, abuse, neglect and dependency proceedings and termination of parental rights.

So what does the SCRA Require?

First: An Affidavit from Plaintiff

If a defendant has not made an appearance, no judgment can be entered until plaintiff files an affidavit stating whether defendant is in the military. 50 U.S.C. app. sec. 521. The term 'judgment' is defined as "any judgment, decree, order, or ruling, final **or temporary**." 50 U.S.C. app. sec. 511(9). The Act states: "[T]he court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit –

(A) Stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or

(B) If the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service."

The Act places responsibility for making sure the Affidavit is filed on the court. For an example of a court form created to help comply with this requirement, see the form adopted in Wake County.

If plaintiff's affidavit does not establish that defendant is in the military, the court can proceed with the case. However, the court may require a bond to compensate a defendant later allowed to set aside a judgment because he or she actually was in military service. In addition, the court can enter any other order "the court determines necessary to protect the rights of the defendant under this Act." 50 U.S.C. app. sec. 521(b)(3).

Second: Appointment of Attorney for Servicemember

If plaintiff's affidavit or other information before the court shows that a defendant who has not made an appearance is in the military, "the court may not enter judgment until after the court appoints an attorney to represent the defendant." 50 U.S.C. app. sec. 521(b)(2). As previously stated, the term 'judgment' is defined by the SCRA to include all orders, including temporary orders. This means the court cannot enter any order – temporary or permanent – before appointing an attorney when defendant has not made an appearance. The SCRA does not define the role of the attorney, but it does require that the attorney attempt to contact the service member and consider requesting a stay of the proceedings. 50 U.S.C. app. sec. 521(d)

Third: Stay of Proceedings

After counsel has been appointed for a servicemember who has not made an appearance , the court must stay the case for *at least* 90 days either "upon motion by the appointed counsel, or on the court's own motion, if the court determines that:

1. There may be a defense to the action and a defense cannot be presented without the presence of the defendant; or
2. After due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists."

50 U.S.C. app. sec. 521(d).

The Act does not define 'stay of proceedings.' The term certainly means the trial court cannot enter final judgment, but does it prohibit the court from entering temporary orders, such as temporary custody or emergency domestic violence protective orders? North Carolina courts have not addressed the issue but at least one state supreme court has held the stay does not mean a court loses jurisdiction to act so it does not prohibit a court from entering temporary orders in custody cases, noting that a child's life does not go into "suspended animation" while a service member is on duty. *Lenser v. McGowan,* 191 S.W.3rd 506 (Arkansas, 2010). *See also* N.C. Gen. Stat. 1-75.12(stay pursuant to that statute does not terminate jurisdiction of trial court until 5 years after it is granted).

Fourth: When the Servicemember Has Notice of the Proceeding

A servicemember who has notice of the proceedings may request a stay pursuant to Section 522 of the Act. The SCRA specifies that a request for a section 522 stay does not constitute an appearance "for jurisdictional purposes," 50 U.S.C. app. sec. 522(c), but does not say that the request does not constitute an appearance for other purposes. This indicates that a servicemember who requests this stay is *not* entitled to a court-appointed attorney, pursuant to 50 U.S.C. app. sec. 521(b)(2) discussed above, because the request is an appearance.

Section 522 provides that, at any stage of the proceeding before final judgment the court may upon its own motion, and shall upon motion of the service member, stay the proceeding for *not less than* 90 days if:

1. A letter or other communication establishes that a servicemember's military duty requirements materially affect the servicemember's ability to appear and gives a date when the servicemember will be available to appear; and
2. A letter or other communication from the servicemember's commanding officer shows that the servicemember's military duty prevents appearance and that leave is not authorized for the servicemember at the time of the letter.

The court is not required to grant the stay unless the court concludes, based on this information provided, that the servicemember's current military duty requirements materially affect the servicemember's ability to appear.

If the initial Section 522 stay is granted, a servicemember can request an additional stay "based on continuing material effect of military duty on the servicemember's ability to appear." 50 U.S.C. app. sec. 522(d)(1). In support of the request for additional time, the court must receive letters or communications containing the same information required for the first stay request. If the court refuses the additional time, the court must appoint an attorney for the servicemember before proceeding with the case. 50 U.S.C. app. sec. 522(d)(2).

How is the Court-Appointed Attorney Paid?

SCRA does not answer this question. This appears to be a wonderful opportunity for pro bono service.

There's definitely more to be said about the SCRA, but this covers the basics.

Tab: Third Party Custody

Parent vs Nonparent Custody and Visitation

July 2023

1

Custody statutes

- GS 50-13.1
  - "Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided."
- GS 50-13.2
  - "An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child."

2

Petersen v. Rogers (1994)

- "Absent a finding that parents are unfit or have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care and control of their children must prevail."

3

Petersen v. Rogers (1994)

- "Parents with lawful custody of a child have the prerogative of determining with whom their children associate."

4

Price v. Howard (1997)

- When parents enjoy constitutionally-protected status, "application of the 'best interest of the child standard' in a custody dispute with a non-parent would offend the Due Process Clause."

5

Price v. Howard (1997)

- "A parent's due process interest in the companionship, custody, care and control of a child is not absolute."

6

Price v. Howard

- Parent's protected interest "is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child."

7

Price v. Howard

- "Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to raising a child."

8

Price v. Howard

- "Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status a parent may enjoy. Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents."

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What does this mean?

- In a dispute between a parent and a nonparent, you cannot consider a child's best interest unless you conclude the parent has lost their constitutional right to custody

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Procedural issues

- "Standing" required – *Ellison v. Ramos*
  - Sufficiency of relationship decided on case-by-case basis
  - Standing cannot be waived
    - Order void if plaintiff did not have standing at time of filing

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Procedural Issues

- Rule 12(b)(6) issue
  - Pleading must allege sufficient facts
  - *McDuffie v. Mitchell; Ellison v. Ramos*
- Waiver doesn't mean parent loses
  - *Price v. Howard; Deborah N. v. Carla B.*

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Procedural Issues

- Emergency and temporary orders?
  - GS 50-13.5 – entered when circumstances 'render it appropriate'
    - *Smith v. Barbour*, 154 NC App 402 (2002) (no conclusions necessary in temporary orders regarding waiver of constitutional rights by parents)
  - Intervention allowed ex parte?
    - Rule 24

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Procedure

- Waiver conclusion needs clear and convincing evidence
  - *Adams v. Tessener,* 354 NC 57(2001)

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Unfitness

- *Raynor v. Odom* (1996)
  - Substance abuse, failure to recognize child's developmental problems, left child with grandmother
- *Sharp v. Sharp* (1996)
  - Risk of harm to child when in mother's care, physical and emotional instability of mother, no financial support of child
- *Davis v. McMillian* (2002)
  - Determination of unfitness in earlier proceeding

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Inconsistent Conduct

- "any past circumstance or conduct which could impact either the present or the future of the child is relevant."
  - *Speagle v. Seitz*, 354 NC 525(2001)
- Conclusion must be supported by clear and convincing evidence
  - *Adams v. Tessener,* 354 NC 57 (2001)

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Inconsistent Conduct

- *Price v. Howard*
  - Voluntary, non-temporary relinquishment of physical custody
  - Compare
    - *Penland v. Harris* (no waiver)
    - *Ellison v. Ramos* (enough in pleading)
    - *Grindstaff v. Byers* (enough in pleading)
    - *Perdue v. Fuqua* (not enough in pleading)

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Inconsistent Conduct

- *Boseman v. Jarrell* (NC 2010)
  - Creation of parent-like relationship; permanently ceding portion of exclusive authority to another
  - *Compare*
    - *Mason v. Dwinnell* (mom intended to waive)
    - *Estroff v. Chatterjee* (mom did not intend to waive)

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Inconsistent Conduct

- *Adams v. Tessener*
  - Dad didn't act quickly enough
- *Speagle v. Seitz*
  - Mom's previous "lifestyle and romantic involvements resulted in neglect and separation from minor child"

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Inconsistent Conduct

- *Owenby v. Young*
  - DWI convictions not enough
- *McDuffie v. Mitchell*
  - Allegations of "estrangement" and limited visitation not enough

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Step-parents

- *Seyboth v. Seyboth*, 147 NC App 63 (2001)
  - Step-parent has standing due to relationship with child
  - No best interest until determine parent waived constitutional rights
  - Intent to permanently cede portion or exclusive parental authority ????

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Modification

- Parent does not lose protected status as a result of custody litigation with other parent
  - *Brewer v. Brewer,* 139 NC App 222 (2000)

22

Modification

- But once custody is granted to non-parent, parent must show changed circumstances and best interest to modify.
  - *Bivens v. Cottle,* 120 NC App 467 (1995)
  - *Speaks v. Fanek,* 122 NC App 389 (1996)
  - *Warner v. Brickhouse* , NC App (4/1/08)
  - *Cf. Weideman v. Shelton,* 787 SE2d 412 (NC App 2016)(parent did not lose protected status by entering consent custody order with another non-parent intended to be 'temporary'

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Consent Orders

- Can custody orders be entered by consent without waiver findings?
- Do all consent orders granting custody or visitation rights to a non-parent result in waiver?
  - "School custody orders"
  - Mediated parenting agreements
  - *See also Weideman*

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Grandparents

- Treated same as everybody else for custody
  - *Owenby v. Young*, 357 NC 142 (2003)
  - *Speagle v. Seitz*, 354 NC 525 (2001)
  - *McDuffie v. Mitchell*, 155 NC App 587 (2002)



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Grandparent Visitation

- 50-13.1(a): general custody/visitation
  - *Not* a grandparent visitation statute
    - *McIntyre v. McIntyre*


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Grandparent Visitation Statutes

- 50-13.2(b1): visitation as part of any custody order
- 50-13.5(j): custody order modified to include grandparent custody or visitation
- 50-13.2A: visitation following relative/step-parent adoption

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Eakett v. Eakett

- "A grandparent cannot initiate a lawsuit for visitation rights unless the child's family is experiencing some strain on the family relationship, such as an adoption or an on-going custody [visitation] battle."

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Troxel v. Granville

- Parents have a "fundamental liberty interest" in the care, custody and control of their children.

29

Troxel v. Granville

- Application of 'best interest standard' without – at least – a showing of "special factors" and/or "appropriate deference" to the parent, violates Due Process

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Alexander v. Alexander

- Court of appeals held grandparent visitation statute unconstitutional as applied
  - See blog post: https://civil.sog.unc.edu/?s=grandparent

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Nonparent vs Parent Consent Custody Orders

Is a consent custody order void if it is entered in a case between a nonparent and a parent and the consent order does not include the conclusion that the parent has waived his or her constitutional right to exclusive, care, custody and control of the child?

I don't think so. Most existing case law indicates that such consent orders are valid. And that makes sense because constitutional rights generally can be waived voluntarily. If a parent is willing to consent to a court order without the findings and conclusions, then it simply is a waiver of that parent's constitutional protections. The subject matter jurisdiction of the court is not implicated.

However, consent orders entered in cases where the **party** requesting custody did not have ***standing*** at the time of filing are *void ab initio*.

Consent Custody Generally

The court of appeals has held that consent custody orders generally are not required to contain any findings of fact and conclusions of law. Buckingham v. Buckingham, 134 NC App 82 (1999)(but stating the trial court should review a consent custody order to "ensure that it does not contradict statutory, judicial, or public policy.").

Third Party v. Parent Cases

In *Petersen v. Rogers,* 337 NC 397 (1994) and *Price v. Howard*, 346 NC 68 (1997), the North Carolina Supreme Court reminded us all that parents have a fundamental liberty interest in the exclusive care, custody and control of their children. The state cannot interfere with this fundamental Due Process right by allowing a judge to apply the Best Interest of the Child test to determine custody in a case where a non-parent is seeking custody from a parent. It is only when the parent has lost his/her constitutional protection that the court can step in and determine whether a non-parent should have custody rights.

But when a parent wants to consent to custody rights for a non-parent in a consent order, must the consent order contain the conclusion of law that the parent has lost constitutional protection in order to be valid? In other words, is the conclusion necessary to give the trial court subject matter jurisdiction to enter the consent order? *See e.g.* Kenton v. Kenton, 218 NC App 603 (2012)(conclusion that defendant committed an act of domestic violence was required to give the trial court subject matter jurisdiction to enter a consent DVPO – result in *Kenton* reversed by statutory amendment).

While there is one appellate opinion, Wellons v. White, 748 SE2d 709 (NC App 2013), that repeatedly refers to this conclusion and the findings of fact to support it as matters of **'standing'** – and standing clearly is required to give the court subject matter jurisdiction to enter an order (see

more below) – there are three reported opinions involving trial court orders entered in third party custody matters without any conclusion of law regarding the parent's waiver of constitutional protections. In each of these cases, the court of appeals held that the order awarding custody to the nonparent third party could not be modified unless the parent showed there had been a substantial change in circumstances since the time the custody order was entered and then established that modification of custody was in the best interest of the child. There is no indication in any of these opinions that the waiver of parental rights is a matter of subject matter jurisdiction. Rather, it appears that all protections are waived if the parent does not raise the constitutional issue it at the time of the initial custody proceeding.

The three cases are: *Bivens v. Cottle*, 120 NC App 467 (1995)(trial court entered order giving custody to grandmother without concluding mother had waived her constitutional rights and instead finding that mom was 'fit and proper' to care for child. Mother was not entitled to modification without showing of changed circumstances and best interest.); *Speaks v. Fanek*, 122 NC App 389 (1996)(same result where initial order was a consent order. Court of appeals held that constitutional presumptions in favor of parents apply only when initial custody order is entered and not at modification hearing, apparently even if constitutional issues were not raised at initial hearing); Sloan v. Sloan, 164 NC App 190 (2004)(trial court gave visitation to grandmother in original custody order without reaching any conclusion that mother had waived constitutional rights but mom did not appeal. Mom could not later object to grandmother's request for increased visitation on the basis of mom's constitutional protections).

But *Standing* is Subject Matter Jurisdiction

The court of appeals has held on several occasions that third party custody complaints must be filed by a person who has standing. Standing refers to the **relationship between the person seeking custody and the child.** *See* Ellison v. Ramos, 130 NC App 389 (1998). *But see* Wellons. The court in Ellison held that the standing requirement comes from the statement by the North Carolina Supreme Court in *Petersen v. Rogers*, 337 NC 397 (1994), that "strangers" have no right to seek custody or visitation with a child. Therefore, to have standing, the person seeking custody must show a relationship sufficient to keep that person from being a stranger. Ellison held that standing must be determined on a case by case basis. To date, the court of appeals has found standing for persons who have a "relationship in the nature of parent and child" with the child, *see e.g.* Ellison and Seyboth v. Seyboth, 147 NC App 63 (2001)(step-father had parent-like relationship sufficient to grant standing), and for persons who are "relatives" of the child. Rodriquez v. Rodriquez, 211 NC App 267 (2011)(grandparents have standing); and Yurek v. Baker, 198 NC App 67 (2009)(sister and brother-in-law of child's father had standing as relatives).

According to the court of appeals, because standing is a matter of subject matter jurisdiction, it cannot be waived by the consent of the parties. Therefore, consent orders will be void if the action was initiated by a person who lacked a sufficient relationship with the child at the time of filing. *See* Myers v. Baldwin and Baker, 205 NC App 696(2010)(appellate court can raise standing issue even

if not argued by either party; unrelated couple who cared for child for two months before filing custody action did not have relationship with child sufficient to give them standing, so judgment giving them custody was void *ab initio*); and *Tilley v. Diamond, unpublished opinion, 184 NC App 758 (2007)*(same result where plaintiffs knew child only for a couple of days before filing; consent order declared void several years after it was entered).

Thoughts?

Third Party Custody: Does a parent lose constitutionally protected status by signing a consent custody order granting custody rights to a non-parent?

It is now well established that a parent has a constitutional right to exclusive care, custody and control of his or her child. This constitutional right protects a parent against claims for custody by non-parents. A court cannot apply the best interest of the child test to determine whether a non-parent should have custody of a child unless the court first concludes that the parent has waived her constitutional right to exclusive custody. A parent waives her constitutional right by being unfit, neglecting the welfare of the child, or by conduct otherwise inconsistent with the parent's protected status. There is no precise definition of conduct inconsistent with protected status and our appellate courts have provided no comprehensive list of actions that will result in a parent's loss of constitutional rights. Instead, whether a parent's conduct has been inconsistent with protected status is an issue that must be determined on a case-by-case basis. The non-parent seeking custody has the burden of proving the parent's inconsistent conduct by clear, cogent and convincing evidence. For more detail on this law, *see* Family Law Bulletin, Third Party Custody and Visitation Actions.

What if a parent signs a consent custody order that grants custody rights to a non-parent third party? Does the parent lose the ability to assert her constitutional right to custody in subsequent custody proceedings? For example, if a parent agrees to a court order granting custody to grandmother, does the parent have the constitutional right to regain custody from grandmother in the future? Or, if another non-parent wants custody or visitation after parent has entered into a consent custody order with grandmother, does the other non-parent still need to prove parent has waived her constitutional right to custody and, if so, can the non-parent rely on the fact that parent voluntarily gave custody to the grandmother to establish that the parent acted inconsistent with her protected status?

Modification of Order Granting Custody to Non-Parent

Regarding the first scenario, the answer has been clear for some time. The court of appeals consistently has held that the constitutional rights of parents are considered only in an initial custody proceeding between a parent and a particular third party. According to the court, GS 50-13.7 sets out the exclusive process for modification of a custody order; the constitutional rights of parents play no role in that process, even if the initial order granting custody to the non-parent did not contain a conclusion that the parent had waived her constitutional right to custody. Instead, the party seeking modification, even if it is the parent seeking to regain custody, has the burden to show there has been a substantial change in circumstances. If there has been a substantial change, the court then applies the best interest of the child test to determine the new custody arrangement. *See Bivens v. Cottle*, 120 NC App 467 (1995); *Speaks v. Fanek*, 122 NC App 389

(1996); and *Warner v. Brickhouse*, 189 NC App 445 (2008).

So in the first scenario above, the parent does not have a constitutional right to regain custody from grandmother after parent has signed a consent custody order giving grandmother custody rights.

Another Third Party Seeks Custody

However, the court of appeals recently held that the analysis is different when the subsequent custody proceeding is initiated by a non-parent other than the non-parent who received custody in the initial custody order. In Weidman v. Shelton v. Wise, NC App. June 7, 2016, the court of appeals upheld the trial court's decision to dismiss the non-parent claim for custody after concluding that the mother of the child had not waived her constitutional right to exclusive custody when she entered into a consent order granting another non-parent sole custody of the child.

In Weidman, the mother of child, Erin Shelton, signed a consent custody order giving her mother, Dawn Weideman, exclusive custody of the child. Following the entry of that consent order, Wise requested to intervene in the custody proceeding and requested custody. Wise claimed that the mother's act of signing the consent order granting exclusive custody to Weideman was conduct inconsistent with her protected status. Wise argued that because mom had signed the consent order, the trial court could apply the best interest of the child test to determine whether to grant Wise's request for custody rights to the child.

Findings of fact made by the trial court indicated that Shelton had a history of untreated mental health issues that had caused her to "self-medicate" with drugs and alcohol. As a result, she had experienced times when she was unable to care for her minor child. During those times, she had relied on both Weideman and Wise to care for the child. At one point, Shelton signed a "Guardianship Agreement" purporting to grant guardianship rights to both Weideman and Wise. That agreement specified that the parties all intended for the guardianship be temporary. Following the execution of the Guardianship Agreement, further problems arose and Wise refused to allow Shelton access to the child when the child was in Wise's care. Weideman, however, encouraged interaction between Shelton and the child. In 2012, Wiedeman filed a Chapter 50 custody proceeding and a consent order was entered between Wiedeman and Shelton granting Wiedeman sole custody of the child. Both testified that this consent custody order was intended to be a "temporary arrangement" and that Shelton believed Weideman would return custody to her when she was ready to parent her child. Shelton believed the custody order would keep the child in the care of Wiedeman who, unlike Wise, would allow Shelton to have access to her child.

According to the court of appeals, a parent who cedes all or a portion of her custody rights to a third party without intending that the arrangement be temporary has acted inconsistent with her protected status and has waived her constitutional right to custody. However, a temporary relinquishment alone is insufficient to establish that a parent has acted inconsistent with her protected status. Because the trial court found that Shelton did not intend for the custody order to

grant permanent custody to Wiedeman and that she believed the custody order was the only way to be sure she had the opportunity “to assume her role as [the child’s] mother in the future,” the court of appeals held that it was proper for the trial court to dismiss Wise’s claim for custody.

NC Court of Appeals rules application of grandparent visitation statutes unconstitutional

In an opinion issued on March 16, 2020, the North Carolina Court of Appeals held that a trial court's award of visitation to paternal grandparents pursuant to North Carolina's grandparent visitation statutes violated mother's constitutional right to control with whom her children associate.

Alexander v. Alexander

Mother and father settled custody by a consent custody order when they divorced. When father became ill a few years later, he began living with his parents and he filed a motion to modify custody. His parents also filed a motion to intervene and filed a claim for visitation pursuant to the grandparent visitation statutes, GS 50-13.2(b1) and 50-13.5(j). The trial court granted the grandparents' motion to intervene, but father died before the court heard his motion to modify or grandparents' request for visitation. Following his death, the trial court entered a permanent order granting mother primary physical and legal custody and awarding grandparents extensive visitation rights. Mother appealed.

Statutory authority to order visitation

Mother first argued that the court had no statutory authority to grant visitation to the grandparents following the death of father. The court of appeals disagreed, holding that current case law interprets the grandparent visitation statutes to allow a court to award visitation when grandparents request visitation while there is an on-going action for custody between the parents. The appellate court held that because the grandparents had been allowed to intervene before father died, their claim remained pending when father passed away and the trial court had statutory authority to consider their request for visitation.

Constitutional authority to order visitation

Mother then argued that the grandparent visitation statutes are unconstitutional as applied in her case in that they allowed the trial court to impermissibly interfere with her fundamental Due Process right to exclusive care, custody and control of her child and the court of appeals agreed. The appellate court first noted that the grandparent visitation statutes are not facially unconstitutional in that both the US Supreme Court and the NC Supreme Court have recognized that there are situations where a trial court can award visitation rights to grandparents without violating Due Process, citing as an example the situation where a parent is found to be unfit or to have waived her constitutional right to custody. However, relying primarily on *Troxel v. Granville*, 530 U.S. 57 (2000), the court of appeals held that the trial court violated mother's constitutional right to control with whom her child associates by awarding visitation without giving sufficient deference to mother's decision regarding whether her child would visit with grandparents

and by awarding such extensive visitation as to interfere with the parent/child relationship.

Required deference to parent's decision regarding visitation

Citing *Troxel's* holdings that fit parents are presumed to act in the best interest of their children and that this presumption cannot be overturned "merely because a judge believes that a different decision would be better", the court of appeals stated that "the court must *presume* that the Mother's determination [about the appropriateness of visitation with the grandparent] is correct." (italics in original) Neither *Troxel* nor the court of appeals in this case gives specific guidance as to what specific circumstances will be sufficient to rebut the presumption, but the court of appeals suggests that one situation may be where the child has a significant bond with the grandparent and the mother denies all contact. In this case, the court of appeals noted that the trial court order gave no indication that the court afforded any deference to mother's decision regarding visitation and contained no findings of fact indicating whether mother denied visitation altogether or about her reasons for her decision about visitation.

Interference with the parent/child relationship

Also based on *Troxel,* the court of appeals held that any award of visitation cannot "adversely interfere with the parent-child relationship". The trial court in *Alexander* granted grandparents every other Thanksgiving and Christmas with the child as well as every other weekend. The court of appeals stated:

"Mother, as the Child's sole custodial parent, has the right to determine with whom her Child spends these major holidays and should not be deprived of any right to spend these holidays with her Child. Also, the grant of visitation every other weekend is too extensive. Mother, as the Child's sole custodial parent, has the right to direct how her Child spends a large majority of the weekends."

The court of appeals remanded the visitation issue to the trial court with the instruction to consider grandparents' request for visitation by applying "the appropriate legal standard set forth in *Troxel* and other binding authority, recognizing the paramount right of Mother to decide with whom her Child may associate."

Where are we now?

Until there is further guidance from the appellate courts, this is what we know now about a court's authority to award grandparent visitation rights.

1. Pursuant to G.S. 50-13.1, the court can grant custody or visitation to a grandparent if the court concludes the parent has waived her constitutional right to custody by being unfit, neglecting the welfare of the child or otherwise acting inconsistent with her fundamental

Due Process right to exclusive care, custody and control of her child, and the trial court concludes visitation is in the best interest of the child; and

2. Pursuant to the grandparent visitation statutes, GS 50-13.2(b1) and G.S. 50-13.5(j), the court can grant visitation rights to a grandparent when there is an on-going custody dispute between the parents and:
    1. The grandparent overcomes the presumption that the parent's decision regarding visitation is in the best interest of the child,
    2. The court concludes visitation is in the best interest of the child, and
    3. The visitation awarded does not adversely interfere with the parent/child relationship.

Tab: Best Interest

Creating Parenting Plans

1

GS 50-13.2

- Custody must be awarded to "such person as will best promote the interest and welfare of the child."
- Court may grant:
  - Joint custody to the parents
  - Exclusive custody to one person
  - Custody to two or more persons

2

GS 50-13.2

- Order shall include such terms, including visitation as will best promote the interest and welfare of the child
  - But court's authority is limited. *See Kanellos v. Kanellos*, 795 SE2d 225 (NC App 2016)
- Visitation is a "lesser form of custody"
  - *Clark v. Clark*, 294 NC 554 (1978)
- Order should establish the time, place and conditions for exercising visitation.
  - *Ingle v. Ingle*, 53 NC App 227 (1981)

3

Parents

- Between mother and father, no presumption shall apply as to who will better promote the interest and welfare of the child
  - GS 50-13.2
- Parent cannot be denied reasonable visitation unless court finds parent unfit or that visitation is not in best interest of the child
  - GS 50-13.5(i)
  - Supervised visitation is not "reasonable visitation"
    - *Hinkle v. Hartsell,* 131 NC App 833 (1998)
- Cannot allow custodial parent to control visitation
  - *Brewington v. Serrato*, 77 N.C.App. 726, 336 S.E.2d 444 (1985)

4

Public Policy Regarding Parents

See GS 50-13.01(2015)

5

What is custody?

- **"Physical custody"** means the physical care and supervision of a child
  - GS 50A-102(14)
  - "Visitation" simply is a lesser form of physical custody
    - *Davis v. Davis*, 229 NC App 494 (2013)
  - Physical custody allows party to make decisions about the child's routine but not matters with "long-range consequences"
    - *Diehl v. Diehl*, 177 NC App 642 (2006)
- **"Legal custody"** means the right and responsibility to make decisions with important and long-tem implications for a child's best interest and welfare. *Diehl*
- **"Joint custody"** means "a relationship where each party has a degree of control over , and a measure of responsibility for, the child's best interest and welfare." *Diehl*

6

"Joint" Custody

- Must be considered "upon request of either party"
  - GS 50-13.2
- There is no presumption in favor of joint custody
  - *Hall v. Hall,* 188 NC App 527, n3 (2008)
- Implies a sharing of responsibility.
  - *Diehl,* 177 NC App 642 (2006)
- Because there is no definition, "judge has substantial latitude in fashioning a joint custody arrangement."
  - *Patterson v. Taylor,* 140 NC App 91 (2000)

7

Joint Legal Custody

- If award joint legal, cannot "split" decision-making authority without specific findings regarding need to split
  - *Diehl,* 177 NC App 642 (2006)
  - *Hall v. Hall,* 188 NC App 527 (2008) (inability to communicate insufficient)
  - *MacLagan v. Klein*, 123 NC App 577 (split upheld based on conflicts over religion and evidence of impact on child)

8

Standard Visitation?????

- "A fairly common visitation schedule for unrestricted visitation with school age children is every other weekend, one weekday evening per week, four weeks in the summer, and alternate holidays."
  - Lee's Family Law, 5th edition, pp. 13-95
  - NOT required by law

9

Scope of Authority in Custody cases

CHERYL HOWELL

JULY 2023

1

What are you trying to do in these cases??

2

GS 50-13.2

"An order for custody … shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child."

"An order for custody of a minor child may grant joint custody to the parents, exclusive custody to one person, agency, organization, or institution, or grant custody to two or more persons, agencies, organizations, or institutions."

3

GS 50-13.2

"Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child."

4

What is custody?

"Physical custody" means the physical care and supervision of a child

- GS 50A-102(14)
- "Visitation" simply is a lesser form of physical custody
  - *Davis v. Davis*, 229 NC App 494 (2013)
- Physical custody allows party to make decisions about the child's routine but not matters with "long-range consequences"
  - *Diehl v. Diehl*, 177 NC App 642 (2006)

"Legal custody" means the right and responsibility to make decisions with important and long-tem implications for a child's best interest and welfare. *Diehl*

"Joint custody" means "a relationship where each party has a degree of control over , and a measure of responsibility for, the child's best interest and welfare." *Diehl*

5

It really is just about ***custody***.....

While GS 50-13.2 gives the court broad discretion –

"In proceedings involving the custody ... of a minor child, the ... judge is authorized to determine the party or parties to whom custody of the child shall be awarded, whether and to what extent a noncustodial person shall be allowed visitation privileges, ... whether an order for child custody or support shall be modified or vacated based on a change in circumstances, and certain other related matters."

- *Appert v. Appert*, 80 NC App 27 (1986)
- *Kanellos v. Kanellos*, 795 NC App 225 (NC App 2016)

6

Kanellos

"Put simply, a district court must consider the pros and cons of ordering primary custody with each parent, contemplating the two options *as they exist*, and then choose which is in the child's best interest. ... However, a court cannot … create a "new and improved" third option, even if the district court sincerely believes it would be in the child's best interest."

"A judgment awarding custody is *based upon the conditions found to exist at the time it is entered*," quoting *Stanback v. Stanback*, 266 N.C. 72, 76, 145 S.E.2d 332, 335 (1965)

7

Other stuff in GS 50-13.2

"An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate"

"Any order for custody, including visitation, may, as a condition of such custody or visitation, require either or both parents, or any other person seeking custody or visitation, to abstain from consuming alcohol and may require submission to a continuous alcohol monitoring system."

"An order for custody of a minor child may provide for such child to be taken outside of the State"

8

Other stuff in GS 50-13.2

"If the court finds that domestic violence has occurred, the court shall enter such orders that best protect the children and party who were the victims of domestic violence, in accordance with the provisions of G.S. 50B-3(a1)(1), (2), and (3)."

"An order for custody of a minor child may provide for visitation rights by electronic communication."

"Absent an order of the court to the contrary, each parent shall have equal access to the records of the minor child involving the health, education, and welfare of the child."

9

Kanallos

What else has been approved .....

Provisions to facilitate the custody and visitation plan

- Location of supervised visitation
- Payment of visitation expenses
- Order party to deliver child to other for visitation

Provisions to resolve disputes that "directly implicate a child's relationship with each parent or academic or other activities"

- Prohibit use of specific babysitter when babysitter interfered with parent's relationship with child
- Prohibit home schooling when home schooling amounts to neglect or significantly interferes with other parent's ability to visit

It's also okay to order parties not to make negative comments about the other

Watkins, 120 NC App 475 (1995)

10

Custody provision or allocation of decision-making authority???

Burger v. Smith, 776 SE2d 886 (2015)
- Visitation to dad
- Dad can decide whether to take child to Africa during visits
- Okay for judge to allow dad to make this decision
- Judge did *not* decide child should go to Africa

MacLagan v. Smith, 123 NC App 557 (1996)
- Order that Dad decides religious training for child is allocation of legal custody
- Judge did not decide religion of child

11

Allocation of Legal Custody

Legal custody includes:
- Authority to make decisions about child's education, health care, and religious training
- Authority to make decisions as to discipline and matters of major significance concerning child's life and welfare

Joint Legal Custody
- Parties share authority to make major decisions
- Cannot split joint legal absent compelling reason related to best interest of child
  - *Diehl*, 177 NC App 642 (2006)
    - Inability to effectively communicate is not compelling reason
    - Inability to communicate supports allocation of sole legal to one parent. *Thomas v. Thomas*, 233 NC App 736 (2014)
  - *MacLagan*, 123 NC App 557 (1996)
    - Emotional harm to child resulting from disagreement over religion was compelling reason
  - Hall v. Hall, 188 NC App 527 (2008)
    - "mere tumultuous relationship" is not sufficient

12

What we know you can't do…….

Order a parent to relocate or not to relocate
- *Kanellos*

Prohibit father from possessing firearms absent evidence of threat to safety of children
- *Martin v. Martin*, 167 NC App 365 (1995)

Order psychological testing or treatment of a party in a permanent custody order
- *Jones v. Patience*, 121 NC App 434 (1996)
- *But cf. Maxwell v. Maxwell*, 212 NC App 614 (2011)(okay when dad committed domestic violence)

Order child support placed in escrow if child doesn't comply with visitation schedule
- *Appert v. Appert*, 80 NC App 27 (1986)

13

STATE OF NORTH CAROLINA
COUNTY OF CUMBERLAND

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NUMBER _____ CVD _____

_____
Plaintiff

V

Order for Custody and Visitation

_____
Defendant

This cause coming on for hearing before the undersigned District Court Judge presiding over the Civil Domestic session on _____, 20___ upon a request for custody and/or visitation.

The Plaintiff was/ was not present and was not represented by counsel, and the Defendant was/was not present and was not represented by counsel.

The Court, after reviewing the court file, affidavits and evidence offered by the parties and hearing the arguments of the parties, makes the following findings:

FINDINGS OF FACT

1. The Plaintiff is a citizen and resident of _____ County, _____. And the Defendant is a citizen and resident of_____ County, _____.

2. The parties are the parents of the following listed child(ren):
(include date of birth)

_____

_____

_____

3. The affidavit as to the status of the minor child(ren), attached to the complaint, is incorporated into this judgment. The minor child(ren) have lived in the state of

North Carolina for more than six months prior to the filing of this action and North Carolina is the home state of the minor child(ren)

4. The Plaintiff is / is not employed at _____ and his/her work hours are from _____ to _____, _____ _____. During work hours, the minor child is in daycare at _____ or stays with _____.

   The Plaintiff is/ is not currently married to _____ and has the following other children _____ _____ who do/do not reside in the home.

5. The Defendant is / is not employed at _____ and his/ her work hours are from _____ to _____, _____ _____. During work hours, the minor child is in daycare at _____or stays with _____.

   The Plaintiff is / is not currently married to _____ and has the following other children _____ _____ who do/ do not reside in the home.

6. The Plaintiff's relationship with the minor child(ren) is as follows:

_____

_____

_____

_____

_____

7. The Defendant's relationship with the minor child(ren) is as follows:

_____

_____

_____

_____

8. ____Plaintiff has the ability to properly promote the physical, emotional and psychological welfare of the children.

9. ____Defendant has the ability to properly promote the physical, emotional and psychological welfare of the children.

10. Other _____

_____

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Court concludes as a matter of law that:

1. North Carolina is the home state of the minor child(ren) and the Court has jurisdiction over the parties and subject matter of this action.

2. ____The Plaintiff is a fit and proper person to have custody of the minor child(ren) and it is in the best interests of the minor child(ren) that custody be awarded to the Plaintiff.

3. ____The Defendant is a fit and proper person to have custody of the minor child(ren) and it is in the best interests of the minor children that custody be awarded to the Defendant.

4. The ____ Plaintiff _____ Defendant is a fit and proper person to exercise visitation with the minor child(ren).

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. The ____Plaintiff ____ Defendant shall have custody of the minor child(ren) with the _____ Plaintiff _____ Defendant having visitation.

2. Visitation shall include the following:

Weekend visitation from _____pm on _____ until _____pm on _____ ____ every ____ every other weekend beginning _____.

Christmas holiday _____

Thanksgiving holiday _____

Spring Break holiday _____

Summer holiday _____

Other _____

3. Exchange of the minor child(ren) shall occur at _____

_____.

4. The Plaintiff and Defendant shall each provide to the other party a current address and phone number and notice of any change of the address and/or phone number.

5. The ___Plaintiff and ____Defendant may maintain regular phone contact with the minor child(ren) while the child is in the other party's care but no phone call shall be made to the child(ren) between the hours of 9:00pm and 7:00am.

6. The _____Plaintiff and ____Defendant shall have full and complete access to the school and medical records of the minor child(ren) and shall have the right to converse with the medical providers, counselors, teachers, and other school personnel of the minor child(ren).

7. The ____Plaintiff and ____ Defendant shall have the right to authorize medical treatment for the minor child(ren) while in their care. Each party shall keep the other informed of the general health and well-being of the minor child(ren). Each shall notify the other as soon as possible of any hospitalizations.

8. The _____ Plaintiff and ____ Defendant shall have the right to attend parent-teacher conferences and other events at the school or extra-curricular activities of the minor child(ren) and the parties shall keep each other notified and informed of these events and activities.

9. The primary custodial parent shall provide to the secondary custodial parent the web address of the child(ren)'s school so that the secondary custodial parent may access the school schedule and activities. The primary custodial parent shall provide the secondary custodial parent a copy of the child(ren)'s report card(s) within five days of receiving them and information about school pictures in a timely manner.

10. Any plans, arrangements, or disagreements that may arise between the parties, in regard to the minor child(ren), will be discussed between the parties and not in the presence of the minor child(ren). Both parents shall refrain from making any disparaging remarks about the other parent to or in the presence of the minor child(ren). Both parents shall discourage others from making disparaging remarks about the other parent to or in the presence of the minor child(ren).

11. This Court retains jurisdiction to enter any further orders necessary to enforce or modify this order.

This the _____ day of _____, 20__.

_____
District Court Judge

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

COUNTY OF CUMBERLAND FILE NO.

ADMINISTRATIVE ORDER

JOINT CUSTODY PROVISIONS

This order updates the previous administrative orders filed on July 30, 2009 and on May 18, 2011 reference the use of standard provisions in orders of joint custody.

It is ordered that temporary and permanent joint custody orders entered in Cumberland County should include the following 'standard' provisions unless the Court or parties specifically elect to add, delete or modify the provisions.

JOINT CUSTODY PROVISIONS

1. The Plaintiff and Defendant shall each provide to the other party a current address and phone number and notice of any change of the address and/or phone number. Each party may maintain regular phone contact with the minor child(ren) but no phone call shall be made to the child(ren) between the hours of 9:00pm and 7:00am.

2. The Plaintiff and Defendant shall have full and complete access to the school/day care and medical records of the minor child(ren). Each shall have the right to converse with the medical providers, counselors, teachers, and other school/day care personnel of the minor child(ren).

3. Each party shall have the right to authorize medical treatment for the minor child(ren). Each party shall keep the other informed of the general health and well-being of the minor child(ren), to include illnesses, medical treatments, and appointments. Each shall notify the other as soon as possible of any hospitalizations.

4. Subject to school rules, each party shall have the right of access to the child at school including scheduled lunches with the child and attending parent-teacher conferences, award assemblies and other events at the schools/day cares or extra-curricular activities of the minor child(ren) and the parties shall keep each other notified and informed of these events and activities.

5. The primary custodial parent shall provide to the secondary custodial parent the web address of the child(ren)'s schools/day cares so that the secondary custodial parent may access the school/day care schedule and activities and shall provide the password necessary to access the child(ren)'s information. The primary custodial parent shall provide the secondary custodial parent a copy of the child(ren)'s report cards within

five days of receiving them and information about school/day care pictures in a timely manner.

6. Only the primary custodian may check the child(ren) out of school during the school day. The secondary custodian may check the child(ren) out of school during the school day only when that party has written permission to do so. If the visitation schedule provides that the visitation begins at the end of the school day, the secondary custodian may pick up the child(ren) from school but only at the end of the school day.

7. Only the primary custodian may withdraw the child(ren) from the school where the child(ren) are enrolled.

8. Any plans, arrangements, or disagreements that may arise between the parties, in regard to the minor child(ren), will be discussed between the parties and not in the presence of the minor child(ren). Both parents will refrain from making any disparaging remarks about the other parent to or in the presence of the minor child(ren). Both parents shall discourage others from making disparaging remarks about the other parent to or in the presence of the minor child(ren).

9. No party shall post any derogatory remarks or pictures about a parent, other relative or significant other on any social media site or allow others to do so in their place. Each party shall limit placement of pictures of the minor children on any social media site.

This the day of January, 2012.

_____

A. Elizabeth Keever
Chief District Court Judge

§ 50-13.01. Purposes.

It is the policy of the State of North Carolina to:

(1) Encourage focused, good faith, and child-centered parenting agreements to reduce needless litigation over child custody matters and to promote the best interest of the child.

(2) Encourage parents to take responsibility for their child by setting the expectation that parenthood will be a significant and ongoing responsibility.

(3) Encourage programs and court practices that reflect the active and ongoing participation of both parents in the child's life and contact with both parents when such is in the child's best interest, regardless of the parents' present marital status, subject to laws regarding abuse, neglect, and dependency.

(4) Encourage both parents to share equitably in the rights and responsibilities of raising their child, even after dissolution of marriage or unwed relationship.

(5) Encourage each parent to establish and maintain a healthy relationship with the other parent when such is determined to be in the best interest of the child, taking into account mental illness, substance abuse, domestic violence, or any other factor the court deems appropriate. (2015-278, s. 1.)

Child Custody Order Cannot Tell a Parent Where to Live

Many appellate opinions explain that judges are vested with wide discretion in matters concerning child custody. G.S. 50-13.2(a) gives the court broad authority to allocate physical and legal custody of a child as the court believes will "best promote the interest and welfare of the child" and GS 50-13.2(b) allows the court to include in any custody order "such terms, including visitation, as will best promote the interest and welfare of the child". Recently, however, the North Carolina Court of Appeals made it clear that there are limits on the court's authority in custody cases. In Kanellos v. Kanellos, 795 S.E.2d 225 (N.C. App., 2016), the court reminded us that custody cases are primarily about determining who has physical care and control of a child and who has decision-making authority regarding a child and not as much about controlling the details of the lives of the child or the parties.

Kanellos

Before they separated, Stacie and John Kanellos lived with their children in Union County. After separation, Stacie and the children moved to Forsyth County and John moved to Mecklenburg County, but the parties continued to own the marital residence in Union County at the time of the custody trial. The trial court awarded joint legal custody to Stacie and John and awarded primary physical custody to Stacie with John having visitation on alternate weekends. In addition, the trial court determined that it was in the best interest of the children to live in Union County and therefore ordered Stacie and the children to move back to the marital residence. Stacie appealed, arguing that the trial court abused its discretion in ordering her to move. The court of appeals agreed with Stacie, holding that compelling a parent to reside in a specific county and house fell "outside the scope of authority granted to the district court in a child custody action."

Statutory Authority

Acknowledging that GS 50-13.2 vests judges with broad discretion, the appellate court quoted *Appert v. Appert*, 80 N.C. App. 27, 34, 341 S.E.2d 342, 346 (1986), to explain that the discretion is not unlimited:

[t]he . . . judge's discretion . . . can extend no further than the bounds of the authority vested in the . . . judge. *In proceedings involving the custody . . .of a minor child, the . . . judge is authorized to determine the party or parties to whom custody of the child shall be awarded, whether and to what extent a noncustodial person shall be allowed visitation privileges, . . ., and certain other related matters*.

Kanellos, (emphasis in original).

The court further explained that the trial court's authority to determine "certain other related matters" comes from the provision in G.S. 50-13.2(b) allowing the court to include in custody orders

"such terms, including visitation as will best promote the interest and welfare of the child." Such "certain other provisions," therefore, must be supported by findings of fact sufficient to show why the provisions are necessary for the child's welfare.

Court generally must take the parties as they are

To support the conclusion that ordering a parent to live in a certain place exceeded this authority to order "certain other related matters," the court in Kanellos explained that courts are required to determine custody based upon the circumstances of the parties that exist at the time of the custody hearing.

"Our courts may consider *where each parent lives*, along with any other pertinent circumstances, in determining which parent should be awarded primary custody to facilitate the child's best interest. (citations omitted). Put simply, a district court must consider the pros and cons of ordering primary custody with each parent, contemplating the two options as *they exist*, and then choose which one is in the child's best interest. (citations omitted). However, a court cannot order a parent to relocate in order to create a "new and improved" third option, even if the district court believes it would be in the child's best interest."

Kanellos (emphasis in original)

So what is included in "certain other related matters"?

The Kanellos opinion does not provide clear guidance about how to determine whether a particular provision is one that can be included in a custody order. The court states that just as a parent cannot be ordered to move, a court also cannot order a parent to refrain from relocating. However, the court acknowledged existing case law approving provisions that:

- Facilitate the ordered custody and visitation plan. For example, the court has approved orders of supervised visitation and orders that specify where the visitation will take place; orders that allocate responsibility for the payment of visitation expenses; and orders allowing a parent to take a child out of the country during visitation.
- Resolve disputes "that directly implicate a child's relationship with each parent or academic and other activities." For example, the court has approved orders barring a parent from using a specific babysitter who had been interfering with child's relationship with other parent, prohibiting home schooling when home schooling interfered with visitation with the other parent, and allocating responsibility for the religious training of a child and prohibiting the other parent from providing religious training that conflicted with that provided by the other parent.

GS 50-13.2 specifically authorizes the court to:

- Protect children and parties who have been victims of domestic violence by including as part of the custody order any of the relief provisions authorized in GS 50B-3(a)(1), (2) or (3).
- Require any party to abstain from consuming alcohol and require a party to submit to a continuous alcohol monitoring system.
- Provide that a child can be taken out of the state and require that a person allowed to take a child out of the state post a bond or other security conditioned upon the return of the child to the state; and
- Provide for visitation by electronic communication and allocate the cost between the parties.

In addition to the case law cited in the Kanellos opinion, there also is case law upholding reciprocal provisions ordering both parties to refrain from making negative comments about the other and interfering with the other's relationship with the child. *See e.g. Watkins v. Watkins*, 120 NC App 475 (1995);

However, there also are opinions other than Kanellos wherein the appellate court concluded the trial court exceeded its authority. For example:

- In *Martin v. Martin*, 167 NC App 365 (2004), a trial court order prohibiting father from owning or possessing firearms was vacated due to lack of findings indicating that the safety of the children was affected by father's possession or ownership of guns; and
- In *Jones v. Patience*, 121 NC App 434 (1996), the court held that a trial court does not have authority to order the appointment of experts or to order psychological testing or treatment of a parent as part of a permanent custody order, concluding that these provisions are allowed only in temporary orders. *But cf. Maxwell v. Maxwell*, 212 NC App 614 (2011)(upholding provision in permanent custody order that father submit to a mental health evaluation when court concluded that he had committed acts of domestic violence). See also GS 50-91(authorizing the appointment of a parenting coordinator as part of any temporary or permanent custody order).

Child Custody: Denying Visitation to a Parent in a Case Between Parents

In this previous post, Child Custody: Denying or Significantly Limiting a Parent's Visitation (March 18, 2016), I wrote about a trial court's authority to deny 'reasonable' visitation to a parent in a child custody proceeding between two parents. I mentioned in that post the conflict between two opinions from the NC Court of Appeals regarding whether a trial court must consider the constitutional rights of a parent before denying that parent reasonable visitation in such cases. Those two conflicting opinions are *Moore v. Moore*, 160 NC App 569 (2003)(because a complete denial of visitation is 'tantamount to a termination of parental rights', the trial court must apply the constitutional analysis set forth in *Petersen* and *Price* before reaching a decision about a child's best interest) and *Respess v. Respess*, 232 NC App 611 (2014)(the constitutional analysis set forth in *Petersen* and subsequently clarified by *Price v. Howard*, 346 NC 68 (1997), applies in cases between a parent and a non-parent and has no application in custody cases between two parents).

In *Routten v. Routten* filed on June 5, 2020, the NC Supreme Court resolved this conflict and held that custody cases between parents do not implicate the parents' constitutional right to exclusive care, custody and control of their children that the trial court must consider in cases between a parent and a non-parent.

Routten v. Routten

The trial court awarded sole physical custody of the children to Mr. Routten after mother repeatedly failed to provide the neuropsychological evaluation ordered by the court. The trial court concluded that sole physical custody to father was in the best interests of the children and allowed mother only two phone calls each week with the children.

The court of appeals agreed with mother's contention that the trial court order violated her constitutionally protected interest as a parent by awarding full physical custody to father without first finding she was unfit or that she had acted inconsistently with her protected status as a parent. *Routten*, 262 NC App 458. A dissenting opinion argued that the constitutional rights of parents relied upon by the majority are not applicable in cases between two parents.

GS 50-13.5(i) **controls; *Petersen v. Rogers* does not apply**

The supreme court agreed with the dissent in the court of appeals and affirmed the trial court order. According to the supreme court:

"The resolution of the issue regarding the trial court's decision to deny visitation by defendant with the children without a determination that she was unfit to have visitation with them is governed by

North Carolina General Statutes Section 50-13.5(i). As between two parents seeking custody and visitation of their children, the cited statutory provision states, in pertinent part, that

"the trial judge, *prior to denying a parent the right of reasonable visitation*, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child *or* that such visitation rights are not in the best interest of the child.

N.C.G.S. § 50-13.5(i) (2019) (emphasis added)."

The court rejected mother's argument that the statute requires that the trial court find her unfit before denying her any physical custody of her child, explaining:

"A plain reading of this subsection reveals two points critical to the resolution of the issues in the matter here. First, this provision contemplates the authorized prospect of the denial to a parent of a right to visitation. Second, that such a denial is permitted upon a trial court's written finding of fact that the parent being denied visitation is deemed unfit to visit the child *or* that visitation would not be in the child's best interests. The unequivocal and clear meaning of the statute identifies two different circumstances in which a parent can be denied visitation, and the disjunctive term "or" in N.C.G.S. § 50-13.5(i) establishes that either of the circumstances is sufficient to justify the trial judge's decision to deny visitation. [citations omitted] Thus, contrary to the majority view and consistent with the dissenting view in the lower appellate court, in a dispute between two parents if the trial court determines that visitation with one parent is not in a child's best interests, then the trial court is authorized to deny visitation to said parent without a requirement to find the existence of the alternative circumstance that the parent in question is unfit."

The court further rejected the holding by the court of appeals that if a trial court does not find a parent to be unfit, the trial court must conclude the parent has waived his or her constitutionally protected status before denying that parent physical contact with his or her children. The supreme court disavowed the holding in *Moore v. Moore*, stating:

"The majority decision of the Court of Appeals in this matter went astray due

to its reliance upon *Moore*. The *Moore* case, as accurately recounted by the dissenting

judge, "held that in a custody dispute between a child's natural or adoptive parents

'absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their

children, the constitutionally protected paramount right of parents to custody, care,

and control of their children must prevail.' " *Routten*, 262 N.C. App. at 458, 822 S.E.2d

at 451 (citation omitted). The dissent notes that the Court of Appeals in *Moore* excerpted this language from our opinion in *Petersen v. Rogers*, 337 N.C. 397, 403–04, 445 S.E.2d 901, 905 (1994), "which established a constitutionally based presumption favoring a parent in a custody dispute with a non-parent," as controlling authority for the outcome in *Moore*. *Routten*, 262 N.C. App. at 459, 822 S.E.2d at 451.

However, the *Moore* court misapplied our decision in *Petersen*. The *Petersen* case established a presumption favoring a parent in a custody dispute *with a non-parent*; *Moore* wrongly employed this presumption in a custody dispute between two parents. This presumption is not implicated in disputes between parents because in such cases, a trial court must determine custody between two parties who each have, by virtue of their identical statuses as parents, the same "constitutionally-protected paramount right to custody, care, and control of their children." *Petersen*, 337 N.C. at 400, 445 S.E.2d at 903. Therefore, no constitutionally based presumption favors custody for one parent or the other nor bars the award of full custody to one parent without visitation to the other."

The supreme court also noted that this is not the first time it has held that the *Petersen* analysis has no application in cases between parents. The court stated that in *Owenby v. Young*, 357 NC 142 (2003):

"we acknowledged the *Petersen* presumption and reaffirmed that "unless a natural parent's conduct has been inconsistent with his or her constitutionally protected status, application of the 'best interest of the child' standard in a custody dispute with a nonparent offends the Due Process Clause of the United States Constitution." *Id.* at 145, 579 S.E.2d at 266–67 (citations omitted). This

Court went on to observe, however, that this "protected right *is irrelevant in a custody proceeding between two natural parents*, whether biological or adoptive, or between two parties who are not natural parents. In such instances, the trial court must determine custody using the 'best interest of the child' test." *Id.* at 145, 579 S.E.2d at 267 (citation omitted).

See also Adams v. Tessener, 354 N.C. 57, 61, 550 S.E.2d 499, 502 (2001)("In a custody proceeding between two natural parents (including biological or adoptive parents), or between two parties who are not natural parents, the trial court must determine custody based on the 'best interest of the child' test.").

What constitutes a denial of reasonable visitation?

Completely denying a parent physical custody time with a child clearly is a denial of reasonable visitation within the meaning of GS 50-13.5(i). The court of appeals also has consistently held that limiting a parent to supervised visitation is a denial of 'reasonable visitation' that requires the findings set out in GS 50-13.5(i). *Maxwell v. Maxwell*, 212 NC App 614 (2011), *Hinkle v. Hinkle*, 131 NC App 833 (1998), and *Cox v. Cox*, 133 NC App 221 (1999).

However, the court of appeals has held that GS 50-135(i) did not apply in other cases where a parent's access to a child was significantly limited. Recently, in the case of *Paynich v. Vestal*, 837 S.E.2d 433 (2020), the court of appeals held that a trial court order allowing mother unsupervised visitation when the child was in her custody for short periods of time but requiring supervision when mother has the child for 5 or more consecutive days was not such 'severe restrictions' as to require the court to make those findings of fact required for orders of supervised visitation only. And in *O'Connor v. Zalinske*, 193 NC App 683 (2008), 193 NC App 683 (2008), the court of appeals held that an order limiting father to alternating weekends from Thursday through Sunday and requiring that the visitation always occur within a one hundred mile radius of the custodial mother's home was not unreasonable visitation under the circumstances of the case.

What findings of fact are required to support a denial of reasonable visitation?

While the trial court is not required to conclude that a parent has lost his or her constitutional rights due to conduct inconsistent with the parent's protected status, the findings of fact supporting no visitation or supervised visitation must be sufficient to establish why such a significant limitation is in the best interest of the child. Conclusory statements of best interests are not sufficient. The court of appeals explained in *In re Custody of Stanci*l, 10 NC App 545 (1971):

"The right of visitation is an important, natural and legal right, although it is not an absolute right, but is one which must yield to the good of the child. A parent's right of access to his or her child will ordinarily be decreed unless the parent has forfeited the privilege by his conduct or unless the exercise of the privilege would injuriously affect the welfare of the child, for it is only in exceptional cases that this right should be denied. But when it is clearly shown to be best for the welfare of the

child, either parent may be denied the right of access to his or her own child."

See also Hinson v. Hinson, 836 SE2d 309 (2019)(trial court must identify the nexus between the facts found and the welfare of the child), and *Paynich v. Vestal*, 837 SE2d 433 (2020)(order denying a parent access to child's school and medical records must directly link that restriction to the welfare of the child).

Should Little Johnny Play Football or Take Piano Lessons? Allocating Legal Custody

All custody orders in cases between parents must allocate custody rights and responsibilities in a way that meets the best interest of the child. GS 50-13.2. “Custody” is a term that is not well-defined in North Carolina law but clearly refers to both physical care and control of a child as well as to the authority to make decisions regarding the child. Physical care and control is referred to as physical custody while decision-making authority is referred to as legal custody. GS 50-13.2(a) requires the court to consider “joint custody” whenever requested by a parent. What does joint legal custody mean? What can a court do when the parents simply cannot agree on whether little Johnny will play football or take piano?

What is Legal Custody?

“Legal custody” is not defined in the general statutes, but the court of appeals has held that it refers generally to the right and responsibility to make decisions with important and long-term implications for a child’s best interest and welfare. *Hall v. Hall,* 188 N.C. App. 527, 655 S.E.2d 901 (2008); *Diehl v. Diehl,* 177 N.C. App. 642, 630 S.E.2d 25 (2006).

Examples of decisions a parent with legal custody can make include:

(1) The child’s education, health care, and religious training *Patterson v. Taylor*, 140 N.C. App. 91, 535 S.E.2d 374 (2002); and

(2) Discipline and other matters of major significance concerning the child’s life and welfare. *Diehl.*

What is Joint Legal Custody?

While GS 50-13.2 (a) requires the court to consider ‘joint custody’ if requested by either parent, the statute contains no definition of ‘joint custody,’ nor does it distinguish between ‘joint legal custody’ and ‘joint physical custody’. *Patterson.*

The statute does not create a presumption in favor of joint legal custody. *Hall*.

The court of appeals has stated that “[w]ithout further definition … joint custody implies a relationship where each party has a degree of control over, and a measure of responsibility for, the child’s best interest and welfare,” *Patterson*, and that G.S. § 50-13.2(a) allows the court substantial latitude in fashioning a ‘joint custody’ arrangement. *Diehl*.

If awarded joint legal custody, the parties share the right to make major decisions affecting the child’s life or certain decisions are allocated between the custodians by the court. *Diehl*; *Patterson*

(because the General Assembly chose not to define “joint custody”, the court, or parties to a custody agreement, are free to define the term to fit the needs of a particular situation).

Must a Court Award Joint Legal Custody of A Parent Requests It?

No. In the recent case Oltmanns v. Oltmanns, NC App June 2, 2015, the court of appeals rejected father’s argument on appeal that the trial court was required to award joint legal custody after finding that both parents had been significantly involved in the lives of the children before separation. The trial court awarded primary legal custody to mom after concluding it was in the best interest of the children to do so. The court of appeals upheld the trial court, pointing to the findings that because the parents:

“have some differing belief systems, values and priorities, there are numerous areas where they might disagree on what is best for the children. Ongoing tension between them over decisions about the children’s upbringing would have a more damaging effect on the children than the unilateral decisions of either parent. ….due to the lack of trust between the parents, the differing values and the parenting styles between them, and the fact that both parents are extremely intelligent, the court finds that the parties are unable to make decisions of significance for the children together and that the power struggles between them is more detrimental to the children that unilateral decision making authority to one parent would be.”

The trial court supported the decision to give defendant mother primary legal custody with findings that she had demonstrated more willingness than had father to support and foster the relationship between the children and the other parent and to consider father’s opinions when making decisions about the children.

See also Dixon v. Gordon, 223 NC App 365 (2012) and *Thomas v. Thomas*, 757 SE2d 375 (2014)(both upholding primary legal to one parent based on parents’ inability to communicate and resolve conflict).

Can the Court Split Joint Legal Custody?

When the parents can’t agree on much of anything but dad feels strongly about whether Johnny plays football, can the court award joint legal custody except with regard to decisions about extracurricular activities and then give final say to dad on those issues? The court of appeals has said no. If the court decides to award joint legal custody, it must be “true” joint legal – evidently meaning both parties decide everything together. The court can ‘split’ joint legal only with specific findings as to why such a ‘deviation’ is necessary and in the best interest of the child.

So in *Diehl*, the court of appeals reversed the trial court order of split joint legal that allowed mom to make most decisions but allowed dad to decide whenever a decision would have a significant financial impact on him. The court of appeals held that the trial court’s findings that the parties

were unable to “effectively communicate” regarding the needs of the children did not support that order and questioned whether an award of joint legal was appropriate at all given the general inability of the parties to communicate.

There was a similar decision in *Hall v. Hall*, 188 NC App 527 (2008), but in dicta, the court indicated that a history of disagreements between the parties as to a specific issue, such as school or religion, would be sufficient to support a split of joint legal. And in *MacLagan v. Klein*, 123 NC App 557 (1996), the court upheld a decision to award joint legal except with regard to the child’s religious upbringing. Findings by the trial court that the child had been raised Jewish by agreement of the parties but the mother had decided the child needed to convert to Christianity when the parents separated supported the conclusion that it would be in the child’s best interest for one parent to make that decision.

Creating "Parenting Plans"

Discussion Questions

Question 1:

How would you describe your general approach to creating custody and visitation plans in child custody cases? For example, do you have a "philosophy" that influences your custody and visitation orders? Are there principles you use to guide your decision-making process in addition to the principles and considerations required by statutes and case law?

Question 2:

a) Consider a request for a temporary child custody order involving a 3 month-old child. Dad filed action for joint legal and physical custody of infant, alleging mom refuses to allow him overnight visitation with the child in his home.
   During the hearing for temporary custody, it is established that both mom and dad have been very involved in the care of the child. Both have cared for the needs of the child, both are fit and proper persons, both hold jobs with traditional hours (i.e. 9 am until 5 pm), and they live within 5 miles of each other.
      1) Is there other information you need in order to decide temporary custody? Please explain the importance of each additional piece of information.

2) Assuming no other evidence is offered, what temporary order are you likely to enter in this situation?

3) Would you address legal custody at this point? If so, what would you order? If not, why not?

4) What additional information do you want to see at the custody trial before you enter a final custody order? Why? Assuming both parents are as 'equal' as possible, what permanent order would you likely enter? Please address both physical and legal custody.

b) How would your orders change if there was another child involved, one attending kindergarten? (same situation, just 2 kids instead of one. Parents always shared care-taking responsibility and they both have strong positive relationships with both children).

Question 3:
How would you schedule custody and visitation in the scenario set out in Question 1(b) above if mom is employed as a nurse and she primarily works the night shift – meaning 10 pm until 6 am – and she typically works Thursday through Sunday nights? Mom does not work Monday through Wednesday. Dad has a traditional day-time, Monday through Friday job?

Question 4:

a) Kids are 11 and 13 years-old. Both parents work. Both are good parents. Before separation, mom did all household chores, took kids to doctor and dentist, and volunteered at school. Dad did yard work, helped kids with homework, and coached sports teams for both kids. Upon separation, dad moved to town 30 miles away for lower cost of living, so mom could stay in marital home with the kids. Dad files action for joint legal custody and requests extensive visitation. Mom asks that dad be granted one weekend a month because both children have church and extracurricular activities most weekends. Mom also requests sole legal custody, because she and dad have difficulty communicating.
What other information would you like to have before determining custody and visitation? Why?

Assuming no additional information, what custody/visitation arrangement are you likely to create in this case? Please address both physical and legal custody.

b) How would the order be different if dad now lives in New York rather than just the next town? What terms would you include in your order, if any, to facilitate contact between the father and the children?

Question 5:

Custody case involves a 7 year-old girl. Mom has been the sole caretaker since the birth of the child, but mom now has a substance abuse problem. A babysitter alerted DSS when mom failed to pick up child from the babysitter two Friday evenings in a row. Both times, the babysitter took the child home on Saturday and found mom asleep with many empty liquor bottles throughout

the house. As part of an agreement with DSS to avoid the filing of a neglect petition, mom has started a nonresidential treatment program. In addition, mom and 7 year-old girl now reside with mom's sister. Sister's home is a safe, good place for child. Dad filed custody case, asking for sole custody or at least significant visitation. Dad is fit and proper, and has a good home with new wife and a good job. However, dad has no relationship with 7 year-old child. He and mom were never married, and he has had no contact with mom since approximately 6 months after the birth of the child. He has sent money to mom from time to time during the years, but nothing regular.

a) Assume sister is not an option for primary custodian. What would you do at a temporary custody hearing where dad is asking for sole physical and legal custody?

b) By the time of the permanent hearing, mom has completed treatment and appears to be doing well. What additional information do you need to determine custody and visitation? Why?

c) Assuming you receive no additional important information, what are you likely to do in a permanent custody order in this case? Please address both physical and legal custody.

Tab: Custody Modification

Modification

- GS 50-13.7(a):
  - "an order of a court of this State for 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."

1

2-step process

- First: Moving party must show substantial change of circumstances affecting the welfare of the minor child[ren]
- Second: If changed circumstances, trial court must determine that modification is in the best interest of the child[ren]

2

Establishing Nexus

- Shipman – NC Supreme Court
  - Some effects of circumstances are "self-evident"
- West v. Marko – NC Court Of Appeals
  - Identified factors "naturally affecting" a child's welfare

3

Establishing Nexus

- Circumstances where effect is not self-evident include:
  - Cohabitation, relocation, change in sexual orientation, improved finances
- Need "direct" evidence of effect
  - By professionals, parents or testimony of children

4

Relocation under NC law

- Evidence must show effect of move on child
- Best interest analysis must include review of factors identified in Evans

5

Evans factors

- 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 relocation;
- And the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent.

6

Custody Modification: the effects of the same circumstances can be the changed circumstances

Child custody orders can be modified upon a showing that there has been a substantial change in circumstances affecting the welfare of the child(ren) since the entry of the last custody order and upon a showing that modification is in the best interest of the child(ren). GS 50-13.7; *Shipman v. Shipman*, 357 NC 471 (2003). Three relatively recent opinions from the court of appeals clarify that the required substantial change does not necessarily need to be the development or occurrence of a new circumstance; the required substantial change can be a change in the way an existing circumstance impacts the welfare of the child(ren).

Shell v. Shell, NC App (August 21, 2018)

The original custody order in this case granted primary physical custody to father and visitation to mother. At the time of the entry of the original order, mom had a history of alcohol and drug abuse, was unable to maintain employment and moved frequently. Father had limited intellectual abilities, struggled with literacy and relied heavily on his parents to manage his affairs and help him care for the children. He lived with his parents at the time of the original custody order and he and the children continued to reside with them when mother filed a motion to modify four years later. The trial court modified custody after concluding there had been a substantial change in circumstances and granted primary physical custody to mother and visitation to dad. On appeal, among other things, father argued that the trial court erred in considering circumstances considered by the court at the time it entered the original custody order four years earlier.

Mother's sobriety. Father first argued that the trial court should not have considered the positive impact of the improvements in mother's life resulting in large part from her sobriety because mom had been sober for four months at the time of the original custody order. The court of appeals held that the improvement in mother's ability to care for her children resulting from her continued sobriety during the four years between entry of the original order and the motion to modify was an appropriate change for the trial court to consider. The findings of fact in the order clearly showed that the mother's improvement affected the welfare of the children.

Father's limited abilities. Father also argued that the trial court erred in considering his limited intellectual abilities and struggles with literacy because he had those same issues at the time of the original order. The court of appeals held that the trial court findings established that the impact of father's condition on the children had changed since the original order because as the children aged, their needs became more complex. The trial court appropriately considered that father was less able to meet many of the needs of the children than he was at the time of the original order.

Parents' inability to communicate. Similarly, father argued that the trial court should not have considered the inability of the parents to interact with each other without arguing and their inability

to cooperate with each other to parent the children because they had the same relationship at the time of the original order. Again, the court of appeals held that even though the relationship of the parents was bad at the time of the original order, the findings by the trial court clearly established that the impact of this relationship on the children had worsened in the time between the original order and the modification hearing

Laprade v. Barry, 800 SE2d 112 (NC App 2017)

The trial court entered the first custody order in this case in 2011 when the child was 3 years old. The court modified the original order in 2012 due in part to the parties' inability to communicate about the needs of the child. In 2014, mother filed another motion to modify and in 2015, the trial court concluded there had been a substantial change in that, in addition to other things, the father's inability to communicate with mother was causing the child to experience high levels of anxiety.

Father appealed, arguing that the problem concerning communication identified by the court in 2015 existed at the time of the previous order and therefore could not support the conclusion that there had been a substantial change in circumstances. The court of appeals disagreed, holding that while the evidence clearly established that the parties had demonstrated a complete inability to communicate about the child from the time they originally separated, the trial court's findings of fact in the 2015 order focused on how "father's *present* actions had adversely affected the child…". Even though the basic problems existed at the time of the last order, the negative impact of the problems on the child worsened due to the conduct of the father and due to the age of the child. The court noted that it is "foreseeable" that communication difficulties between parents will affect a child "more and more as she becomes older and is engaged in activities which require parental cooperation and as she is more aware of the conflict between her parents."

Spoon v. Spoon, 233 NC App 38 (2014)

In this case, mother appealed a trial court order modifying a custody order to give father primary custody of the minor children based on the conclusion that the impact of mother's relocation on the children constituted a substantial change in circumstances. Mother argued that her relocation could not be the basis for the modification because she had moved before the entry of the last custody order entered in the case. The court of appeals affirmed the trial court after concluding that the trial court findings of fact established that the impact of the move on the children did not manifest and become apparent until after the entry of the previous order and therefore were appropriate for the trial court to consider as a basis for modification. The trial court modification order included findings that the grades of the children dropped after they changed schools, the children had become "clingy, tearful and upset" since the move, and they were unable to spend as much time with their father as before the move. The appellate court held that these findings clearly established that the move had a negative impact on the welfare of the children that became apparent only after the entry of the previous custody order.

Child Custody and Support: Jurisdiction to Modify

Unlike other civil judgments, custody and support orders can be modified when there has been a substantial change in circumstances since the order was entered. This rule is codified in North Carolina at GS 50-13.7 and every state in the country has a similar statute.

While this authority is broad and straight forward, there are other statutory provisions that place significant limits on a court's subject matter jurisdiction to modify a custody or support order – whether the order originally was entered in NC or in some other state or country. These statutory provisions were enacted for the purpose of discouraging parents from running from state to state in the hope of obtaining a more favorable court order.

Custody and Support Orders are Different

Even though custody and support often are addressed in the same order, the law relating to subject matter jurisdiction for each is different and found in different statutes. Custody jurisdiction is addressed in Chapter 50A, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), while support jurisdiction is addressed in Chapter 52C, the Uniform Family Support Act (UIFSA).

Both are uniform acts and both have been adopted by every state in the country. Fortunately, this means that the law relating to jurisdiction to modify is substantially similar, if not identical, in every state in the country.

Consent to Jurisdiction: It Works for Support but Not For Custody

Perhaps the most important thing to remember is that these statutes define subject matter jurisdiction rather than personal jurisdiction. While requirements of personal jurisdiction can be waived, subject matter jurisdiction generally cannot be conferred upon a court by the parties. *Foley v. Foley*, 156 NC App 409 (2003). Similarly, a failure to object to a lack of jurisdiction does not result in a waiver of that objection. *In re NRM,* 165 NC App 294 (2004). An order entered without subject matter jurisdiction is void.

A custody order entered by a state without jurisdiction under the UCCJEA is void, regardless of whether it is an initial determination or a modification, even if the parties consent or fail to object. *Foley; In re NRM.* In addition, the federal Parental Kidnapping Act (the PKPA) provides that a custody order entered in violation of its provisions (which are identical to the provisions in the UCCJEA) is not entitled to Full Faith and Credit. 28 USC sec. 1738A(c). The Federal Full Faith and Credit of Child Support Orders Act(the FFCCOA) provides the same regarding support orders entered in violation of UIFSA. 28 USC sec. 1738B.

However, UIFSA allows parties to agree to litigate a child support modification in a state that does not have jurisdiction under the Act, if that agreement is in writing and signed by both parties. GS 52C-2-205.

Continuing Exclusive Jurisdiction ("CEJ")

Modification jurisdiction for both custody and support is based on the concept of *continuing exclusive jurisdiction (CEJ).* If the state that entered the original support or custody order has CEJ at the time the motion to modify is filed, only that state has authority to handle the case. GS 52C-2-205(support); GS 50A-203(custody). *See also Hook v. Hook*, 170 NC App 138 (2005)(support) and *Crenshaw v. Williams*, 211 NC App 136 (2011)(custody); *In re NRM* (Termination of parental rights).

A state that entered a support order will have CEJ to modify that order if, at the time the motion to modify is filed, the state continues to be the residence of the obligor, the obligee or the child. Even if the state is not the residence of one of these people, the state also will have CEJ if the parties agree to jurisdiction in writing or on the court record. GS 52C-2-205.

A state that entered a custody order will have CEJ to modify that order until either:

1) that state determines that the child, the parents and any other person acting as a parent no longer have a significant connection with the state and that substantial evidence is no longer available in the state about the child, or

2) any state determines that the child, the parents and any person acting as a parent do not reside in the state.

GS 50A-202.

For custody modification, the state with CEJ can, instead of litigating the modification request, decide that another state is a more convenient forum for the matter to be resolved. GS 50A-207. But the authority to make that determination rests exclusively with the state with continuing exclusive jurisdiction. Id.

When Continuing Exclusive Jurisdiction is Lost

In both custody and support cases, the state that entered the order sought to be modified loses CEJ when the parents and the child (and any person acting as a parent in a custody case) all leave the state. GS 52C-2-205(support); GS 50A-202(custody).

So the first question to ask in any modification case is whether anyone continues to live in the state that issued the order to be modified. If the answer to that question is yes, then absent an

emergency situation that will justify the temporary exercise of child custody jurisdiction or a ruling by that court that the state no longer has significant connection/substantial evidence to support the exercise of jurisdiction for custody modification, the state that entered the order will be the only state with jurisdiction to modify the order. No other state has subject matter jurisdiction to modify either a child support order (absent written consent of the parties) or a custody order. GS 50A-203(custody); GS 52C-2-205(child support). *See also* PKPA, 28 USC sec. 1738A(c) (full faith and credit for custody); FFCCOA, 28 USC sec. 1738B (full faith and credit for child support).

But if no one continues to reside in the issuing state, the UCCJEA and UIFSA contain different rules regarding what state will have jurisdiction to modify.

For custody, any state that could make an initial determination will have jurisdiction to modify when there is no state with CEJ. GS 50A-203. This means a state that is *the home state of the child at the time the motion to modify is filed has priority jurisdiction*. If there is no home state, then a court with substantial evidence/significant connection jurisdiction can modify the order. *See* GS 50A-201(initial determination jurisdiction).

For support, the play-away rule applies. UIFSA provides that if no state has CEJ, the party seeking modification must litigate in the state where the other parent resides (unless both parties agree in writing to litigation in another state). If they reside in the same state, it is convenient for both parties. But if they reside in different states, UIFSA provides that the inconvenience of traveling falls upon the party seeking modification. GS 52C-6-611. *Crenshaw*; *Barclay v. Makarov, unpublished,* 767 SE2d 152 (2014).

Same Rules Apply When Original Order was Entered in North Carolina

It is common for people to assume that North Carolina can modify any custody or support order entered by a North Carolina court, but that is not true. Instead, the rule regarding CJE applies to our own orders as well as to orders entered by other states or countries. If NC does not have CEJ at the time the motion to modify is filed, then NC does not have jurisdiction to modify either type of order. GS 50A-202(b)(custody); GS 52C-205(support).

Custody Modification
Discussion Problems

1) When the children were 9 months old, a "permanent" custody order was entered giving Sara and David joint legal and joint physical custody of their twin boys. Things worked well until David's girlfriend moved into his house when the children were 2 years old. The children now are 3 years old and Sara has filed a motion to modify the custody order. She claims that the children are emotionally upset and confused about the girlfriend, and she argues that primary physical custody should be given to her to protect the children from additional harm in the future. She testifies that Alex seems to be doing fine, but Aaron has been having "temper tantrums" on a regular basis, he cries much more than Alex when moving from her house to David's house, and he is not talking as much as Alex. She thinks that neither boy is talking as much as they did before the girlfriend moved in with David. She also is extremely concerned that neither boy is completely potty trained. Both have frequent nighttime "accidents" and Aaron has on a number of occasions refused to use the restroom during the day and ended up soiling his clothes.

David testifies that the children are doing very well with the current schedule. He thinks tantrums are "normal for little boys" and he tells you that both boys also cry when leaving his house for Sara's house. He is not worried because the boys become happy very quickly after Sara leaves them at his house, although he admits that it takes Aaron quite a bit longer to "adjust." David also testifies that his girlfriend helps care for the boys and that they seem to enjoy being around her. He is of the opinion that Sara is "overly obsessive about this potty training stuff."

1. Is this evidence sufficient to establish a substantial change in circumstances? What findings would you make to support your conclusion? Is there other information you would like to have?

2. Assuming you find a substantial change, you must then determine whether the original custody arrangement needs to be changed to meet the best interest of the children. Is there additional information you would like to have before resolving

the modification motion? Assuming you learn nothing negative about the are taking ability of either parent, what type of parenting plan would you be likely to enter in this case?

2) Now assume that the first judge gave primary physical custody to David when the boys were 9 months old. Both Sara and David are architects, but Sara works a lot and she spends much more time at the office than does David. The twins are now 10 years old. David has remarried and the boys get along well with the stepmother. Sara has a very good relationship with the boys even though she spends less time with them than does David. She sees the boys 3 to 4 times each week and they spend the night at her house at least twice each week. Sara frequently attends school functions and extracurricular activities, and she keeps in close contact with the boys' school teachers. She talks to the boys every day by telephone. Sara's extended family lives in Raleigh, and the boys are very close to Sara's parents as well as to the young children of Sara's two brothers. Alex and Aaron are both involved in sports, do well in school, and are active in their church. David's parents also live in Raleigh and have a strong relationship with the boys.

   David was fired from the kitchen design firm 6 months ago, and he has not been able to find a job in Raleigh. He was offered a very good job (one he would consider a significant advancement) in California. He is not excited about leaving North Carolina but he feels this is the only way to maintain the family's current standard of living. He does not believe he will be able to find work at all in the Raleigh area due to "problems" he experienced with his colleagues at the Raleigh firm. He told Sara he planned to accept the California job and take the boys with him. Sara then filed a motion to modify custody, asking that primary physical custody be transferred to her if David moves to California.

   a. You must first determine whether David's move to California with the boys would be a substantial change in circumstances affecting the welfare of the children. Would it? If so, what finding would you make to support that conclusion? And, what type of evidence do you need from the parties in order to support your findings?

   b. Once you determine that the move will affect the boys, you must determine how to arrange custody and visitation in a way that will best promote the interests and welfare of the children. What additional information do you need in this case?

Assuming no other significant information, what type of parenting arrangement would you likely create in this situation?

Tab: Setting Child Support

Child Support

- Parents liable for support until child turns 18
  - Obligation continues until 20 if child is "making satisfactory progress towards graduation."
  - GS 50-13.4(c)
- Non-parents responsible for support only if obligation is undertaken in writing – then only secondarily liable
  - Limited exception for grandparents when minor children have children
  - GS 50-13.4(b)

1

Personal Jurisdiction

- Child support requires *in personum* jurisdiction
  - Unless defendant consents, defendant must have 'minimum contacts' with state
  - Remember *Kulko v. Superior Ct of California,* 436 US 84 (1978)

2

Subject Matter Jurisdiction

- A state's subject matter jurisdiction to adjudicate child support is affected by UIFSA (Uniform Instate Family Support Act)
  - NC cannot enter a new support order if there already is an order entered in another state entitled to recognition.
    - See GS 52C-2-207(d)
  - NC cannot adjudicate support if support action pending in 'home state' of child
    - See GS 52C-2-204

3

Child Support

- Support amount is set based on **actual present gross income** of parent
  - Unless income is "imputed" due to parent's **bad faith disregard of support obligation**
  - Imputing income means award is based on earning capacity rather than actual income
    - Cannot use minimum wage unless there a finding of bad faith

4

Income

- Definition of income is very broad
  - "includes income from any source"
  - Includes non-recurring lump sum payments
  - Definition found in Child Support Guidelines

5

Child Support: General Standard

- "…shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the childcare and homemaker contributions of each party, and other facts of a particular case."
  - GS 50-13.4(c)

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Child Support

- Guidelines supply the presumptive support obligation
  - Presumed to meet GS 50-13.4(c) standard
- NC uses "Income Shares Model" guidelines
  - Model adopted by majority of states
- Model based on premise that child should receive same percentage of parents' combined income that child would receive if parents lived together.

7

Guidelines

- Assume most normal expenses, including taxes
- So, worksheets require gross income
- Consider some expenses on case-by-case basis
  - Childcare
  - Health care
  - Extraordinary expenses

8

Child Support

- Guidelines must be used to set prospective support unless court decides to deviate from the guidelines
- Deviation allowed when court determines guidelines "would not meet or would exceed the reasonable needs of the child… or would be otherwise unjust or inappropriate."
  - Requires **extensive findings of fact**
- If deviate, support set by GS 50-13.4(c)

9

Guidelines

- Apply to cases where combined income is $40,000 per month or less
- If income is higher, use GS 50-13.4
  - Need findings of fact supported by evidence

10

Child Support

- Prospective Support = Support ordered to be paid from time complaint or motion is filed forward
- Retroactive Support = Support ordered to be paid to cover time before complaint or motion is filed
  - Statute of limitations allows recovery of support up to three years before case is filed

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Retroactive Support

- Also called 'prior maintenance'
- Reimbursement for actual expenses incurred for care of child that were not shared by the other parent
  - Parent seeking to recover must prove actual expenditures
- Since 2006: Guidelines say parent can use guidelines to establish amount rather than proving actual expenditures

12

Agreements

- Parent can contract regarding child support and those contracts are enforceable by the court
- However, court never loses authority to address needs of children
- If agreement is incorporated, it becomes a court order subject to modification as any other order for support
- If agreement is not incorporated, either party can file a new action for support pursuant to Chapter 50

13

Effect of *Unincorporated* Agreement

- On Retroactive Support:
  - *Carson v. Carson,* 680 SE2d 885 (NC App 2009)
    - Contract controls amount
  - Court can order only reimbursement for emergency expenses not covered by the agreement
- On Prospective Support:
  - *Pataky v. Pataky*, 160 NC App 289 (2003) (discussed some in *Carson*)
  - Contract controls amount unless party can show it fails to meet reasonable needs of child

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Modification: GS 50-13.7

- Court can modify court orders only; cannot modify an *unincorporated* contract (agreement)
- Modification is 2 step process:
  - 1st step: substantial change of circumstances
  - 2nd step: new award set based on present circumstances
- Vested arrears cannot be modified
  - GS 50-13.10
  - Rule is required by federal child support enforcement program so rule is the same in every state

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Changed Circumstances

- Substantial involuntary decrease in income of a parent
- Substantial change in the needs of the child
- 3-year order/15% change
- Significant change in custody/visitation arrangement
- Need to provide for child's health care needs

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Modification

- Subject matter jurisdiction to modify order from another state controlled by UIFSA
  - See GS 52C-6-613
- If one parent continues to reside in the other state, NC can modify only if both parties consent in writing
- If neither resides in issuing state, NC can modify only if:
  - Both parties reside here, or
  - Both consent in writing, or
  - One lives here but party requesting modification does not live here (play-away rule)
  - See GS 52C-6-611

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North Carolina
Child Support Guidelines

Effective January 1, 2023

Introduction

Section 50-13.4 of the North Carolina General Statutes requires the Conference of Chief District Judges to prescribe uniform statewide presumptive guidelines for determining the child support obligations of parents, and to review the guidelines periodically (at least once every four years) to determine whether their application results in appropriate child support orders. The next review will occur during 2026. Comments and suggestions regarding the review should be directed to the North Carolina Administrative Office of the Courts' Office of General Counsel, PO Box 2448, Raleigh, NC 27602.

These revised guidelines are the product of the ongoing review process conducted by the Conference of Chief District Judges. The Conference conducted a public hearing to provide interested citizens an opportunity to comment on the guidelines and also considered written comments from agencies, attorneys, judges, and members of the public.

Applicability and Deviation

These revised guidelines are effective January 1, 2023, and apply to child support actions heard on or after that date.

North Carolina's child support guidelines apply as a rebuttable presumption in all legal proceedings involving the child support obligation of a parent (including orders entered in criminal and juvenile proceedings, orders entered in UIFSA proceedings, orders entered in civil domestic violence proceedings pursuant to G.S. Chapter 50B, and voluntary support agreements and consent orders approved by the court). The guidelines do not apply to child support orders entered against stepparents or other persons or agencies who are secondarily liable for child support. If a child's parents have executed a valid, unincorporated separation agreement that determines a parent's child support obligations and an action for child support is subsequently brought against the parent, the court must base the parent's child support obligation on the amount of support provided under the separation agreement rather than the amount of support payable under the child support guidelines, unless the court determines, by the greater weight of the evidence, taking into account the child's needs and the factors enumerated in the first sentence of G.S. 50-13.4(c), that the amount of support under the separation agreement is unreasonable.

The guidelines must be used when the court enters a temporary or permanent child support order in a non-contested case or a contested hearing.

The court upon its own motion or upon motion of a party may deviate from the guidelines if, after hearing evidence and making findings regarding the reasonable needs of the child for support and the relative ability of each parent to provide support, it finds by the greater weight of the evidence that application of the guidelines would not meet, or would exceed, the reasonable needs of the child considering the relative ability of each parent to provide support, or would otherwise be unjust or inappropriate. If the court deviates from the guidelines, the court must make written findings (1) stating the amount of the supporting parent's presumptive child support obligation determined pursuant to these guidelines, (2) determining the reasonable needs of the child and the relative ability of each parent to provide support, (3) supporting the court's conclusion that the presumptive amount of child support determined under the guidelines is inadequate or excessive or that application of the guidelines is otherwise unjust or inappropriate, and (4) stating the basis on which the court determined the amount of child support ordered. (One example of a reason to deviate may be when one parent pays 100% of the child support obligation and 100% of the insurance premium.)

The guidelines are intended to provide adequate awards of child support that are equitable to the child and both of the child's parents, considering the parents' earnings, income, and other evidence of ability to pay. When the court does not deviate from the guidelines, an order for child support in an amount determined pursuant to the guidelines is conclusively presumed to meet the reasonable needs of a child, considering the relative ability of each parent to provide support, and specific findings regarding a child's reasonable needs or the relative ability of each parent to provide support are therefore not required.

Regardless of whether the court deviates from the guidelines or enters a child support order pursuant to the guidelines, the court should consider incorporating in or attaching to its order, or including in the case file, the child support worksheet it uses to determine the supporting parent's presumptive child support obligation under the guidelines.

Retroactive Child Support

In a direct response to *Respess v. Respess,* 232 N.C. App. 611, 754 S.E.2d 691 (2014), the 2014 General Assembly amended G.S. 50-13.4(c1) to provide that "the Conference of Chief District Judges shall prescribe uniform statewide presumptive guidelines for the computation of child support obligations, including retroactive support obligations [. . .]"

In cases involving a parent's obligation to support his or her child for a period before a child support action was filed (i.e., cases involving claims for "retroactive child support" or "prior maintenance"), a court may determine the amount of the parent's obligation (a) by determining the amount of support that would have been required had the guidelines been applied at the beginning of the time period for which support is being sought, or (b) based on the parent's fair share of actual expenditures for the child's care. However, if a child's parents have executed a valid, unincorporated separation agreement that determined a parent's child support obligation for the period of time before the child support action was filed, the court shall not enter an order for retroactive child support or prior maintenance in an amount different than the amount required by the unincorporated separation agreement.

Self-Support Reserve; Supporting Parents With Low Incomes

The guidelines include a self-support reserve that ensures that obligors have sufficient income to maintain a minimum standard of living based on the 2022 federal poverty level for one person ($1,133 per month). For obligors with an adjusted gross income of less than $1,150, the Guidelines require, absent a deviation, the establishment of a minimum support order ($50). For obligors with adjusted gross incomes above $1,150, the Schedule of Basic Support Obligations incorporates a further adjustment to maintain the self-support reserve for the obligor.

If the obligor's adjusted gross income falls within the shaded area of the Schedule and Worksheet A is used, the basic child support obligation and the obligor's total child support obligation are computed using only the obligor's income. In these cases, childcare and health insurance premiums should not be used to calculate the child support obligation. However, payment of these costs or other extraordinary expenses by either parent may be a basis for deviation. This approach prevents disproportionate increases in the child support obligation with moderate increases in income and protects the integrity of the self-support reserve. In all other cases, the basic child support obligation is computed using the combined adjusted gross incomes of both parents.

Determination Of Support In Cases Involving High Combined Income

In cases in which the parents' combined adjusted gross income is more than $40,000 per month ($480,000 per year), the supporting parent's basic child support obligation cannot be determined by using the child support schedule.

In cases in which the parents' combined income is above $40,000 per month, the court should set support in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case, as provided in the first sentence of G.S. 50-13.4(c). The schedule of basic child support may be of assistance to the court in determining a minimal level of child support.

Assumptions And Expenses Included In Schedule Of Basic Child Support Obligations

North Carolina's child support guidelines are based on the "income shares" model, which was developed under the Child Support Guidelines Project funded by the U.S. Office of Child Support Enforcement and administered by the National Center for State Courts. The income shares model is based on the concept that child support is a shared parental obligation and that a child should receive the same proportion of parental income he or she would have received if the child's parents lived together. The schedule of basic child support obligations is based primarily on an analysis by the Center for Policy Research of economic research regarding family expenditures for children.

The child support schedule that is a part of the guidelines is based on economic data which represent adjusted estimates of average total household spending for children between birth and age 18, excluding child care, health insurance, and health care costs in excess of $250 per child per year. Expenses incurred in the exercise of visitation are not factored into the schedule.

Income

The Schedule of Basic Child Support Obligations is based upon net income converted to gross annual income by incorporating the federal tax rates, North Carolina tax rates and FICA. Gross income is income before deductions for federal or state income taxes, Social Security or Medicare taxes, health insurance premiums, retirement contributions, or other amounts withheld from income.

(1) Gross Income. "Income" means a parent's actual gross income from any source, including but not limited to income from employment or self-employment (salaries, wages, commissions, bonuses, dividends, severance pay, etc.), ownership or operation of a business, partnership, or corporation, rental of property, retirement or pensions, interest, trusts, annuities, capital gains, Social Security benefits, workers compensation benefits, unemployment insurance benefits, disability pay and insurance benefits, gifts, prizes and alimony or maintenance received from persons other than the parties to the instant action. When income is received on an irregular, non-recurring, or one-time basis, the court may average or prorate the income over a specified period of time or require an obligor to pay as child support a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support.

Specifically excluded from income are adoption assistance benefits and benefits received from means-tested public assistance programs, including but not limited to Temporary Assistance to Needy Families (TANF), Supplemental Security Income (SSI), Electronic Food and Nutrition Benefits, and General Assistance. Also specifically excluded from income are (1) child support payments received on behalf of a child other than the child for whom support is being sought in the present action, (2) employer contributions toward future Social Security and Medicare payments for an employee, and (3) amounts that are paid by a parent's employer directly to a third party or entity for health, disability or life insurance or retirement benefits and are not withheld or deducted from the parent's wages, salary or pay.

Veterans Administration benefits and Social Security benefits received for the benefit of a child as a result of the disability or retirement of either parent are included as income attributed to the parent on whose earnings record the benefits are paid, but are deductible from that parent's child support obligation if the benefits are paid to the other parent. If the Social Security or Veterans Administration benefits received by the child are based on the disability or retirement of the obligor and exceed the obligor's child support obligation, no order for prospective child support should be entered, unless the court decides to deviate.

Except as otherwise provided, income does not include the income of a person who is not a parent of a child for whom support is being determined, regardless of whether that person is married to or lives with the child's parent or has physical custody of the child.

(2) Income from Self-Employment or Operation of a Business. Gross income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, is defined as gross receipts minus ordinary and necessary expenses required for self-employment or business operation. Ordinary and necessary business expenses do not include amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses, investment tax credits, or any other business expenses determined by the court to be inappropriate for determining gross income. In general, income and expenses from self-employment or operation of a business should be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support obligation. In most cases, this amount will differ from a determination of business income for tax purposes.

Expense reimbursements or in-kind payments (for example, use of a company car, free housing, or reimbursed meals) received by a parent in the course of employment, self-employment, or operation of a business are counted as income if they are significant and reduce personal living expenses.

(3) Potential or Imputed Income. If the court finds that a parent's voluntary unemployment or underemployment is the result of the parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income. Potential income may not be imputed to a parent who is physically or mentally incapacitated and, in compliance with 45 C.F.R. § 302.56(c)(3), incarceration may not be treated as voluntary unemployment in establishing or modifying a child support order. In determining whether a parent's voluntary unemployment or underemployment is the result of the parent's bad faith or deliberate suppression of income, the court shall consider the specific circumstances of the parent, including the presence of a young or physically or mentally disabled child in the home of the parent impacting the parent's ability to work.

The amount of potential income imputed to a parent must be based on the parent's assets, residence, employment potential and probable earnings level, based on the parent's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the community and other relevant background factors relating to the parent's actual earning potential. If the parent has no recent work history or vocational training, potential income should not be less than the minimum hourly wage for a 35-hour work week.

(4) Income Verification. Child support calculations under the guidelines are based on the parents' current incomes at the time the order is entered. Income statements of the parents should be verified through documentation of both current and past income. Suitable documentation of current earnings (at least one full month) includes pay stubs, employer statements, or business receipts and expenses, if self-employed. Documentation of current income must be supplemented with copies of the most recent tax return to provide verification of earnings over a longer period. Sanctions may be imposed for failure to comply with this provision on the motion of a party or by the court on its own motion.

Existing Support Obligations And Responsibility For Other Children

Current child support payments actually made by a parent under any existing court order, separation agreement, or voluntary support arrangement are deducted from the parent's gross income, regardless of whether the child or children for whom support is being paid was/were born before or after the child or children for whom support is being determined. Payments on arrearages are not deducted. The court may consider a voluntary support arrangement as an existing child support obligation when the supporting parent has consistently paid child support for a reasonable and extended period of time. **The fact that a parent pays child support for two or more families under two or more child support orders, separation agreements, or voluntary support arrangements may be considered as a factor warranting deviation from the child support guidelines.** When establishing, reviewing, or modifying a child support order, the court shall consider, during the same session of court if possible, all other requests to establish, review, or modify any other support order involving the same non-custodial parent.

Any payment of alimony made by a parent to any person is not deducted from gross income but may be considered as a factor to vary from the final presumptive child support obligation.

A parent's financial responsibility (as determined below) for his or her natural or adopted children who currently reside with the parent (other than children for whom child support is being determined in the pending action) is deducted from the parent's gross income. Use of this deduction is appropriate when a child support order is entered or modified, but may not be the sole basis for modifying an existing order.

A parent's financial responsibility for his or her natural or adopted children who currently reside with the parent (other than children for whom child support is being determined in the pending action) is equal to the basic child support obligation for these children, based on the parent's income.

Basic Child Support Obligation

The basic child support obligation is determined using the attached schedule of basic child support obligations. For combined monthly adjusted gross income amounts falling between amounts shown in the schedule, the basic child support obligation should be interpolated.

The number of children refers to children for whom the parents share joint legal responsibility and for whom support is being sought.

Child Care Costs

Reasonable child care costs that are, or will be, paid by a parent due to employment or job search are added to the basic child support obligation and prorated between the parents based on their respective incomes. Other reasonable child care costs, such as child care costs incurred while the custodial parent attends school, may be the basis for a deviation. The court may also consider actual child care tax credits received by a parent as a basis for deviation.

Health Insurance And Health Care Costs

The amount that is or will be paid by a parent (or a parent's spouse) for health (medical, or medical and dental and/or vision) insurance for the children for whom support is being determined is added to the basic child support obligation and prorated between the parents based on their respective incomes. Payments that are made by a parent's (or stepparent's) employer for health insurance and are not deducted from the parent's (or stepparent's) wages are not included. When a child for whom support is being determined is covered by a family policy, only the health insurance premium actually attributable to that child is added. If this amount is not available or cannot be verified, the total cost of the premium is divided by the total number of persons covered by the policy and then multiplied by the number of covered children for whom support is being determined.

The basic guideline support obligation includes $250 per child for the child's annual uninsured medical and/or dental expenses. In any case, including those where a parent's income falls within the shaded area of the child support schedule, the court may order that uninsured health care costs in excess of $250 per year (including reasonable and necessary costs related to medical care, dental care, orthodontia, vision care, asthma treatments, physical therapy, treatment of chronic health problems, and counseling or psychiatric therapy for diagnosed mental disorders) **incurred by a parent** be paid by either parent or both parents in such proportion as the court deems appropriate.

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

If health insurance is not actually and currently available to a parent at a reasonable cost at the time the court orders child support, the court must enter an order requiring the parent to obtain and maintain health insurance for a child if and when the parent has access to reasonably-priced health insurance for the child.

The court may require one or both parties to maintain dental insurance and/or vision insurance.

Pursuant to G.S. 50-13.11(a1), health insurance is reasonable if the coverage for the child is available at a cost to the parent that does not exceed five percent (5%) of the parent's gross income. In applying this standard, the cost is the cost of (i) adding the child to the parent's existing coverage, (ii) child-only coverage, or (iii) if new coverage must be obtained, the difference between the cost of self-only and family coverage.

Other Extraordinary Expenses

Other extraordinary child-related expenses (including (1) expenses related to special or private elementary or secondary schools to meet a child's particular education needs, and (2) expenses for transporting the child between the parent's homes) may be added to the basic child support obligation and ordered paid by the parents in proportion to their respective incomes if the court determines the expenses are reasonable, necessary, and in the child's best interest.

Child Support Worksheets

A parent's presumptive child support obligation under the guidelines must be determined using one of the attached child support worksheets.

The child support worksheets must include the incomes of both parents, regardless of whether one parent is seeking child support from the other parent or a third party is seeking child support from one or both parents. The child support worksheets may not be used to calculate the child support obligation of a stepparent or other party who is secondarily liable for child support. Do not include the income of an individual who is not the parent of a child for whom support is being determined on the worksheets.

Use Worksheet A when one parent (or a third party) has primary physical custody of all of the children for whom support is being determined. A parent (or third party) has primary physical custody of a child if the child lives with that parent (or custodian) for 243 nights or more during the year. Primary physical custody is determined without regard to whether a parent has primary, shared, or joint legal custody of a child. Do not use Worksheet A when (a) a parent has primary custody of one or more children and the parents share custody of one or more children [instead, use Worksheet B], or (b) when primary custody of two or more children is split between the parents [instead, use Worksheet C]. In child support cases involving primary physical custody, a child support obligation is calculated for both parents but the court enters an order requiring the parent who does not have primary physical custody of the child to pay child support to the parent or other party who has primary physical custody of the child.

Use Worksheet B when (a) the parents share custody of all of the children for whom support is being determined, or (b) when one parent has primary physical custody of one or more of the children and the parents share custody of another child. Parents share custody of a child if the child lives with each parent for at least 123 nights during the year and each parent assumes financial responsibility for the child's expenses during the time the child lives with that parent. A parent does not have shared custody of a child when that parent has visitation rights that allow the child to spend less than 123 nights per year with the parent and the other parent has primary physical custody of the child. Shared custody is determined without regard to whether a parent has primary, shared, or joint legal custody of a child. Do not apply the self-sufficiency reserve incorporated into the shaded area of the schedule when using Worksheet B.

In cases involving shared custody, the parents' combined basic support obligation is increased by 50% (multiplied by 1.5) and is allocated between the parents based on their respective incomes and the amount of time the children live with the other parent. The adjustment based on the amount of time the children live with the other parent is calculated for all of the children regardless of whether a parent has primary, shared, or split custody of a child. After child support obligations are calculated for both parents, the parent with the higher child support obligation is ordered to pay the difference between his or her presumptive child support obligation and the other parent's presumptive child support obligation.

Use Worksheet C when primary physical custody of two or more children is split between the parents. Split custody refers to cases in which one parent has primary custody of at least one of the children for whom support is being determined and the other parent has primary custody of the other child or children. Do not use Worksheet C when the parents share custody of one or more of the children and have primary physical custody or split custody of another child instead, use Worksheet B. The parents' combined basic support obligation is allocated between the parents based on their respective incomes and the number of children living with each parent. After child support obligations are calculated for both parents, the parent with the higher child support obligation is ordered to pay the difference between his or her presumptive child support obligation and the other parent's presumptive child support obligation. Do not apply the self-sufficiency reserve incorporated into the shaded area of the schedule when using Worksheet C.

Modification

In a proceeding to modify the amount of child support payable under a child support order that was entered at least three years before the pending motion to modify was filed, 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 shall be presumed to constitute a substantial change of circumstances warranting modification of the existing child support order.

In compliance with 45 C.F.R. § 302.56(c)(3), incarceration may not be treated as voluntary unemployment in establishing or modifying a child support order.

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

North Carolina
Schedule of Basic Support Obligations

Combined Adjusted Gross Income	Effective January 1, 2023					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
0 - 1300	50	50	50	50	50	50
1350	65	66	67	67	68	69
1400	100	101	102	103	104	106
1450	135	136	138	139	141	142
1500	170	171	173	175	177	179
1550	204	207	209	211	213	216
1600	239	242	244	247	250	252
1650	274	277	280	283	286	289
1700	309	312	315	319	322	326
1750	343	347	351	355	359	362
1800	358	382	387	391	395	399
1850	367	418	422	427	431	436
1900	376	453	458	463	468	473
1950	384	488	493	498	504	509
2000	393	522	528	533	539	545
2050	402	556	562	568	574	580
2100	410	590	597	603	610	616
2150	419	625	631	638	645	652
2200	428	651	666	673	680	688
2250	436	665	701	708	716	723
2300	445	678	735	743	751	759
2350	454	691	770	778	787	795
2400	462	704	804	813	822	831
2450	471	717	839	848	857	866
2500	480	731	874	883	893	902
2550	488	744	899	918	928	938
2600	497	757	915	953	963	974
2650	506	770	931	988	999	1009
2700	514	783	947	1023	1034	1045
2750	523	797	963	1058	1070	1081
2800	532	810	979	1093	1105	1117
2850	540	823	995	1111	1140	1152
2900	549	836	1011	1129	1176	1188
2950	558	849	1027	1147	1211	1224
3000	566	863	1043	1165	1246	1260
3050	575	876	1059	1183	1282	1295
3100	584	889	1075	1200	1317	1331
3150	592	902	1091	1218	1340	1367
3200	601	915	1107	1236	1360	1403
3250	610	929	1123	1254	1379	1438
3300	618	942	1139	1272	1399	1474

North Carolina
Schedule of Basic Support Obligations

Combined Adjusted Gross Income	Effective January 1, 2023					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
3350	627	955	1154	1290	1418	1510
3400	636	968	1170	1307	1438	1546
3450	644	981	1186	1325	1458	1581
3500	653	995	1202	1343	1477	1606
3550	662	1008	1218	1361	1497	1627
3600	671	1021	1234	1379	1517	1648
3650	679	1034	1250	1397	1536	1670
3700	688	1047	1266	1414	1556	1691
3750	697	1061	1282	1432	1575	1712
3800	705	1074	1298	1450	1595	1734
3850	714	1087	1314	1468	1615	1755
3900	723	1099	1328	1483	1632	1774
3950	731	1110	1341	1498	1648	1791
4000	740	1122	1354	1513	1664	1809
4050	749	1133	1367	1527	1680	1826
4100	757	1145	1380	1542	1696	1844
4150	766	1156	1394	1557	1712	1861
4200	775	1168	1407	1571	1728	1879
4250	783	1179	1420	1586	1744	1896
4300	792	1190	1433	1600	1761	1914
4350	801	1202	1446	1615	1777	1931
4400	809	1213	1459	1630	1793	1949
4450	818	1225	1472	1644	1809	1966
4500	827	1236	1485	1659	1825	1984
4550	834	1249	1500	1676	1843	2004
4600	841	1260	1514	1691	1860	2022
4650	848	1272	1527	1706	1876	2039
4700	855	1283	1540	1720	1892	2057
4750	862	1294	1553	1735	1908	2074
4800	869	1305	1566	1750	1925	2092
4850	875	1316	1579	1764	1941	2110
4900	882	1327	1593	1779	1957	2127
4950	889	1338	1606	1794	1973	2145
5000	896	1349	1619	1808	1989	2162
5050	903	1360	1632	1823	2005	2180
5100	909	1372	1645	1838	2021	2197
5150	916	1383	1658	1852	2037	2215
5200	923	1394	1671	1867	2054	2232
5250	929	1403	1683	1880	2068	2247
5300	935	1412	1693	1891	2080	2261
5350	940	1420	1702	1901	2092	2274

North Carolina
Schedule of Basic Support Obligations

Combined Adjusted Gross Income	Effective January 1, 2023					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
5400	946	1428	1712	1912	2104	2287
5450	951	1436	1722	1923	2116	2300
5500	957	1445	1732	1934	2128	2313
5550	962	1453	1741	1945	2140	2326
5600	968	1461	1751	1956	2152	2339
5650	973	1469	1761	1967	2164	2352
5700	979	1478	1771	1978	2176	2365
5750	985	1486	1781	1989	2188	2378
5800	990	1494	1790	2000	2200	2391
5850	996	1503	1800	2011	2212	2404
5900	1001	1511	1810	2022	2224	2417
5950	1007	1519	1820	2033	2236	2430
6000	1010	1524	1826	2040	2244	2439
6050	1014	1529	1832	2046	2250	2446
6100	1017	1534	1837	2052	2257	2454
6150	1021	1539	1843	2058	2264	2461
6200	1024	1544	1848	2064	2271	2468
6250	1027	1549	1854	2071	2278	2476
6300	1031	1554	1859	2077	2284	2483
6350	1034	1559	1865	2083	2291	2491
6400	1038	1564	1870	2089	2298	2498
6450	1041	1568	1876	2095	2305	2505
6500	1044	1573	1881	2102	2312	2513
6550	1048	1578	1887	2108	2319	2520
6600	1051	1583	1893	2114	2325	2528
6650	1055	1588	1898	2120	2332	2535
6700	1058	1593	1903	2126	2338	2542
6750	1061	1596	1906	2129	2342	2546
6800	1064	1600	1909	2132	2345	2550
6850	1067	1603	1912	2135	2349	2553
6900	1070	1607	1915	2139	2353	2557
6950	1073	1610	1918	2142	2356	2561
7000	1076	1614	1920	2145	2360	2565
7050	1080	1617	1923	2148	2363	2569
7100	1083	1621	1926	2152	2367	2573
7150	1086	1624	1929	2155	2370	2576
7200	1089	1628	1932	2158	2374	2580
7250	1092	1631	1935	2161	2377	2584
7300	1095	1635	1938	2164	2381	2588
7350	1098	1639	1941	2168	2384	2592
7400	1101	1642	1943	2171	2388	2596

North Carolina
Schedule of Basic Support Obligations

Combined Adjusted Gross Income	Effective January 1, 2023					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
7450	1105	1648	1950	2178	2396	2604
7500	1109	1655	1959	2189	2408	2617
7550	1113	1662	1969	2199	2419	2630
7600	1118	1669	1979	2210	2431	2643
7650	1122	1676	1988	2221	2443	2655
7700	1126	1684	1998	2231	2455	2668
7750	1130	1691	2007	2242	2466	2681
7800	1135	1698	2017	2253	2478	2694
7850	1139	1705	2026	2263	2490	2706
7900	1143	1712	2036	2274	2501	2719
7950	1148	1720	2045	2285	2513	2732
8000	1152	1727	2055	2295	2525	2745
8050	1156	1734	2065	2306	2537	2757
8100	1160	1741	2074	2317	2548	2770
8150	1165	1749	2084	2327	2560	2783
8200	1168	1752	2087	2331	2564	2787
8250	1170	1755	2089	2334	2567	2791
8300	1173	1758	2092	2337	2570	2794
8350	1175	1761	2094	2339	2573	2797
8400	1178	1764	2097	2342	2576	2800
8450	1181	1767	2099	2345	2579	2804
8500	1183	1770	2102	2347	2582	2807
8550	1186	1773	2104	2350	2585	2810
8600	1188	1776	2106	2353	2588	2813
8650	1191	1779	2109	2355	2591	2816
8700	1193	1782	2111	2358	2594	2819
8750	1196	1785	2113	2361	2597	2823
8800	1198	1787	2116	2363	2600	2826
8850	1201	1790	2118	2366	2602	2829
8900	1203	1793	2120	2369	2605	2832
8950	1207	1798	2125	2374	2611	2838
9000	1210	1802	2130	2379	2617	2844
9050	1214	1807	2134	2384	2623	2851
9100	1217	1812	2139	2389	2628	2857
9150	1221	1816	2144	2395	2634	2863
9200	1225	1821	2148	2400	2640	2869
9250	1228	1825	2153	2405	2646	2876
9300	1232	1830	2158	2410	2651	2882
9350	1235	1835	2162	2415	2657	2888
9400	1239	1839	2167	2421	2663	2894
9450	1242	1844	2172	2426	2668	2901

North Carolina
Schedule of Basic Support Obligations

Combined Adjusted Gross Income	Effective January 1, 2023					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
9500	1246	1849	2176	2431	2674	2907
9550	1249	1853	2181	2436	2680	2913
9600	1253	1858	2186	2442	2686	2919
9650	1256	1862	2191	2447	2691	2926
9700	1261	1869	2198	2455	2701	2936
9750	1266	1877	2206	2464	2711	2947
9800	1272	1884	2214	2473	2721	2957
9850	1277	1891	2222	2483	2731	2968
9900	1282	1899	2231	2492	2741	2979
9950	1287	1906	2239	2501	2751	2990
10000	1292	1913	2247	2510	2761	3001
10050	1298	1921	2255	2519	2771	3012
10100	1303	1928	2263	2528	2781	3023
10150	1308	1935	2271	2537	2791	3033
10200	1313	1943	2279	2546	2801	3044
10250	1319	1950	2288	2555	2811	3055
10300	1324	1957	2296	2564	2821	3066
10350	1329	1965	2304	2573	2831	3077
10400	1334	1972	2312	2582	2841	3088
10450	1340	1979	2320	2591	2851	3099
10500	1345	1987	2328	2601	2861	3109
10550	1350	1994	2336	2610	2871	3120
10600	1355	2001	2344	2619	2881	3131
10650	1360	2009	2353	2628	2891	3142
10700	1366	2016	2361	2637	2901	3153
10750	1371	2023	2369	2646	2911	3164
10800	1376	2031	2377	2655	2921	3175
10850	1380	2037	2385	2664	2931	3186
10900	1384	2043	2393	2673	2941	3196
10950	1387	2049	2401	2682	2951	3207
11000	1391	2056	2410	2692	2961	3218
11050	1395	2062	2418	2701	2971	3229
11100	1399	2068	2426	2710	2981	3240
11150	1403	2075	2434	2719	2991	3251
11200	1406	2081	2442	2728	3001	3262
11250	1410	2087	2451	2737	3011	3273
11300	1414	2094	2459	2746	3021	3284
11350	1418	2100	2467	2756	3031	3295
11400	1422	2106	2475	2765	3041	3306
11450	1426	2112	2483	2774	3051	3317
11500	1429	2119	2492	2783	3061	3328

North Carolina
Schedule of Basic Support Obligations

Combined Adjusted Gross Income	Effective January 1, 2023					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
11550	1433	2125	2500	2792	3071	3339
11600	1437	2131	2508	2801	3081	3350
11650	1441	2138	2516	2810	3092	3360
11700	1445	2144	2524	2820	3102	3371
11750	1449	2150	2532	2829	3112	3382
11800	1452	2156	2541	2838	3122	3393
11850	1456	2163	2549	2847	3132	3404
11900	1460	2169	2557	2856	3142	3415
11950	1463	2174	2564	2863	3150	3424
12000	1466	2178	2568	2869	3155	3430
12050	1469	2183	2573	2874	3161	3436
12100	1472	2187	2577	2879	3167	3442
12150	1475	2191	2582	2884	3172	3448
12200	1478	2195	2586	2889	3178	3454
12250	1482	2200	2591	2894	3184	3461
12300	1485	2204	2596	2899	3189	3467
12350	1488	2208	2601	2905	3196	3474
12400	1491	2213	2606	2911	3202	3480
12450	1494	2217	2611	2916	3208	3487
12500	1498	2222	2616	2922	3214	3494
12550	1501	2227	2621	2927	3220	3500
12600	1504	2231	2626	2933	3226	3507
12650	1507	2236	2631	2938	3232	3514
12700	1511	2240	2636	2944	3238	3520
12750	1514	2245	2641	2950	3245	3527
12800	1517	2249	2646	2955	3251	3534
12850	1521	2254	2651	2961	3257	3540
12900	1524	2258	2656	2966	3263	3547
12950	1527	2263	2661	2972	3269	3554
13000	1531	2268	2666	2978	3275	3560
13050	1535	2273	2672	2984	3283	3568
13100	1539	2279	2677	2991	3290	3576
13150	1543	2285	2683	2997	3297	3584
13200	1547	2290	2689	3003	3304	3591
13250	1552	2296	2695	3010	3311	3599
13300	1556	2301	2700	3016	3318	3607
13350	1560	2307	2706	3023	3325	3614
13400	1564	2313	2712	3029	3332	3622
13450	1569	2318	2718	3036	3339	3630
13500	1573	2324	2723	3042	3346	3637
13550	1577	2329	2729	3049	3353	3645

North Carolina
Schedule of Basic Support Obligations

Combined Adjusted Gross Income	Effective January 1, 2023					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
13600	1581	2335	2735	3055	3360	3653
13650	1585	2340	2741	3061	3368	3661
13700	1590	2346	2747	3068	3375	3668
13750	1594	2352	2752	3074	3382	3676
13800	1598	2357	2758	3081	3389	3684
13850	1602	2363	2764	3087	3396	3691
13900	1606	2368	2770	3094	3403	3699
13950	1611	2374	2775	3100	3410	3707
14000	1615	2380	2781	3106	3417	3714
14050	1619	2385	2787	3113	3424	3722
14100	1623	2391	2793	3119	3431	3730
14150	1628	2396	2798	3126	3438	3738
14200	1632	2402	2804	3132	3445	3745
14250	1636	2408	2810	3139	3453	3753
14300	1640	2413	2816	3145	3460	3761
14350	1644	2419	2821	3152	3467	3768
14400	1648	2423	2825	3156	3472	3774
14450	1650	2426	2829	3160	3476	3778
14500	1653	2430	2832	3163	3480	3782
14550	1656	2433	2835	3167	3484	3787
14600	1658	2436	2838	3170	3487	3791
14650	1661	2440	2842	3174	3491	3795
14700	1664	2443	2845	3178	3495	3799
14750	1666	2446	2848	3181	3499	3804
14800	1669	2450	2851	3185	3503	3808
14850	1672	2453	2854	3188	3507	3812
14900	1674	2457	2858	3192	3511	3817
14950	1677	2460	2861	3196	3515	3821
15000	1680	2463	2864	3199	3519	3825
15050	1682	2467	2867	3203	3523	3830
15100	1685	2470	2871	3206	3527	3834
15150	1688	2473	2874	3210	3531	3838
15200	1690	2477	2877	3214	3535	3842
15250	1693	2480	2880	3217	3539	3847
15300	1695	2483	2883	3220	3542	3851
15350	1698	2486	2886	3224	3546	3854
15400	1700	2489	2889	3227	3549	3858
15450	1703	2492	2892	3230	3553	3862
15500	1705	2495	2894	3233	3556	3866
15550	1707	2498	2897	3236	3560	3870
15600	1710	2501	2900	3239	3563	3873

North Carolina
Schedule of Basic Support Obligations

Combined Adjusted Gross Income	Effective January 1, 2023					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
15650	1712	2504	2903	3243	3567	3877
15700	1714	2507	2906	3246	3570	3881
15750	1717	2510	2909	3250	3575	3886
15800	1719	2513	2915	3257	3582	3894
15850	1723	2519	2921	3263	3590	3902
15900	1728	2525	2927	3270	3597	3910
15950	1732	2532	2934	3277	3605	3918
16000	1736	2538	2941	3286	3614	3929
16050	1741	2545	2949	3294	3624	3939
16100	1745	2551	2957	3303	3633	3949
16150	1750	2558	2964	3311	3642	3959
16200	1754	2564	2972	3320	3652	3969
16250	1758	2571	2980	3328	3661	3980
16300	1763	2577	2987	3337	3671	3990
16350	1767	2584	2995	3345	3680	4000
16400	1771	2590	3003	3354	3689	4010
16450	1776	2597	3010	3362	3699	4021
16500	1780	2603	3018	3371	3708	4031
16550	1785	2610	3026	3380	3718	4041
16600	1789	2616	3033	3388	3727	4051
16650	1793	2623	3041	3397	3736	4061
16700	1798	2629	3049	3405	3746	4072
16750	1802	2636	3056	3414	3755	4082
16800	1806	2642	3064	3422	3764	4092
16850	1811	2649	3071	3430	3773	4102
16900	1815	2655	3079	3439	3783	4112
16950	1819	2661	3086	3447	3792	4122
17000	1824	2668	3094	3456	3801	4132
17050	1828	2674	3101	3464	3810	4142
17100	1832	2681	3109	3472	3820	4152
17150	1837	2687	3116	3481	3829	4162
17200	1841	2693	3124	3489	3838	4172
17250	1845	2700	3131	3498	3848	4182
17300	1850	2706	3139	3506	3857	4192
17350	1854	2713	3146	3515	3866	4202
17400	1858	2719	3154	3523	3875	4212
17450	1863	2725	3162	3531	3885	4223
17500	1867	2732	3169	3540	3894	4233
17550	1871	2738	3177	3548	3903	4243
17600	1875	2745	3184	3557	3912	4253
17650	1880	2751	3192	3565	3922	4263

North Carolina
Schedule of Basic Support Obligations

Combined Adjusted Gross Income	Effective January 1, 2023					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
17700	1884	2757	3199	3574	3931	4273
17750	1888	2764	3207	3582	3940	4283
17800	1893	2770	3214	3590	3949	4293
17850	1897	2777	3222	3599	3959	4303
17900	1901	2783	3229	3607	3968	4313
17950	1906	2790	3237	3616	3977	4323
18000	1910	2796	3244	3624	3986	4333
18050	1914	2802	3252	3632	3996	4343
18100	1919	2809	3260	3641	4005	4353
18150	1923	2815	3267	3649	4014	4363
18200	1927	2820	3273	3655	4021	4371
18250	1930	2825	3277	3661	4027	4377
18300	1934	2829	3282	3666	4032	4383
18350	1937	2834	3287	3671	4038	4390
18400	1940	2838	3291	3676	4044	4396
18450	1944	2843	3296	3682	4050	4402
18500	1947	2848	3301	3687	4055	4408
18550	1951	2852	3305	3692	4061	4414
18600	1954	2857	3310	3697	4067	4421
18650	1958	2861	3315	3702	4073	4427
18700	1961	2866	3319	3708	4078	4433
18750	1965	2870	3324	3713	4084	4439
18800	1968	2875	3329	3718	4090	4446
18850	1971	2879	3333	3723	4096	4452
18900	1975	2884	3338	3728	4101	4458
18950	1978	2889	3343	3734	4107	4464
19000	1982	2893	3347	3739	4113	4471
19050	1985	2898	3352	3744	4119	4477
19100	1989	2902	3356	3749	4124	4483
19150	1992	2906	3361	3754	4130	4489
19200	1995	2911	3365	3759	4135	4495
19250	1998	2915	3370	3764	4140	4501
19300	2002	2919	3374	3769	4146	4507
19350	2005	2924	3379	3774	4151	4513
19400	2008	2928	3383	3779	4157	4518
19450	2012	2932	3388	3784	4162	4524
19500	2015	2937	3392	3789	4168	4530
19550	2018	2941	3396	3794	4173	4536
19600	2021	2945	3401	3799	4179	4542
19650	2025	2950	3405	3804	4184	4548
19700	2028	2954	3410	3809	4190	4554

North Carolina
Schedule of Basic Support Obligations

Combined Adjusted Gross Income	Effective January 1, 2023					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
19750	2031	2958	3414	3814	4195	4560
19800	2034	2963	3419	3819	4200	4566
19850	2038	2967	3423	3824	4206	4572
19900	2041	2971	3427	3828	4211	4578
19950	2044	2976	3432	3833	4217	4584
20000	2048	2980	3436	3838	4222	4590
20050	2051	2984	3441	3843	4228	4596
20100	2054	2989	3445	3848	4233	4601
20150	2057	2993	3450	3853	4239	4607
20200	2061	2997	3454	3858	4244	4613
20250	2064	3002	3459	3863	4250	4619
20300	2067	3006	3463	3868	4255	4625
20350	2070	3010	3467	3873	4260	4631
20400	2074	3015	3472	3878	4266	4637
20450	2077	3019	3476	3883	4271	4643
20500	2080	3023	3481	3888	4277	4649
20550	2084	3028	3485	3893	4282	4655
20600	2087	3032	3490	3898	4288	4661
20650	2090	3036	3494	3903	4293	4667
20700	2093	3041	3498	3908	4299	4673
20750	2097	3045	3503	3913	4304	4678
20800	2100	3049	3507	3918	4309	4684
20850	2103	3054	3512	3923	4315	4690
20900	2106	3058	3516	3928	4320	4696
20950	2110	3062	3521	3933	4326	4702
21000	2113	3067	3525	3938	4331	4708
21050	2116	3071	3530	3942	4337	4714
21100	2120	3075	3534	3947	4342	4720
21150	2123	3079	3538	3952	4348	4726
21200	2126	3084	3543	3957	4353	4732
21250	2129	3088	3547	3962	4359	4738
21300	2133	3092	3552	3967	4364	4744
21350	2136	3097	3556	3972	4369	4750
21400	2139	3101	3561	3977	4375	4756
21450	2142	3106	3565	3983	4381	4762
21500	2145	3110	3572	3990	4389	4771
21550	2148	3115	3579	3997	4397	4780
21600	2151	3120	3585	4005	4405	4789
21650	2154	3125	3592	4012	4414	4798
21700	2157	3130	3599	4020	4422	4806
21750	2160	3135	3605	4027	4430	4815

North Carolina
Schedule of Basic Support Obligations

Combined Adjusted Gross Income	Effective January 1, 2023					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
21800	2163	3140	3612	4035	4438	4824
21850	2165	3145	3619	4042	4446	4833
21900	2168	3150	3625	4050	4455	4842
21950	2171	3155	3632	4057	4463	4851
22000	2174	3160	3639	4064	4471	4860
22050	2177	3165	3645	4072	4479	4869
22100	2180	3170	3652	4079	4487	4878
22150	2183	3175	3659	4087	4495	4887
22200	2186	3180	3665	4094	4504	4896
22250	2188	3185	3672	4102	4512	4904
22300	2191	3190	3679	4109	4520	4913
22350	2194	3195	3685	4117	4528	4922
22400	2197	3199	3692	4124	4536	4931
22450	2200	3204	3699	4131	4545	4940
22500	2203	3209	3705	4139	4553	4949
22550	2206	3214	3712	4146	4561	4958
22600	2209	3219	3719	4154	4569	4967
22650	2211	3224	3725	4161	4577	4976
22700	2214	3229	3732	4169	4586	4985
22750	2217	3234	3739	4176	4594	4993
22800	2220	3239	3745	4184	4602	5002
22850	2223	3244	3752	4191	4610	5011
22900	2226	3249	3759	4198	4618	5020
22950	2229	3254	3765	4206	4627	5029
23000	2232	3259	3772	4213	4635	5038
23050	2234	3264	3779	4221	4643	5047
23100	2237	3269	3785	4228	4651	5056
23150	2240	3274	3792	4236	4659	5065
23200	2243	3279	3799	4243	4667	5074
23250	2246	3284	3805	4251	4676	5082
23300	2249	3288	3812	4258	4684	5091
23350	2252	3293	3819	4266	4692	5100
23400	2255	3298	3825	4273	4700	5109
23450	2257	3303	3832	4280	4708	5118
23500	2260	3308	3839	4288	4717	5127
23550	2263	3313	3845	4295	4725	5136
23600	2266	3318	3852	4303	4733	5145
23650	2269	3323	3859	4310	4741	5154
23700	2272	3328	3865	4318	4749	5163
23750	2275	3333	3872	4325	4758	5171
23800	2278	3338	3879	4333	4766	5180

North Carolina
Schedule of Basic Support Obligations

Combined Adjusted Gross Income	Effective January 1, 2023					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
23850	2280	3343	3885	4340	4774	5189
23900	2283	3348	3892	4347	4782	5198
23950	2286	3353	3899	4355	4790	5207
24000	2289	3358	3905	4362	4799	5216
24050	2292	3363	3912	4370	4807	5225
24100	2295	3368	3919	4377	4815	5234
24150	2298	3373	3925	4385	4823	5243
24200	2301	3377	3932	4392	4831	5252
24250	2303	3382	3939	4400	4839	5261
24300	2306	3387	3945	4407	4848	5269
24350	2309	3392	3952	4414	4856	5278
24400	2312	3397	3959	4422	4864	5287
24450	2315	3402	3965	4429	4872	5296
24500	2318	3407	3972	4437	4880	5305
24550	2321	3412	3979	4444	4889	5314
24600	2324	3417	3985	4452	4897	5323
24650	2326	3422	3992	4459	4905	5332
24700	2329	3427	3999	4467	4913	5341
24750	2332	3432	4005	4474	4921	5350
24800	2335	3437	4012	4481	4930	5358
24850	2338	3442	4019	4489	4938	5367
24900	2341	3447	4025	4496	4946	5376
24950	2344	3452	4032	4504	4954	5385
25000	2347	3457	4039	4511	4962	5394
25050	2350	3461	4045	4519	4971	5403
25100	2352	3466	4052	4526	4979	5412
25150	2355	3471	4059	4534	4987	5421
25200	2358	3476	4065	4541	4995	5430
25250	2361	3481	4072	4548	5003	5439
25300	2364	3486	4079	4556	5011	5447
25350	2367	3491	4085	4563	5020	5456
25400	2370	3496	4092	4571	5028	5465
25450	2373	3501	4099	4578	5036	5474
25500	2375	3506	4105	4586	5044	5483
25550	2378	3511	4112	4593	5052	5492
25600	2381	3516	4119	4601	5061	5501
25650	2384	3521	4125	4608	5069	5510
25700	2387	3526	4132	4615	5077	5519
25750	2390	3531	4139	4623	5085	5528
25800	2393	3536	4145	4630	5093	5537
25850	2396	3541	4152	4638	5102	5545

North Carolina
Schedule of Basic Support Obligations

Combined Adjusted Gross Income	Effective January 1, 2023					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
25900	2398	3546	4159	4645	5110	5554
25950	2401	3550	4165	4653	5118	5563
26000	2404	3555	4172	4660	5126	5572
26050	2407	3560	4179	4668	5134	5581
26100	2410	3565	4185	4675	5143	5590
26150	2413	3570	4192	4682	5151	5599
26200	2416	3575	4199	4690	5159	5608
26250	2419	3580	4205	4697	5167	5617
26300	2421	3585	4212	4705	5175	5626
26350	2424	3590	4219	4712	5183	5634
26400	2427	3595	4225	4720	5192	5643
26450	2430	3600	4231	4726	5199	5651
26500	2433	3604	4236	4732	5205	5658
26550	2436	3608	4241	4737	5211	5664
26600	2439	3612	4246	4742	5217	5671
26650	2442	3617	4251	4748	5223	5677
26700	2445	3621	4255	4753	5229	5683
26750	2448	3625	4260	4759	5234	5690
26800	2451	3629	4265	4764	5240	5696
26850	2454	3634	4270	4769	5246	5703
26900	2457	3638	4275	4775	5252	5709
26950	2460	3642	4279	4780	5258	5716
27000	2463	3647	4284	4786	5264	5722
27050	2466	3651	4289	4791	5270	5729
27100	2469	3655	4294	4796	5276	5735
27150	2472	3659	4299	4802	5282	5741
27200	2475	3664	4304	4807	5288	5748
27250	2478	3668	4308	4813	5294	5754
27300	2481	3672	4313	4818	5300	5761
27350	2484	3676	4318	4823	5306	5767
27400	2487	3681	4323	4829	5312	5774
27450	2490	3685	4328	4834	5318	5780
27500	2493	3689	4333	4840	5323	5787
27550	2496	3694	4337	4845	5329	5793
27600	2499	3698	4342	4850	5335	5800
27650	2502	3702	4347	4856	5341	5806
27700	2505	3706	4352	4861	5347	5812
27750	2508	3711	4357	4866	5353	5819
27800	2511	3715	4362	4872	5359	5825
27850	2514	3719	4366	4877	5365	5832
27900	2517	3723	4371	4883	5371	5838

North Carolina
Schedule of Basic Support Obligations

Combined Adjusted Gross Income	Effective January 1, 2023					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
27950	2520	3728	4376	4888	5377	5845
28000	2523	3732	4381	4893	5383	5851
28050	2526	3736	4386	4899	5389	5858
28100	2529	3740	4391	4904	5395	5864
28150	2532	3745	4395	4910	5401	5870
28200	2535	3749	4400	4915	5407	5877
28250	2538	3753	4405	4920	5412	5883
28300	2541	3758	4410	4926	5418	5890
28350	2544	3762	4415	4931	5424	5896
28400	2547	3766	4420	4937	5430	5903
28450	2550	3770	4424	4942	5436	5909
28500	2553	3775	4429	4947	5442	5916
28550	2556	3779	4434	4953	5448	5922
28600	2559	3783	4439	4958	5454	5929
28650	2562	3787	4444	4964	5460	5935
28700	2564	3792	4448	4969	5466	5941
28750	2567	3796	4453	4974	5472	5948
28800	2570	3800	4458	4980	5478	5954
28850	2573	3805	4463	4985	5484	5961
28900	2576	3809	4468	4991	5490	5967
28950	2579	3813	4473	4996	5496	5974
29000	2582	3817	4477	5001	5501	5980
29050	2585	3822	4482	5007	5507	5987
29100	2588	3826	4487	5012	5513	5993
29150	2591	3830	4492	5018	5519	5999
29200	2594	3834	4497	5023	5525	6006
29250	2597	3839	4502	5028	5531	6012
29300	2600	3843	4506	5034	5537	6019
29350	2603	3847	4511	5039	5543	6025
29400	2606	3852	4516	5044	5549	6032
29450	2609	3856	4521	5050	5555	6038
29500	2612	3860	4526	5055	5561	6045
29550	2615	3864	4531	5061	5567	6051
29600	2618	3869	4535	5066	5573	6057
29650	2621	3873	4540	5071	5579	6064
29700	2624	3877	4545	5077	5585	6070
29750	2627	3881	4550	5082	5590	6077
29800	2630	3886	4555	5088	5596	6083
29850	2633	3890	4560	5093	5602	6090
29900	2636	3894	4564	5098	5608	6096
29950	2639	3898	4569	5104	5614	6103

North Carolina
Schedule of Basic Support Obligations

Combined Adjusted Gross Income	Effective January 1, 2023					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
30000	2642	3903	4574	5109	5620	6109
30050	2645	3907	4579	5115	5626	6116
30100	2648	3911	4584	5120	5632	6122
30150	2651	3916	4589	5125	5638	6128
30200	2654	3920	4593	5131	5644	6135
30250	2657	3924	4598	5136	5650	6141
30300	2660	3928	4603	5142	5656	6148
30350	2663	3933	4608	5147	5662	6154
30400	2666	3937	4613	5152	5668	6161
30450	2669	3941	4618	5158	5674	6167
30500	2672	3945	4622	5163	5679	6174
30550	2675	3950	4627	5169	5685	6180
30600	2678	3954	4632	5174	5691	6186
30650	2681	3958	4637	5179	5697	6193
30700	2684	3963	4642	5185	5703	6199
30750	2687	3967	4646	5190	5709	6206
30800	2690	3971	4651	5196	5715	6212
30850	2693	3975	4656	5201	5721	6219
30900	2696	3980	4661	5206	5727	6225
30950	2699	3984	4666	5212	5733	6232
31000	2702	3988	4671	5217	5739	6238
31050	2705	3992	4675	5223	5745	6245
31100	2708	3997	4680	5228	5751	6251
31150	2711	4001	4685	5233	5757	6257
31200	2714	4005	4690	5239	5763	6264
31250	2717	4009	4695	5244	5768	6270
31300	2720	4014	4700	5249	5774	6277
31350	2723	4018	4704	5255	5780	6283
31400	2726	4022	4709	5260	5786	6290
31450	2729	4027	4714	5266	5792	6296
31500	2732	4031	4719	5271	5798	6303
31550	2735	4035	4724	5276	5804	6309
31600	2738	4039	4729	5282	5810	6315
31650	2741	4044	4733	5287	5816	6322
31700	2744	4048	4738	5293	5822	6328
31750	2747	4052	4743	5298	5828	6335
31800	2750	4056	4748	5303	5834	6341
31850	2753	4061	4753	5309	5840	6348
31900	2756	4065	4758	5314	5846	6354
31950	2759	4069	4762	5320	5852	6361
32000	2762	4074	4767	5325	5857	6367

North Carolina
Schedule of Basic Support Obligations

Combined Adjusted Gross Income	Effective January 1, 2023					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
32050	2765	4078	4772	5330	5863	6374
32100	2768	4082	4777	5336	5869	6380
32150	2771	4086	4782	5341	5875	6386
32200	2774	4091	4787	5347	5881	6393
32250	2777	4095	4791	5352	5887	6399
32300	2780	4099	4796	5357	5893	6406
32350	2782	4103	4801	5363	5899	6412
32400	2785	4108	4806	5368	5905	6419
32450	2788	4112	4811	5374	5911	6425
32500	2791	4116	4816	5379	5917	6432
32550	2794	4120	4820	5384	5923	6438
32600	2797	4125	4825	5390	5929	6444
32650	2800	4129	4830	5395	5935	6451
32700	2803	4133	4835	5401	5941	6457
32750	2806	4138	4840	5406	5946	6464
32800	2809	4142	4844	5411	5952	6470
32850	2812	4146	4849	5417	5958	6477
32900	2815	4150	4854	5422	5964	6483
32950	2818	4155	4859	5427	5970	6490
33000	2821	4159	4864	5433	5976	6496
33050	2824	4163	4869	5438	5982	6503
33100	2827	4167	4873	5444	5988	6509
33150	2830	4172	4878	5449	5994	6515
33200	2833	4176	4883	5454	6000	6522
33250	2836	4180	4888	5460	6006	6528
33300	2839	4185	4893	5465	6012	6535
33350	2842	4189	4898	5471	6018	6541
33400	2845	4193	4902	5476	6024	6548
33450	2848	4197	4907	5481	6030	6554
33500	2851	4202	4912	5487	6036	6561
33550	2854	4206	4917	5492	6041	6567
33600	2857	4210	4922	5498	6047	6573
33650	2860	4214	4927	5503	6053	6580
33700	2863	4219	4931	5508	6059	6586
33750	2866	4223	4936	5514	6065	6593
33800	2869	4227	4941	5519	6071	6599
33850	2872	4231	4946	5525	6077	6606
33900	2875	4236	4951	5530	6083	6612
33950	2878	4240	4956	5535	6089	6619
34000	2881	4244	4960	5541	6095	6625
34050	2884	4249	4965	5546	6101	6632

North Carolina
Schedule of Basic Support Obligations

Combined Adjusted Gross Income	Effective January 1, 2023					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
34100	2887	4253	4970	5552	6107	6638
34150	2890	4257	4975	5557	6113	6644
34200	2893	4261	4980	5562	6119	6651
34250	2896	4266	4985	5568	6125	6657
34300	2899	4270	4989	5573	6130	6664
34350	2902	4274	4994	5579	6136	6670
34400	2905	4278	4999	5584	6142	6677
34450	2908	4283	5004	5589	6148	6683
34500	2911	4287	5009	5595	6154	6690
34550	2914	4291	5014	5600	6160	6696
34600	2917	4296	5018	5605	6166	6702
34650	2920	4300	5023	5611	6172	6709
34700	2923	4304	5028	5616	6178	6715
34750	2926	4308	5033	5622	6184	6722
34800	2929	4313	5038	5627	6190	6728
34850	2932	4317	5042	5632	6196	6735
34900	2935	4321	5047	5638	6202	6741
34950	2938	4325	5052	5643	6208	6748
35000	2941	4330	5057	5649	6214	6754
35050	2944	4334	5062	5654	6219	6761
35100	2947	4338	5067	5659	6225	6767
35150	2950	4342	5071	5665	6231	6773
35200	2953	4347	5076	5670	6237	6780
35250	2956	4351	5081	5676	6243	6786
35300	2959	4355	5086	5681	6249	6793
35350	2962	4360	5091	5686	6255	6799
35400	2965	4364	5096	5692	6261	6806
35450	2968	4368	5100	5697	6267	6812
35500	2971	4372	5105	5703	6273	6819
35550	2974	4377	5110	5708	6279	6825
35600	2977	4381	5115	5713	6285	6831
35650	2980	4385	5120	5719	6291	6838
35700	2983	4389	5125	5724	6297	6844
35750	2986	4394	5129	5730	6303	6851
35800	2989	4398	5134	5735	6308	6857
35850	2992	4402	5139	5740	6314	6864
35900	2995	4407	5144	5746	6320	6870
35950	2997	4411	5149	5751	6326	6877
36000	3000	4415	5154	5757	6332	6883
36050	3003	4419	5158	5762	6338	6890
36100	3006	4424	5163	5767	6344	6896

North Carolina
Schedule of Basic Support Obligations

Combined Adjusted Gross Income	Effective January 1, 2023					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
36150	3009	4428	5168	5773	6350	6902
36200	3012	4432	5173	5778	6356	6909
36250	3015	4436	5178	5784	6362	6915
36300	3018	4441	5183	5789	6368	6922
36350	3021	4445	5187	5794	6374	6928
36400	3024	4449	5192	5800	6380	6935
36450	3027	4453	5197	5805	6386	6941
36500	3030	4458	5202	5810	6392	6948
36550	3033	4462	5207	5816	6397	6954
36600	3036	4466	5212	5821	6403	6960
36650	3039	4471	5216	5827	6409	6967
36700	3042	4475	5221	5832	6415	6973
36750	3045	4479	5226	5837	6421	6980
36800	3048	4483	5231	5843	6427	6986
36850	3051	4488	5236	5848	6433	6993
36900	3054	4492	5240	5854	6439	6999
36950	3057	4496	5245	5859	6445	7006
37000	3060	4500	5250	5864	6451	7012
37050	3063	4505	5255	5870	6457	7019
37100	3066	4509	5260	5875	6463	7025
37150	3069	4513	5265	5881	6469	7031
37200	3072	4518	5269	5886	6475	7038
37250	3075	4522	5274	5891	6481	7044
37300	3078	4526	5279	5897	6486	7051
37350	3081	4530	5284	5902	6492	7057
37400	3084	4535	5289	5908	6498	7064
37450	3087	4539	5294	5913	6504	7070
37500	3090	4543	5298	5918	6510	7077
37550	3093	4547	5303	5924	6516	7083
37600	3096	4552	5308	5929	6522	7089
37650	3099	4556	5313	5935	6528	7096
37700	3102	4560	5318	5940	6534	7102
37750	3105	4565	5323	5945	6540	7109
37800	3108	4569	5327	5951	6546	7115
37850	3111	4573	5332	5956	6552	7122
37900	3114	4577	5337	5962	6558	7128
37950	3117	4582	5342	5967	6564	7135
38000	3120	4586	5347	5972	6570	7141
38050	3123	4590	5352	5978	6575	7148
38100	3126	4594	5356	5983	6581	7154
38150	3129	4599	5361	5988	6587	7160

North Carolina
Schedule of Basic Support Obligations

Combined Adjusted Gross Income	Effective January 1, 2023					
	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
38200	3132	4603	5366	5994	6593	7167
38250	3135	4607	5371	5999	6599	7173
38300	3138	4611	5376	6005	6605	7180
38350	3141	4616	5381	6010	6611	7186
38400	3144	4620	5385	6015	6617	7193
38450	3147	4624	5390	6021	6623	7199
38500	3150	4629	5395	6026	6629	7206
38550	3153	4633	5400	6032	6635	7212
38600	3156	4637	5405	6037	6641	7218
38650	3159	4641	5410	6042	6647	7225
38700	3162	4646	5414	6048	6653	7231
38750	3165	4650	5419	6053	6659	7238
38800	3168	4654	5424	6059	6664	7244
38850	3171	4658	5429	6064	6670	7251
38900	3174	4663	5434	6069	6676	7257
38950	3177	4667	5438	6075	6682	7264
39000	3180	4671	5443	6080	6688	7270
39050	3183	4676	5448	6086	6694	7277
39100	3186	4680	5453	6091	6700	7283
39150	3189	4684	5458	6096	6706	7289
39200	3192	4688	5463	6102	6712	7296
39250	3195	4693	5467	6107	6718	7302
39300	3198	4697	5472	6113	6724	7309
39350	3201	4701	5477	6118	6730	7315
39400	3204	4705	5482	6123	6736	7322
39450	3207	4710	5487	6129	6742	7328
39500	3210	4714	5492	6134	6748	7335
39550	3213	4718	5497	6140	6754	7341
39600	3216	4724	5503	6147	6762	7350
39650	3220	4729	5510	6154	6770	7358
39700	3224	4735	5516	6161	6777	7367
39750	3228	4740	5522	6168	6785	7376
39800	3231	4746	5529	6176	6793	7384
39850	3235	4751	5535	6183	6801	7393
39900	3239	4757	5541	6190	6809	7401
39950	3243	4762	5548	6197	6817	7410
40000	3246	4768	5554	6204	6824	7418

STATE OF NORTH CAROLINA

_____ County

File No.	IV-D Case No.
Case No. (Code)	UIFSA Case No.

In The General Court Of Justice
☐ District ☐ Superior Court Division

☐ Civil: *Plaintiff* _____

☐ Criminal: *STATE*

VERSUS

Name Of Defendant

WORKSHEET A
CHILD SUPPORT OBLIGATION
PRIMARY CUSTODY

G.S. 50-13.4(c)

Children	Date Of Birth	Children	Date Of Birth

	Plaintiff	Defendant	Combined
1. MONTHLY GROSS INCOME	$	$	
a. Minus pre-existing child support payment	–	–	
b. Minus responsibility for other children	–	–	
2. MONTHLY ADJUSTED GROSS INCOME	$	$	$
3. PERCENTAGE SHARE OF INCOME *(line 2 for each parent's income, divided by Combined income)*	%	%	
4. BASIC CHILD SUPPORT OBLIGATION *(apply line 2 Combined to the Schedule of Basic Support Obligations—see AOC-A-162, Rev. 1/23)*			$
5. ADJUSTMENTS *(expenses paid directly by each parent)* a. Work-related child care costs	$	$	
b. Health Insurance premium costs - child's/children's portion only *(total premium ÷ # of persons covered × # of children subject to order = children's portion)*	$	$	
c. Extraordinary expenses	$	$	
d. Total Adjustments *(for each column, add 5a, 5b, and 5c. Add two totals for Combined amount)*	$	$	$
6. TOTAL CHILD SUPPORT OBLIGATION *(add line 4 Combined to line 5d Combined)*			$
7. EACH PARENT'S CHILD SUPPORT OBLIGATION *(line 3 × line 6 for each parent)*	$	$	
8. NON-CUSTODIAL PARENT ADJUSTMENT *(enter non-custodial parent's line 5d)*	$	$	
9. RECOMMENDED CHILD SUPPORT ORDER *(subtract line 8 from line 7 for the non-custodial parent only. Leave custodial parent column blank)*	$	$	

Date	*Prepared By (type or print)*

(**NOTE:** *This form may be used in both civil and criminal cases.*)
(Over)

INSTRUCTIONS FOR COMPLETING CHILD SUPPORT WORKSHEET A
OBLIGEE WITH SOLE CUSTODY OF CHILD(REN)

Worksheet A should be used when the obligee has primary physical custody of the child(ren) who are involved in the pending action for a period of time that is more than two-thirds of the year (243 nights or more during the year). However, if the non-custodial parent's income falls within the shaded area of the Schedule, determine the basic child support obligation based on the non-custodial parent's monthly adjusted gross income, rather than the combined income of both parents, and do not proceed further on the worksheet.

On line 1, enter the monthly gross incomes of both parties in the appropriate column, subtract the payments made by each parent under previous child support orders for other children of that parent and the amount of the parent's financial responsibility for other children living with that parent, and enter the difference (monthly adjusted gross income) for each parent on line 2. Add the monthly adjusted gross incomes of both parents and enter the result in the third column (Combined) on line 2. Divide each parent's monthly adjusted gross income by the combined monthly adjusted income and enter each parent's percentage share of the combined income on line 3.

On line 4, enter the amount of the basic child support obligation for the child(ren) for whom support is sought by using the Schedule of Basic Child Support Obligations based on the combined income of both parents (line 3) and the number of children involved in the pending action.

On lines 5a through 5c, enter the amount of work-related child care costs, health insurance premiums for the child(ren), and extraordinary child-related expenses that are paid by either parent under the column for that parent. On line 5d, enter the sum of lines 5a through 5c for each parent, and in the third column (Combined) enter the total expenses paid by both parents. Add line 4 and line 5d (Combined) and enter the result on line 6 (total child support obligation).

On line 7, multiply line 6 by line 3 (percentage share of income) and enter the result in the appropriate column for each parent. On line 8, enter the amount of expenses paid directly by the non-custodial parent (line 5d) under the appropriate column; leave the custodial parent's column blank and do not enter any amount paid by the custodial parent. Subtract line 8 from line 7 for the non-custodial parent only and enter the difference on line 9 (recommended child support order) under the column for the non-custodial parent. Leave the column for the custodial parent blank.

NOTE TO PLAINTIFF AND DEFENDANT: *The information required to complete the worksheet is known only to the parties. It is the responsibility of the parties to provide this information to the Court so that the Court can set the appropriate amount of child support. The Clerk of Superior Court CANNOT obtain this information or fill out this worksheet for you. If you need assistance, you may contact an attorney or apply for assistance at the IV-D agency within your county.*

STATE OF NORTH CAROLINA

_____ County

File No.	IV-D Case No.
Case No. (Code)	UIFSA Case No.

In The General Court Of Justice
☐ District ☐ Superior Court Division

☐ Civil: *Plaintiff* _____

☐ Criminal: *STATE*

VERSUS

Name Of Defendant

WORKSHEET B
CHILD SUPPORT OBLIGATION
JOINT OR SHARED
PHYSICAL CUSTODY

G.S. 50-13.4(c)

Children	Date Of Birth	Children	Date Of Birth

STOP ***Stop here if the number of overnights with either parent is less than 123**, in which case shared physical custody does not apply (and see Worksheet A, AOC-CV-627).*

	Plaintiff	Defendant	Combined
1. MONTHLY GROSS INCOME	$	$	
a. Minus pre-existing child support payment	–	–	
b. Minus responsibility for other children	–	–	
2. MONTHLY ADJUSTED GROSS INCOME	$	$	$
3. PERCENTAGE SHARE OF INCOME *(line 2 for each parent's income, divided by Combined income)*	%	%	
4. BASIC CHILD SUPPORT OBLIGATION *(apply line 2 Combined to the Schedule of Basic Support Obligations—see AOC-A-162, Rev. 1/23)*			$
5. SHARED CUSTODY BASIC OBLIGATION *(multiply line 4 by 1.5)*			$
6. EACH PARENT'S PORTION OF SHARED CUSTODY SUPPORT OBLIGATION *(line 3 × line 5 for each parent)*	$	$	
7. OVERNIGHTS WITH EACH PARENT *(Combined must total 365 × total number of children)*			
8. PERCENTAGE WITH EACH PARENT *(line 7 divided by 365 × total number of children)*	%	%	
9. SUPPORT OBLIGATION FOR TIME WITH OTHER PARENT *(line 6 × other parent's line 8)*	$	$	
10. ADJUSTMENTS *(expenses paid directly by each parent)* a. Work-related child care costs	$	$	
b. Health Insurance premium costs - child's/children's portion only *(total premium ÷ # of persons covered × # of children subject to order = children's portion)*	$	$	
c. Extraordinary expenses	$	$	
d. Total Adjustments *(for each column, add 10a, 10b, and 10c. Add two totals for Combined amount)*	$	$	$
11. EACH PARENT'S FAIR SHARE OF ADJUSTMENTS *(line 10d Combined × line 3 for each parent)*	$	$	
12. ADJUSTMENTS PAID IN EXCESS OF FAIR SHARE *(line 10d minus line 11. If negative number, enter zero)*	$	$	
13. EACH PARENT'S ADJUSTED SUPPORT OBLIGATION *(line 9 minus line 12)*	$	$	
14. RECOMMENDED CHILD SUPPORT ORDER *(subtract lesser amount from greater amount in line 13 and enter result directly under greater amount)*	$	$	

Date	*Prepared By (type or print)*

(**NOTE:** *This form may be used in both civil and criminal cases.*)
(Over)

INSTRUCTIONS FOR COMPLETING CHILD SUPPORT WORKSHEET B
PARENTS WITH JOINT OR SHARED CUSTODY

Worksheet B should be used when the parents share joint physical custody of at least one of the child(ren) for whom support is sought. Legal custody of the child(ren) is not relevant with respect to this determination. Worksheet B should be used if one parent has sole legal custody but, in fact, the parents exercise joint physical custody of the child(ren) as defined below. On the other hand, the worksheet should not be used simply because the parents share joint legal custody of the child(ren).

Joint physical custody is defined as custody for at least one-third of the year (more than 122 overnights per year) - not one-third of a shorter period of time, e.g., one-third of a particular month. For example, child support would not be abated merely because the child spends an entire month with one parent during the summer. **Worksheet B should be used only if both parents have custody of the child(ren) for at least one-third of the year and the situation involves a true sharing of expenses, rather than extended visitation with one parent that exceeds 122 overnights.** Parents share custody of a child if the child lives with each parent for at least 123 nights during the year and each parent assumes financial responsibility for the child's expenses during the time the child lives with that parent. A parent does not have shared custody of a child when that parent has visitation rights that allow the child to spend less than 123 nights per year with the parent and the other parent has primary physical custody of the child. Split custody refers to cases in which one parent has primary custody of the other child or children. Child support computations for shared and split custody are determined without regard to whether a parent has primary, shared, or joint legal custody of a child.

In cases involving joint or shared physical custody, the basic child support obligation is multiplied by 1.5 to take into account the increased cost of maintaining two primary homes for the child(ren). Each parent's child support obligation is calculated based on the percentage of time that the child(ren) spends/spend with the other parent. The support obligations of both parents are then offset against each other, and the parent with the higher support obligation pays the difference between the two amounts.

Lines 1 through 4 of Worksheet B are calculated in the same manner as lines 1 through 4 of Worksheet A. Multiply line 4 by 1.5 and enter the result on line 5. On line 6, multiply line 5 by each parent's percentage share of income (line 3) and enter the result under the appropriate column for each parent.

On lines 7 and 8, enter the number of nights the child(ren) spend with each parent during the year and calculate the percentage of total overnights spent with each parent. If at least one of the children does not spend at least 123 overnights with each parent, Worksheet B should not be used. The total number of nights should equal 365 times the total number of children. On line 9, multiply plaintiff's line 6 by defendant's line 8 and enter the result under the column for plaintiff, then multiply defendant's line 6 by plaintiff's line 8 and enter the result under the column for defendant.

Lines 10a through 10d of Worksheet B are calculated in the same manner as lines 5a through 5d of Worksheet A. On line 11, multiply line 10d (Combined) by line 3 for each parent and enter the result under the column for that parent. Subtract line 11 from line 10d for each parent and enter the result on line 12 (if negative, enter zero).

Subtract line 12 from line 9 for each parent and enter the result on line 13 under the appropriate column. In some cases, the result may be a negative number. If the result is negative, enter it as a negative number on line 13, not as a positive number or as a zero. If plaintiff's line 13 is greater than defendant's line 13, enter the difference between these two amounts on line 14 under plaintiff's column and leave defendant's column blank. If defendant's line 13 is greater than plaintiff's line 13, enter the difference between these two amounts on line 14 under defendant's column and leave plaintiff's column blank. [Note that if either of the numbers on line 13 is a negative number, you must change the signs when you subtract. For example, $100 minus negative $50 equals $150.]

NOTE TO PLAINTIFF AND DEFENDANT: *The information required to complete the worksheet is known only to the parties. It is the responsibility of the parties to provide this information to the Court so that the Court can set the appropriate amount of child support. The Clerk of Superior Court CANNOT obtain this information or fill out this worksheet for you. If you need assistance, you may contact an attorney or apply for assistance at the IV-D agency within your county.*

STATE OF NORTH CAROLINA

_____ County

File No.	IV-D Case No.
Case No. (Code)	UIFSA Case No.

In The General Court Of Justice
☐ District ☐ Superior Court Division

☐ Civil: *Plaintiff* _____

☐ Criminal: *STATE*

VERSUS

Name Of Defendant

WORKSHEET C
CHILD SUPPORT OBLIGATION
SPLIT CUSTODY

G.S. 50-13.4(c)

Children	Date Of Birth	Children	Date Of Birth

	Plaintiff	Defendant	Combined
1. MONTHLY GROSS INCOME	$	$	
a. Minus pre-existing child support payment	–	–	
b. Minus responsibility for other children	–	–	
2. MONTHLY ADJUSTED GROSS INCOME	$	$	$
3. PERCENTAGE SHARE OF INCOME *(line 2 for each parent's income, divided by Combined income)*	%	%	
4. BASIC CHILD SUPPORT OBLIGATION *(apply line 2 Combined to the Schedule of Basic Support Obligations—see AOC-A-162, Rev. 1/23)*			$
5a. SPLIT CUSTODY ADJUSTMENT *(enter number of children living with each parent and under Combined, enter total number of children)*			
5b. Number of children with each parent divided by total number of children			
5c. Multiply line 4 by line 5b for each parent	$	$	
6a. PLAINTIFF'S SUPPORT FOR CHILDREN WITH DEFENDANT *(multiply defendant's line 5c by plaintiff's line 3)*	$		
6b. DEFENDANT'S SUPPORT FOR CHILDREN WITH PLAINTIFF *(multiply plaintiff's line 5c by defendant's line 3)*		$	
7. ADJUSTMENTS *(expenses paid directly by each parent)* a. Work-related child care costs	$	$	
b. Health Insurance premium costs - child's/children's portion only *(total premium ÷ # of persons covered × # of children subject to order = children's portion)*	$	$	
c. Extraordinary expenses	$	$	
d. Total Adjustments *(for each column, add 7a, 7b, and 7c. Add two totals for Combined amount)*	$	$	$
8. EACH PARENT'S FAIR SHARE OF ADJUSTMENTS *(line 7d Combined × line 3 for each parent)*	$	$	
9. ADJUSTMENTS PAID IN EXCESS OF FAIR SHARE *(line 7d minus line 8. If negative number, enter zero)*	$	$	
10. EACH PARENT'S ADJUSTED SUPPORT OBLIGATION *(line 6a or 6b minus line 9 for each parent)*	$	$	
11. RECOMMENDED CHILD SUPPORT ORDER *(subtract lesser amount from greater amount in line 10 and enter result directly under greater amount)*	$	$	

Date	*Prepared By (type or print)*

(**NOTE:** *This form may be used in both civil and criminal cases.*)
(Over)

INSTRUCTIONS FOR COMPLETING CHILD SUPPORT WORKSHEET C
SPLIT CUSTODY OF CHILD(REN)

Worksheet C is used when there is more than one child involved in the pending action and each parent has physical custody of at least one of the children.

Lines 1 through 4 of Worksheet C are calculated in the same manner as lines 1 through 4 of Worksheet A. On line 5a, enter the number of children living with each parent and the total number of children for whom support is sought. Divide the number of children living with each parent by the total number of children and enter the result in the appropriate column for each parent on line 5b. (For example, if there are three children of the parties and one child lives with the plaintiff, divide one by three and enter 33.33% in plaintiff's column, then divide two by three and enter 66.67% in defendant's column on line 5b.) Multiply line 4 by line 5b for each parent and enter the results on line 5c.

On line 6a, multiply defendant's line 5c by plaintiff's line 3 (plaintiff's percentage share of income) and enter the result in the column for plaintiff. Multiply plaintiff's line 5c by defendant's line 3 and enter the result on line 6b.

Lines 7a through 7d of Worksheet C are calculated in the same manner as lines 5a through 5d of Worksheet A. On line 8, multiply line 7d (Combined) by line 3 for each parent and enter the result under the column for that parent. Subtract line 8 from line 7d for each parent and enter the result on line 9 (if negative, enter zero).

Subtract line 9 from line 6a or 6b for each parent and enter the result on line 10 under the appropriate column. In some cases, the result may be a negative number. If the result is negative, enter it as a negative number on line 10, not as a positive number or as a zero. If plaintiff's line 10 is greater than defendant's line 10, enter the difference between these two amounts on line 11 under plaintiff's column and leave defendant's column blank. If defendant's line 10 is greater than plaintiff's line 10, enter the difference between these two amounts on line 11 under defendant's column and leave plaintiff's column blank. [Note that if either of the numbers on line 10 is a negative number, you must change the signs when you subtract. For example, $100 minus negative $50 equals $150.]

NOTE TO PLAINTIFF AND DEFENDANT: *The information required to complete the worksheet is known only to the parties. It is the responsibility of the parties to provide this information to the Court so that the Court can set the appropriate amount of child support. The Clerk of Superior Court CANNOT obtain this information or fill out this worksheet for you. If you need assistance, you may contact an attorney or apply for assistance at the IV-D agency within your county.*

Child Support

Discussion Problem #2

Family Law for Judges Session 2

Calculate Child Support

Two minor children; ages 8 and 10

Mom is Plaintiff

Mom's gross monthly income is $8,500

Mom has not remarried

Dad is Defendant

Dad's gross monthly income is $6,300

Dad's new wife's gross monthly income is $6,000

Paternal grandparents set up a trust with dad as trustee and the children as beneficiaries. The trust can pay up to $2,00 per month for the benefit of the children, at the discretion of dad.

Custody order gives mom primary physical custody and dad visitation. However, the order also gives both parents up to 5 consecutive weeks each summer for travel. Dad had children 124 nights last year and 129 nights the year before because he traveled with the children for 5 weeks each summer.

Dad has two minor children living in his home with his new wife. Both children are dad's biological children. One was born while dad was still living with mom (the cause of the separation).

Mom pays the cost of medical and dental insurance for the two minor children at a cost of $300 per month. Dad's new wife is in the military and can cover all four of dad's children for $200 per month.

Mom pays $400 per month during the school year for after school care for the two children (9 months of the year). She pays $600 per summer for day care and camps during the summer when the children are not traveling.

Mom also pays an average of $300 per month for the extracurricular activities of both children throughout the year. They both play sports and take music lessons.

Enter Child Support Order

Mom filed the complaint for child support 12 months ago. While the case was pending, dad sent mom $5,000 from the children's trust fund but did not make any other support payments.

Child Support: Extraordinary Expenses in Guideline Cases

The North Carolina Court of Appeals recently affirmed the trial court order in Madar v. Madar, (Dec. 31, 2020), that required both parents to pay costs associated with their child's mental health treatment in a residential treatment facility in addition to their basic child support obligation pursuant to the Child Support Guidelines. The court held that the Child Support Guidelines give the trial court the discretion to determine when parents should be ordered to pay such 'extraordinary expenses' as part of their child support obligation. Because ordering the payment of extraordinary expenses does not constitute a deviation from the Child Support Guidelines, a trial court is not required to make findings of fact to support its decision that the expenses are reasonable and necessary or that the parties have the ability to pay.

Madar v. Madar

The youngest child of the parties suffered from severe mental illness and was residing in a residential treatment program at the time of the child support hearing. The trial court determined that the expenses related to the child's inpatient treatment, including travel costs and psychological evaluations, were extraordinary expenses as defined by the Child Support Guidelines and ordered that defendant pay 60% of the costs and that plaintiff pay 40% of the costs in addition to the child support obligation calculated pursuant to the Guidelines.

Defendant argued on appeal that the trial court erred in concluding both parents had a duty to pay for the costs associated with the child's residential treatment. The court of appeals disagreed, holding that the Child Support Guidelines authorize the court to order payment of extraordinary expenses in addition to the monthly child support obligation required by the Guidelines when the trial court determines it is appropriate to do so. The Guidelines state:

"extraordinary child-related expenses (including (1) expenses related to special or private elementary or secondary schools to meet a child's particular education needs, and (2) expenses for transporting the child between the parent's homes) may be added to the basic child support obligation and ordered paid by the parents in proportion to their respective incomes if the court determines the expenses are reasonable, necessary, and in the child's best interest."

The court of appeals held that a trial court has discretion to determine whether an expense constitutes an extraordinary expense, whether to order payment of an expense as an extraordinary expense, and how the expense should be apportioned between the parties.

Not a Deviation

When the trial court sets support in accordance with the Guidelines, the amount ordered is conclusively presumed to meet the reasonable needs of the child based on the parents' ability to pay. Therefore, specific findings about the child's reasonable needs and the relative ability of each

parent to provide support are not required. 2020 Guidelines; *Browne v. Browne*, 101 NC App 617 (1991). However, when a court deviates from the Guidelines, the order must be supported with specific findings regarding the needs of the child and the ability of the parent to pay. 2020 Guidelines; *Row v. Row*, 185 NC App 450 (2007).

In Madar, the court of appeals rejected husband's argument that the trial court was required to make findings regarding the needs of the child and the ability of the parents to pay before ordering payment of the residential treatment expenses, explaining that orders for the payment of extraordinary expenses are Guideline orders and are not deviations from the Guidelines. As a Guideline order, no findings regarding needs of the child and ability of parents to pay are required. *See also Biggs v. Geer*, 136 NC App 294 (2000)(trial court not required to make findings to show private school expenses were reasonable, necessary and in the child's best interest); *Doan v. Doan*, 156 NC App 570 (2003)(no findings were required to show ice skating expenses were reasonable and necessary but case was remanded for trial court to make findings to establish the amount of the monthly expenses related to the ice skating).

Examples of extraordinary expenses

The Guidelines specifically list education expenses and the cost of transporting a child between the parents' homes as extraordinary expenses, but the court of appeals has held that the list of expenses in the Guidelines is not exhaustive. *Mackins v. Mackins*, 114 NC App 538 (1994). The trial court has the discretion to determine what expenses constitute extraordinary expenses, the amount of those expenses that should be paid, and how the payments should be apportioned between the parties. *Mackins*; Madar.

In addition to upholding orders to pay private school expenses, *see Biggs v. Geer*, 136 NC App 294 (2000) and *Balawejder v. Balawejder*, 216 NC App 301(2011), the court of appeals also has upheld orders to pay ice skating expenses, *Doan v. Doan*, 156 NC App 570 (2003), and costs for summer camps, *Balawejder*. But the court of appeals also has upheld a trial court's denial of a request to order travel expenses where father failed to establish expenses that had been or would be incurred with sufficient certainty to satisfy the trial court. *Foss v. Miller*, unpublished opinion, 235 NC App 655 (2014), and has upheld a denial of a request for private school expenses where the trial court concluded father did not have the ability to pay the expenses. *Ludham v. Miller*, 225 NC App 350 (2013).

Prospective Child Support: What is it and how is the amount determined?

In the post "Retroactive Support: What is it and how is the amount determined", I wrote that the law defines retroactive support as support due for the time before a complaint or motion seeking support is filed, *Briggs v. Greer*, 136 NC App 294 (2000), and that the amount of retroactive support owed by an obligor can be determined based either on the Child Support Guidelines or on the parent's share of actual expense incurred on behalf of the child during a period of time in the past. NC Child Support Guidelines, March 1, 2020, p. 2.

On the other hand, prospective support is defined as support due from the time a complaint or motion seeking support is filed forward in time. *Ex. rel. Miller v. Hinton,* 147 NC App 700 (2001)(there is an implied presumption that prospective support begins at the time of filing). This means that *prospective* support generally includes amounts due for the period of time *before* the support order is entered, but only that time period between the date of the filing of the complaint or motion and the time of the entry of the child support order. *Mason v. Erwin*, 157 NC App 284 (2003)(it is clear that new amount of child support resulting from a modification is due from the time of filing of the motion); *Cole v. Cole*, 149 NC App 427 (2002)(prospective support begins at the time of filing).

How is the amount of prospective support determined?

Prospective support is determined by application of the guidelines, unless the court deviates from the guidelines upon finding that application of the guidelines is unjust or inappropriate. G.S 50-13.4(c) provides that:

"The court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1) of this section. However, upon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. If, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines. If the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered."

Further, prospective support is set based on the circumstances, including the income of the parties, at the time of the child support hearing. *Simms v. Boger,* 264 N.C. App. 442, 453 (2019).

Does this mean that prospective support must be ordered from the time of filing and in the

same amount as the award going forward from the hearing?

As stated in the *Ex. rel. Miller v. Hinson* case cited above, there is an implied presumption that prospective support will be ordered from the time of filing forward in time and, as the court reiterated in the *Simms* case cited above, prospective support generally is set based on the income of the parties at the time of the hearing. This means that there is a presumption that the amount of support set by the court based on the income of the parties at the time of the hearing is payable from the time the complaint or motion seeking support was filed forward in time.

However, the court of appeals also has stated on occasion that judges have discretion to order that prospective support payments begin at a different date or that the amount of support due from the date of filing until the date of the hearing may be different than the award going forward in time without also addressing when it is appropriate to do so or addressing how to set the amount of support for the time from filing if not in the amount set from the hearing date forward. *See e.g. Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 596 S.E.2d 285 (2004) (affirming court order that made permanent support payable as of two weeks before trial started, but not back to the date complaint was filed).

However, in *State ex rel. Fisher v. Lukinoff*, 131 NC App 642 (1998), the court addressed the issue directly and stated:

"This Court has held for purposes of computing child support, the portion of the award “representing that period from the time a complaint seeking child support is filed to the date of trial,” is “in the nature of prospective child support.” [citations omitted] Since prospective child support is to be awarded for the time period between the filing of a complaint for child support and the hearing date, Section 50–13.4(c) applies and requires application of the Guidelines with respect to that period. … [citations omitted] **Thus, the court must make adequate findings to justify deviating from the Guidelines for the time period between the filing of plaintiff's complaint and the hearing date, as it was required to make findings to “justify varying from the guidelines” [if it orders support to begin at a time other than the date of filing]. See G.S. § 50–13.4(c).”**

See also State ex rel. Miller v. Hinton, 147 NC App 700 (2001)(guidelines are required from time of filing unless court deviates after determining amount is unjust or otherwise inappropriate)

These cases hold that, just as prospective support going forward from the date the court enters the award, prospective support owed for the time between filing and the entry of the order must be based on the guidelines unless the court makes findings to support deviation. If the court concludes deviation is appropriate, the alternative amount ordered must be supported with findings to show the alternative is appropriate given the financial circumstances of the parties and the needs of the children during the time covered. The court in *Fisher* explained:

“As we hold that the trial court did not determine [the child's] reasonable needs including his education, maintenance, or accustomed standard of living in deviating from the Guidelines in its award of child support commencing [on the day following the hearing on permanent support], the court's failure to provide child support for the time period between plaintiff's filing of her complaint and the trial date is also not adequately justified to support deviation from the Guidelines. We therefore remand to the trial court for findings concerning the “reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.” G.S. § 50–13.4(c1)."

The court cited the *Fisher* opinion in *State ex. Rel. Miller v. Hinton*, 147 NC App 700 (2001), to support this statement:

"After careful examination of the record, we conclude that the trial court in the present case made the same error as the trial court in *Fisher*, in that the trial court provided no rationale as to why the child support award did not begin at the filing of the complaint. Unless the trial court finds that beginning the prospective child support payments on the date the complaint was filed would be “unjust or inappropriate” and there is evidence in the record to support this finding, it is error to order prospective support to begin at any other time."

Most recently, in *Simms v. Boger*, 264 N.C. App. 442 (2019), the court of appeals reversed and remanded where the trial court determined that because the income of the payor had changed over the time the motion to modify was pending, support for that time period should be set based on an application of the guidelines to the income of the parties for each separate year before the hearing. The court of appeals did not discuss deviation specifically but held the trial court erred by not setting support based on the income of the parties at the time of the modification hearing without much more explanation as to why the amount ordered for the time before the modification hearing was appropriate under the circumstances.

What if a temporary order had been entered while the matter was pending?

Prospective child support payments begin at the time of the filing of the complaint even when a temporary support order has been in effect while the case was awaiting trial on the permanent order. In *Cole v. Cole*, 149 N.C. App. 427, 562 S.E.2d 11 (2002), the court of appeals rejected defendant’s argument that a temporary consent order entered shortly after the action was filed established his support obligation while action was pending. *See also Miller v. Miller,* 153 NC App 40 (2002)(no error for trial court to order permanent prospective support payable for time temporary order was in place; trial court gave payor appropriate credit for amounts paid pursuant to the temporary order).

Sample Orders

***provided by judges**

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

WAKE COUNTY

FILE NO. 03 CVD 12351

ROD [redacted],)
Plaintiff,)
)
v.) ORDER FOR CHILD SUPPORT
)
)
KELLE [redacted])
Defendant.)

THIS CAUSE came on for hearing on Plaintiff's Motion for Establishment of Child Support, and Defendant's Motion for Establishment of Child Support and Attorney's Fees during the during the June 4, 2007 session of District Court, Wake County. Defendant subsequently dismissed her Motion for Establishment of Child Support and Attorney's Fees on June 7, 2007, during the first session that lasted from June 5 – 7, 2007. The hearing on the matters before the Court resumed on September 4, 2007, until completion on that same day. Plaintiff was present during the proceedings and was represented by counsel, Robert A. P[redacted], Jr. and D. Caldwell B[redacted], [redacted] of Wyrick Robbins Yates & Ponton, LLP. Defendant was present during the proceedings and was represented by counsel, Kimberly A. W[redacted] and Cathy C. H[redacted] of Gailor, Wallis & Hunt, P.L.L.C. Both parties presented evidence and, based upon the evidence presented and the arguments of counsel for both parties, by the greater weight of the evidence, the Court makes the following:

FINDINGS OF FACT

1. Plaintiff is a citizen and resident of Wake County, North Carolina, and has been for more than six months next preceding the institution of this action.

2. Defendant is a citizen and resident of Wake County, North Carolina.

3. The parties were married to each other on August 4, 1996, and separated one from the other on September 10, 2003.

4. Three children were born of the parties' marriage: Briley [redacted] born January 18, 1998; Skyler [redacted] born July 27, 1999; and Reece [redacted], born September 6, 2000. The children were ages five (5), four (4), and three (3) years old at the time the parties separated. They are now ages nine (9), eight (8), and seven (7) years old.

Procedural History

5. Plaintiff filed the Complaint in this action on September 11, 2003, seeking child custody and equitable distribution.

6. On November 20, 2003, a consent order was entered providing for a partial distribution of marital property. By the terms of this Order, the parties evenly divided the funds in CapTrust Account ****-7919, which was then valued at approximately $2,100,000.

7. Defendant filed her answer on December 5, 2003, counterclaiming for postseparation support, alimony, child custody, child support, equitable distribution, and attorney's fees.

8. On February 18, 2004, a consent order was entered providing for postseparation support ("PSS"). By the terms of this Order, Plaintiff was obligated to pay Defendant $36,333 per month in February and March, 2004, along with paying the mortgage payments on [redacted] Birchfalls Drive (the "former marital residence"). Beginning April 2004, Plaintiff's postseparation support obligation increased to $43,208 per month and Defendant was required to begin making the monthly mortgage payments on the former marital residence. The Postseparation Support Order also obligated Defendant to pay all the expenses related to the former marital residence and to pay the parties' nanny.

9. On March 16, 2004, the Order Approving Parenting Agreement (hereinafter the "Custody Order") was entered, having been signed by Plaintiff and Defendant on March 9 and March 11, 2004 respectively. Since the entry of this Order, the parties have shared physical custody of the minor children.

10. On June 15, 2004, Defendant filed an Amended Answer, counterclaiming for PSS, alimony, child custody, child support, equitable distribution and attorney's fees.

11. The financial matters in this case were zealously litigated by both parties, and a trial on all claims except child custody was scheduled for August 2, 2004.

12. On July 30, 2004, the parties executed a "Memorandum of Agreement of Equitable Distribution and Support Between Rod [redacted] and Kelle [redacted]" (hereinafter referred to as the "Agreement"), which settled all issues relating to equitable distribution and alimony, and it addressed "family and child support". No portion of the Agreement has been incorporated into a court order.

13. On August 2, 2004, each party dismissed, with prejudice, his or her respective claims expressly excluding child custody and child support from the operation of the dismissal.

14. On September 8, 2006, Plaintiff filed a Motion in the Cause for Establishment of Child Support.

15. On January 31, 2007, Defendant filed a Motion in the Cause for Establishment of Child Support and for Attorney's Fees. On June 7, 2007, after the child support trial had commenced, Defendant took a voluntary dismissal on this Motion. Defendant did not, however, dismiss her claim for child support, which was filed in December 2003. To date, this claim remains pending.

16. On May 30, 2007, Defendant filed a Motion in Limine that sought to prevent Plaintiff from testifying or offering any evidence on certain issues related to each party's expenses encompassing a span of time both before and after the parties' separation, to preclude Plaintiff from offering any evidence as to why his child support amount should be reduced, and to preclude Plaintiff from offering any testimony or evidence as to the appropriate amount of child support. Counsel for both parties argued the Motion in Limine on June 5, 2007, immediately prior to the start of the hearing on child support. This Court took judicial notice of the Plaintiff's discovery responses that were the basis of Defendant's Motion in Limine. This court reserved ruling on part of the Motion, so as not to prejudge the evidence in the case and allowed that Defendant could object to specific evidence or testimony at the time it was presented and could cross-examine Plaintiff as desired to show any inconsistencies in his trial testimony and his prior discovery responses and deposition testimony. This Court denied those portions of the Motion in Limine that sought to preclude Plaintiff from offering testimony or evidence as to the appropriate amount of child support or his contentions as to why the amount of child support should be reduced from the amount in the Agreement, and held that ultimately, the appropriate amount of child support is a determination to be made by the Court based upon all of the evidence presented by the parties.

Intent of the Agreement

17. The Agreement expressly provides that either party may request that the Court establish child support at anytime prior to the start of the 2006-2007 hockey season. Further, the Agreement expressly provides that all claims pending in the action at the time of the Agreement will be dismissed, except for the parties' respective claims for child support and child custody. The Agreement expressly provides as follows:

    a) ". . . either party shall have the right to seek a modification of the child support amount prior to the start of the 2005-2006 [sic] NHL season as set forth in paragraph II.B (iii), below." (Agreement, ¶II,B(i))

    b) "Either party will have the right to file a claim regarding the support of the children in the event: (1) a NHL lockout occurs during the 2004-2005 season and RB is employed and earning income as a hockey player; (2) a NHL lockout will occur or continue into the 2005-2006 or 2006-2007 hockey seasons; or (3) prior to

the beginning of the 2006-2007 hockey season after the expiration of RB's [Rod [redacted]'s] current contract." (Agreement, ¶II,B(iii))

c) "Neither party will be required to show a change of conditions or substantial change in circumstances in requesting an order for child support following the occurrence of any of the three events set forth in this paragraph II B(iii)." (Agreement, ¶II,B(iii))

d) "The parties agree to execute full and complete releases of all claims either may have against the other as of the date of execution of this Memorandum of Agreement excepting claims relating to child support and custody and any claims regarding the validity or enforcement of this Memorandum of Agreement." (Agreement, ¶IV(b))

e) "Upon execution of this Memorandum of Agreement on July 30, 2004, each party will file a dismissal with prejudice of his or her claims and counterclaims except for his or her claims for child custody and child support." (Agreement, ¶V(c))

18. The Agreement evidences the intent of the parties with regard to child support and child custody, which was to leave these matters within the jurisdiction of the Court. The Agreement further evidences the intent of the parties that their settlement with regard to child support was temporary in nature at least until either party exercised their right to request the Court to establish an appropriate child support amount prior to the start of the 2006-07 hockey season.

19. In addition to the intent of the parties as evidenced by the specific terms of the Agreement, the parties acted in a manner consistent with their intent as evidenced in the specific language of the Agreement that the support amounts provided in the Agreement were temporary. Consistent with the Agreement:

a) Plaintiff timely exercised his right under the Agreement to ask the Court to make an initial determination of child support prior to the start of the 2006 – 2007 hockey season.

b) Defendant also requested that the Court make an initial determination of child support.

c) Both parties filed their Motions in the child support action that had been pending prior to the execution of the Agreement and neither party ever dismissed their respective claims for child support.

d) In the Motions filed by both parties, each party's motion requested that the Court determine the appropriate amount of child support for the minor children and both Motions agreed that neither party would be required to show a change in circumstances in order to have the Court make its determination regarding child support.

e) In filing her Motion in Limine on May 30, 2007, Defendant implicitly recognized the continued validity of the pending child support claims because she argued that Plaintiff should have supplemented his responses to discovery served and initially answered in 2004, prior to the execution of the Agreement.

20. Given the temporary nature of the parties' agreement with regard to child support amounts, the presumption accorded child support in unincorporated separation agreements – that the amount agreed to by the parties is just and reasonable – is rebutted by the intent of the parties as evidenced in the Agreement and in their conduct both before and after the execution of the Agreement.

The Children's Reasonable Needs

21. As part of the Agreement, Defendant waived her claims to postseparation support and alimony. The only matters pending before the Court at the time of this decision are Plaintiff's Motion in the Cause For Establishment of Child Support and Defendant's oral motion for attorneys' fees.

22. As noted more fully below, the parties' combined income exceeds $25,000 per month. As such, the North Carolina Child Support Guidelines do not apply.

23. The [redacted] children have enjoyed advantages that are not available to most children. These advantages include large homes, travel, and exposure to a multitude of extracurricular activities including fine arts classes, participation in sports, and attendance at plays, musicals, museums and magic shows.

24. Since the parties separated, the [redacted] children have never wanted for anything. They have always had their needs met.

25. Plaintiff and Defendant have divergent views on the lifestyle each wants for the children. The Custody Order provides the parents with joint decision-making authority regarding major decisions affecting the health and welfare of the children. The custody Order further provides that day-to-day decisions concerning the children will be made by the parent the children are with at the time.

26. While growing up, Plaintiff enjoyed a simple lifestyle. His basic needs were met, but his parents struggled to make ends meet. Plaintiff's parents encouraged him to excel at whatever he chose to do. In seeing the sacrifices his parents made, Plaintiff grew to appreciate the value of hard work and their sacrifice motivated him to succeed as a professional athlete.

27. Plaintiff has a strong desire to instill the value of frugality and hard work in his children, notwithstanding his high income. With the exception of the expenses related to the former marital residence, which has been for sale almost since its completion more than 5 years ago, Plaintiff's living expenses for himself and the

minor children when they are in his care are substantially lower than those of the Defendant and the minor children when they are in her care.

28. Family finances were a constant source of contention throughout the parties' marriage. Although there was no shortfall of money available to spend, Plaintiff wanted his family to have a less extravagant lifestyle than what Defendant wanted.

29. Throughout the parties' marriage, Plaintiff tried to curtail Defendant's expenditures. Defendant was responsible for paying the bills for a short period of time during their marriage, but then Plaintiff assumed that responsibility because he thought the expenses had gotten out of control.

30. Mr. [redacted] was traded from the Philadelphia Flyers to the Carolina Hurricanes with no notice in approximately January 2000. Ms. [redacted] and the children stayed behind in Philadelphia to make arrangements for the move to North Carolina. Ms. [redacted] came to North Carolina for 24 hours in 2004 while pregnant and during a snow storm to locate a home for the family. Ms. [redacted] selected a home on Falls Bridge Drive which cost about $560,000 at that time. This home was similar to the home they left in New Jersey but with a bigger yard. The parties moved into the home in approximately April of 2000. The parties' third child, Reece, was born in September 2000 and the parties decided to locate a new home and initially agreed to spend approximately $1,000,000. The parties found a lot which they bought with cash. Several months later, on October 23, 2001, the parties retained Steve D[redacted] to build a new home.

31. The parties' divergent philosophies about money, wants, and needs extended to the construction of this new home. Defendant had the burdening oar in overseeing the construction of the new home. From early in the construction phase of the project, Plaintiff was concerned about the extravagant direction the home had taken. However, he signed all the financial papers relating to the construction of the home. The final cost on the home was closer to three million dollars ($3,000,000) and included many luxuries that Plaintiff did not want and to which the family was not accustomed.

32. Defendant enjoyed the work she put into the design, planning, and construction of the former marital residence, and she was happier than she had been in some time. Plaintiff could have stopped the excessive spending relating to the former marital residence, but he did not, as he hoped that this project would help strengthen their marriage, and he saw how happy this project made Defendant.

33. The parties moved into the former marital residence in December 2002. The parties' marital woes continued, and the former marital residence was listed for sale in February 2003. Defendant lived in the marital residence following the parties' separation until required to move from the former marital residence by the terms of the Agreement. The house remains for sale, and Plaintiff currently resides in the former marital residence pursuant to the parties' Agreement. The parties continue to

own the residence jointly, but Plaintiff is responsible for paying the mortgage until the residence sells. Pursuant to the parties' Agreement and a subsequent agreement executed between the parties on April 21, 2006, Plaintiff paid off "his half" of the mortgage debt secured by the former marital residence, but he continues to maintain the monthly debt service of approximately $5,300 on the remaining mortgage balance related to "Defendant's half" of the debt secured by the former marital residence. Pursuant to the parties' subsequent agreement, Plaintiff will receive a dollar for dollar credit for all reduction of principal below $2,000,000 on the outstanding debt.

34. Defendant's spending on the minor children in some areas has increased since the parties' separation. Defendant claims reasonable monthly expenses for the minor children in excess of $24,000. Plaintiff's monthly expenditures related to the minor children while they are with him at least 40% of the time (and at least 50% during the "hockey off-season") have been consistently lower than Defendant's expenditures related to the minor children, but he has met the reasonable needs of the children while they have been in his care. Defendant believes that the minor children should have lifestyles commensurate with the parties' ability to pay. Defendant acknowledges the parties' conflict over what is an appropriate lifestyle for the children and both parties acknowledge the conflict between Defendant's views and the Plaintiff's long-stated desire for a more frugal and more "normal" lifestyle, which he held long before the parties' separation.

35. As noted above, Defendant has waived her rights to and dismissed her claims for spousal support. An amount in excess of the amount awarded as child support, below, would essentially result in Plaintiff providing support to Defendant and/or result in Plaintiff subsidizing Defendant's choices regarding the children's standard of living – choices that Plaintiff has historically not supported and are inconsistent with his own lifestyle and the choices he has made for the minor children.

36. Plaintiff has as much right as the Defendant to choose the lifestyle for his children and to participate in the development of an appropriate value system for the children. It is unreasonable for Plaintiff to be required to pay more child support than the amount set forth herein because the Defendant's expenses related to the children are excessive (as detailed below). Requiring Plaintiff to pay more than the amount set forth herein would involuntarily transfer the power of discretionary spending on the children to Defendant and result in a windfall to her that would benefit her, and her choices, more than it would serve to benefit any reasonable needs of the children.

37. In accordance with the terms of the Custody Order, the parents' custodial times during the hockey season are defined by Plaintiff's hockey schedule. During the hockey season, which normally runs from September until April, the children are with Plaintiff about forty percent (40%) of the time and with Defendant about sixty percent (60%) of the time. During the rest of the year (hereinafter referred to as the "hockey off-season"), the parents' custodial times are split evenly.

38. The parties have abided by the terms of the Custody Order resulting in Plaintiff having the children at least forty percent (40%) of the time and Defendant having the children no more than sixty percent (60%) of the time.

39. The Agreement sets forth the amount of "tax deductible family support" and child support to be paid. The amount and nature of the support varied depending on the timeframe and/or the happening of certain events. Under the terms of the Agreement, at the present time, Plaintiff is obligated to pay Defendant $15,000 per month in child support pending the outcome of his Motion in the Cause.

40. The Agreement further provides that Plaintiff is to pay for all of the children's extra-curricular activities, to maintain health insurance coverage for the children and to pay all uninsured medical, dental, and other healthcare related expenses for the children.

41. Plaintiff has health insurance available to him as a benefit of his employment. He has had the children continuously covered by health insurance in accordance with the Agreement. Defendant is not employed, and therefore would have to purchase health insurance if she was responsible for providing insurance coverage for the children. It is reasonable for Plaintiff to continue to provide health insurance for all the children. It is also reasonable to give deference to the provision in the Agreement that requires Plaintiff to pay for all uninsured medical, dental, and other healthcare related expenses for the children.

42. Since the parties separated, Plaintiff has not approved of all of the extracurricular activities in which Defendant enrolled the children. Prior to the hearing on this matter, Plaintiff had not fully reimbursed Defendant for all of the children's extracurricular activities.

43. Given the parties' shared custodial arrangement, the children's participation in any extracurricular activity will likely occur during both parties' respective custodial times. It is in the children's best interest for the parties to mutually agree as to the extracurricular activities in which the children will participate. It is also reasonable to give deference to the provision in the Agreement that requires Plaintiff to pay for all of the children's extracurricular activities. Because the children's custodial schedule is based upon Plaintiff's hockey schedule, it changes each year. Pursuant to the parenting agreement, Defendant must be available to care for the children when Plaintiff is unavailable due to his hockey schedule. The Defendant plays in approximately 80 regular season games, one-half of which are out of town. Given Plaintiff's unusual work schedule, the children's different school schedules, and the parties' agreement regarding custody, it would be extremely difficult for Defendant to secure outside employment that would allow her to arrange her work schedule so that she would be available to care for the children based on Plaintiff's hockey schedule.

44. All three of the children are in private school. Skyler attends Ravenscroft, and Briley and Reece attend Montessori school. The current combined annual tuition for the

children is approximately $34,807. Neither party is paying for the children's private school expenses out of his or her separate funds.

45. As part of the Agreement, the parties designated the Kayne Account ****7884 to pay for educational expenses through high school (hereinafter the "Education Account"). Any balance remaining in this account after the last child completed high school is to be used to defray the cost of the children's college, university and post-graduate educations, relying first on the children's pre-existing College Bound Funds. Upon completion of a child's college and post-graduate education or when Reece reaches age 25 (whichever first occurs), the balance remaining in these accounts, if any, will be equally divided between the parties.

46. Since execution of the Agreement, the total withdrawals from the Education Account have been less than the growth in the account such that the current balance in the Education Account exceeds the balance at the time the Agreement was signed.

47. The parties fully resolved their property division disputes and dismissed, with prejudice, their respective claims for equitable distribution. All of the parties' marital property, including the Education Account, has been allocated and divided. Pursuant to the Agreement, the marital asset designated as the Education Account will be used to pay the children's primary and secondary school educational expenses.

48. It is reasonable and just for the Court to give deference to the Agreement with regard to elementary and secondary school educational expenses. The payment of post-secondary educational expenses is beyond the jurisdiction of this Court.

49. It is just and reasonable for Plaintiff to be responsible for any amounts that the Education Account does not cover with regard to reasonable and necessary primary and secondary school educational expenses.

50. Defendant is not employed outside the home, which allows her to have a more flexible schedule. She plays on three different tennis teams at [redacted] Country Club and volunteers at the children's schools. Such volunteer activities include chaperoning field trips for each child's class, holding end of year parties for each child's class, assisting with class picnics and parties for each child's class, reading to children in the class and regularly volunteering in each child's class. All three children are involved in numerous extra curricular activities including soccer, basketball, baseball, music lessons, art class, skating lessons, tennis, scuba diving, horseback riding, hockey, dancing, book club and drama. Defendant provides transportation to practices, games and meetings with the assistance of a nanny when schedules conflict or when only one child has an event and the other children are engaged in other activities.

51. Defendant spends $15,600 annually ($1,300 per month) on a nanny. In addition, Defendant provides a separate automobile for the nanny to use.

52. The children need care and supervision. They need to be transported to school and to their extracurricular activities.

53. For most, if not all, of the children's lives, the parties have employed a nanny to help with the children. Since the parties' separation, both parties have continued to use a nanny, although when the children are in Defendant's care, Plaintiff helps transport the children to activities if he is available. Because of the flexibility in her schedule, when the children are in the care of Defendant, the children's need for supervision and transportation can be met by Defendant without the assistance of a nanny. Currently there is only one evening per week when the children are in Defendant's care for which the children's scheduled activities conflict. The cost of a nanny is not a reasonable expense when the children are in Defendant's care.

54. Currently, Plaintiff pays 40% of the salary of the nanny and Defendant pays 60% of her salary. If Defendant no longer pays the nanny, it is likely that Plaintiff will have to pay the full amount required by the nanny. To the extent that Plaintiff has to pay the nanny a minimum salary that would cover more hours than what he needs from the nanny, it is reasonable for Plaintiff to make the nanny available to Defendant when the children are in her care.

55. Defendant owns two (2) vehicles, one that she keeps for the nanny's use. One of the vehicles is leased, and Defendant has taken out a loan for the second vehicle. Defendant could have purchased both vehicles without financing them, but after receiving financial advice, she decided to lease one and finance the purchase of the other. Her total automobile payments are $1,096.87 per month. The cost of the second vehicle is not an expense that is reasonably related to the needs of the children.

56. The children are accustomed to having a nice home that is clean.

57. Defendant spends $883.33 per month to have someone to clean her home two times a week. Although Defendant may be used to having someone else clean her house two times a week, because of the flexibility in Defendant's schedule, this is not a need of the children when they are in Defendant's care. Plaintiff works outside the home, and he pays $325 per month for house cleaning services for a house that is larger than Defendant's. Plaintiff's monthly house cleaning expense is a more reasonable amount for Defendant to pay someone to clean her home.

58. The children are accustomed to having a big, well-maintained yard in which to play.

59. The former marital residence is on approximately two (2) acres. Defendant's current residence is located on approximately five and one-half (5.5) acres. She spends $855.63 per month to maintain the yard and for landscaping. Defendant's yard includes a go-cart track, a trampoline, and trails through the woods.

60. There is no evidence that the children had a go-cart track at any of their former residences. Defendant made the decision to provide this for the children at her residence. There is no evidence she consulted with Plaintiff about this decision. Defendant has three (3) acres bush-hogged and mowed every three weeks. Defendant selected the lot on which to build her home. Defendant paid cash for the lot from her portion of the equitable distribution, and the cost of the lot is not included in Defendant's mortgage.

61. At the time of separation, Defendant spent $500 per month on yard maintenance and landscaping. Plaintiff's cost for yard maintenance is approximately $637 per month. Defendant's expenditure of $855.63 per month for lawn maintenance is unreasonable and excessive. Plaintiff's cost for yard maintenance is a more reasonable cost for Defendant to incur.

62. Defendant spends $569.10 per month on household furnishings and seasonal décor. The decorations that are important to the children are the ones in which they directly participate, such as decorating the Christmas tree. The evidence is insufficient to determine what portion of this claimed expense is for the Christmas tree and other seasonal decorations in which the children directly participate. Therefore, this cost is not a reasonable expense as it relates to the children.

63. Defendant buys double the amount of clothes needed by the children in order for the children to have clothes at both Plaintiff's and Defendant's respective homes. Defendant spends approximately $1,147.14 per month on the children's clothing. Given the custodial split between Plaintiff and Defendant, it is reasonable for Plaintiff to purchase clothing used by the children when they are in his care. Therefore, it is reasonable to reduce Defendant's clothing cost for the children to one-half the amount she claims.

64. Defendant uses life insurance as part of her estate planning. She spends approximately $1,708 per month ($20,500 annually) in life insurance premiums. This is not an expense reasonably related to the current needs of the children.

65. Defendant currently spends $2,045.34 per month for the children's portion of her vacations with the children. The children also vacation with Plaintiff, who spends $330 per month for the children's portion of their vacations with him.

66. At the time of separation, the parties took two family vacations a year, three vacations with Defendant and one child, and 2-3 long weekend trips for Defendant only. The children's cost for these vacations was $250 per child per month ($9,000 per year). These costs include the cost for Defendant to bring someone with her to assist on the family vacations.

67. The amount Defendant currently spends for the children's vacations when they are with her is unreasonable and is excessive. A more reasonable amount for the children's total vacation expense with a parent is the date of separation expense,

$9,000 (or $750 per month). It is reasonable to apportion this total cost between the parents with Plaintiff spending $330 per month and Defendant spending $420 per month.

68. Pursuant to the Agreement, Defendant received a residence located in Sweetwater, Indiana (the "Indiana home"). The parties have used the Indiana home as a vacation home, spending from one to three months there during the year. This property is not titled in the children's names, nor is it held in trust for the children. Defendant owns this property as her separate property.

69. The expenses for the Indiana home are not expenses reasonably related to the needs of the children.

70. Defendant spends $389.49 per month on children's pictures. This includes framed pictures of artwork, team pictures and portraits, and the cost includes making extra copies of the pictures for Plaintiff. Defendant presented insufficient evidence as to what portion of these costs is for Plaintiff's copies of the pictures. It is reasonable to reduce the claimed amount by one-half.

71. Defendant spends approximately $1,130.37 per month on the children's entertainment and recreation. The children are ages seven, eight, and nine years old. They split their time between their parent's homes, with Plaintiff having the children at least forty percent (40%) of the time. Defendant's home has a pool, a go cart track, a trampoline, and a wooded area for the children to explore. The children are involved in numerous extracurricular activities on an almost daily basis. The children go on frequent vacations out of state where they go to amusement parks, museums, and get massages, and the vacation expense is accounted for separately.

72. The children attend plays, musicals, magic shows, and go to the museums as entertainment and recreation when they are with Defendant. Defendant hosts birthday parties for each child as well as end-of-school pool parties for the children. She hosts other parties as well for her tennis teammates.

73. Defendant has provided insufficient evidence to determine what portion of her expenditures for recreation and entertainment was solely for the children's parties as opposed to parties she threw for her friends. In addition, Defendant has provided insufficient evidence to determine the entertainment costs for the children for the other local activities.

74. It is excessive and unreasonable for Defendant to spend $1,130.37 per month on the children's entertainment. A more reasonable amount is $355 per month, which allows for spending $500 on each child's birthday party, $300 on each child's end of school pool party, and $60 per week for the time the children are in her custody.

75. Attachment A, Part I, attached hereto and incorporated herein by reference, lists the reasonable household expenses from which the children benefit while they are in

Plaintiff's care. These expenses total $10,999 for the household. The amount of time the children are present in the home directly impacts $1,268 of these expenses.

76. It is reasonable to allocate a portion of Attachment A, Part I expenses to the children's reasonable needs. Three-fourths is a reasonable portion to allocate to the children for the expenses that are not directly impacted by the children's presence in the home, which totals $7,298.25. Thirty percent (40% of three-fourths) is a reasonable portion to allocate to the children for the expenses that are directly impacted by the children's presence in the home, which totals $380. Plaintiff's household expenses reasonably attributable to the children total approximately **$7,678.**

77. Attachment A, Part II, attached hereto and incorporated herein by reference lists the children's reasonable monthly individual expenses while in the care of Plaintiff. These expenses total at least **$2,490** currently.

78. The children's current total reasonable monthly expenses while in Plaintiff's care total at least **$10,168**.

79. Attachment B, Part I, attached hereto and incorporated herein by reference, lists the reasonable household expenses from which the children benefit while they are in Defendant's care. These expenses total $10,575.53 for the household. The amount of time the children are present in the home directly impacts $1,838.94 of these expenses.

80. It is reasonable to allocate a portion of Attachment B, Part I expenses to the children's reasonable needs. Three-fourths is a reasonable portion to allocate to the children for the expenses that are not directly impacted by the children's presence in the home, which totals $6,552.44. Forty-five percent (60% of three-fourths) is a reasonable portion to allocate to the children for the expense that are directly impacted by the children's presence in the home, which totals $827.52. Defendant's household expenses reasonably attributable to the children total approximately **$7,380.**

81. Attachment B, Part II, attached hereto and incorporated herein by reference lists the children's reasonable monthly individual expenses while in the care of Defendant. These expenses total approximately **$2,783** currently.

82. The children's current total reasonable monthly expenses while in Defendant's care total approximately **$10,163**.

83. The children's total reasonable monthly expenses are $20,331.

Income and Assets

84. Plaintiff is thirty-seven years old and has played hockey professionally since he was eighteen (18) years old. He is one of the captains for the Carolina Hurricanes.

85. In 2004, Plaintiff's total income was $2,911,995. His employment generated $2,639,786, and his investments generated approximately $248,008 in income. He paid $758,193 in federal taxes and $189,463 in North Carolina taxes.

86. In 2005, Plaintiff's total income was $2,470,441. Capital gains made up $740,542 of this; his employment generated $1,433,827; and his investments generated approximately $273,573 in income. He paid $586,753 in federal taxes.

87. In 2006, Plaintiff's total income was $4,929,964. Capital gains made up $309,916 of this; his employment generated $4,396,008; and his investments generated approximately $ 222,903 in income. He paid $1,522,190 in federal taxes.

88. Plaintiff's contract with the Hurricanes for the 2007-2008 season provides that Plaintiff will be paid four million dollars ($4,000,000), which is the same salary as he was paid during the 2006-2007 season. In 2007, Plaintiff will be paid an average of $333,333 per month. He has mandatory deductions totaling approximately forty to forty-five percent (40% - 45%) percent of his income ($133,333 - $149,999).

89. Pursuant to the terms of the Agreement, Plaintiff received marital assets totaling $3,963,853, but he contributed $215,000 of his separate property to Defendant as part of their settlement and he received credit for his separate property contribution. He has also received one-half of the proceeds from the sale of the 2002 Mercedes, is entitled to one half of the net proceeds from the sale of the former marital residence, and owns one half of the marital share of Plaintiff's National Hockey League ("NHL") retirement benefits (plus all of the non-marital portion of his NHL retirement benefits). In addition, pursuant to an order entered November 20, 2003, Plaintiff received approximately $1,050,000 as an interim distribution.

90. Since the parties separated, Plaintiff has been able to invest on average approximately $1,000,000 - $1,150,000 each year from his income from the Hurricanes.

91. Plaintiff has made no withdrawals from his investment accounts since the parties separated.

92. Plaintiff's current debt is limited to the mortgage on the former marital residence and charges on his American Express card, which is paid off monthly.

93. Plaintiff's current investments total at least $13,251,139.54. In addition he is entitled to his share (estimated to be approximately $1.3 million) of the net sales proceeds of the former marital residence, and he has his share of the NHL retirement benefits.

94. Defendant is thirty-nine (39) years old. She received a bachelor's degree in psychology and sociology in 1991. She was working as a flight attendant for a specialty airline when she met Plaintiff. Defendant was last employed in an area

related to her degree while living in New Jersey sometime prior to when the parties married.

95. In 2004, Defendant's total income was $406,208, which was comprised of $1,239 in interest income, $43,949 in dividend income, $303,498 in alimony, and $57,814 in capital gains. She reported a loss of $1,806. Defendant paid $93,977 in federal income tax and $27,350 in North Carolina income tax.

96. In 2005, Defendant's total income was $290,182, which was comprised of $5,023 in interest income, $127,143 in dividend income, $181,602 in capital gains. She reported a loss of $23,595. Defendant paid $34,217 in federal income tax and $14,807 in North Carolina income tax.

97. In 2006, Defendant's total income was $290,111, which was comprised of $7,517 in interest income, $74,082 in dividend income, $206,992 in capital gains, and $1,611 from her Fidelity investments. Defendant paid $25,251 in federal income tax and $15,601 in North Carolina income tax.

98. Defendant chose to build a home that cost slightly over $1.5 million ($250,000 plus $1.272 million in construction costs). This is fourteen (14) times the average annual income she received from interest and dividends in 2005 and 2006 – her only source of income other than child support. Her monthly mortgage payment is $5,961, which is 67% of her interest and dividend income.

99. Pursuant to the terms of the Agreement, Defendant received assets totaling at least $3,749,706, of which $215,000 was a contribution of Plaintiff's separate property.

    a) Defendant received the Indiana home, valued at $440,000.
    b) Defendant received the Florida condominium, valued at $218,000.
    c) Farms in Indiana, valued at $390,250.
    d) Defendant received investment accounts totaling $2,648,415 and a checking account with a balance of $46,771.
    e) Defendant received the Dodge Durango, valued at $6,270.
    f) She was to receive one-half of the proceeds from the sale of the 2002 Mercedes
    g) She was to receive one half of the net proceeds from the sale of the former marital residence;
    h) She was to receive one half of the marital share of Plaintiff's National Hockey League retirement benefits.

100. In addition, pursuant to an order entered November 20, 2003, Defendant received approximately $1,050,000 as an interim distribution.

101. Since the execution of the Agreement:

    a) Defendant has withdrawn approximately $1,101,940 from her investment accounts.

b) Defendant purchased a home for just over $1.5 million dollars. This home has a tax value of $825,104, and Defendant owes approximately $985,000 on this home.
c) Defendant sold the Florida condominium, for which she received approximately $271,700.
d) Defendant became a founding partner of Siblings, LLC, which was formed for the purpose of purchasing buildings. Defendant owns a 55% interest in this business. She has contributed at least $224,000 to Siblings, LLC. In 2005, she earned approximately $14,803 from this business. In 2006, she earned approximately $454 from this business.
e) Defendant's investment accounts now total approximately $3,346,015.
f) Defendant's interest in Plaintiff's NHL retirement account.
g) Defendant's share (estimated to be approximately $300,000) of the net sales proceeds of the former marital residence

102. Defendant's estimated annual tax payments are approximately $43,560 (or $3,630 per month).

103. Plaintiff continues to reside in the former marital residence because it has not yet sold. Plaintiff paid down the mortgage by one-half ($1,000,000) to reduce the interest payments on this outstanding marital debt. Pursuant to the Agreement, the parties will equally divide the net sales proceeds such that the remaining mortgage balance will be paid from Defendant's share of the net sales proceeds. Plaintiff is paying $5,300 per month on an interest only loan and will receive no credits for maintaining Defendant's debt on this asset.

104. Both Plaintiff and Defendant have substantial assets; however, Plaintiff's assets are more than triple Defendant's assets. Plaintiff's assets have the potential for substantial growth for so long as he continues employment with an NHL hockey team. Plaintiff's ability to play professional hockey is limited by his age, the possibility of injury, and other conditions beyond his control.

Prospective Child Support

105. Both parents owe a duty of support to the minor children, and both parents have the ability to provide support for the children as set forth herein. Each parent has the ability to pay for the children's reasonable expenses that occur while the children are in that parent's care.

106. It is reasonable for Plaintiff and Defendant to pay a portion of the children's reasonable expenses that is in proportion to the parties' 2006 income.

107. It is reasonable and in the best interests of the children for Plaintiff to pay prospective child support to Defendant in the amount of $9,147 per month, effective October 2006, the month following the filing of his Motion in the Cause.

108. Plaintiff is entitled to a credit on his child support obligation in the amount of $70,236 ($5,853 per month from October 2006 through September 2007). It is just and reasonable for Defendant to reimburse Plaintiff for this credit, and she has the ability to do so.

Attorneys' Fees

109. In closing argument, Defendant orally asked the Court for an award of attorneys' fees, which includes fees relating to time spent prior to the filing of Plaintiff's Motion in the Cause.

110. As noted above, Defendant dismissed (with prejudice) her claim for attorneys' fees that she asserted in her Answer and Counterclaims when the Agreement was executed on or about August 2, 2004. Defendant is barred from asserting a claim for attorneys' fees for attorney time expended prior to and including August 2, 2004.

111. Plaintiff has provided support that is adequate under the circumstances existing at the time of the filing of his Motion in the Cause.

CONCLUSIONS OF LAW

1. This Court has personal jurisdiction over the parties to this action and jurisdiction over the subject matter of this action.

2. The Defendant is entitled to child support from Plaintiff as set forth below.

3. The North Carolina Child Support Guidelines are not applicable in this action because the parties' combined income is in excess of $300,000 annually.

4. The decretal provisions of this Order as they relate to support for the minor children are just and reasonable and are in the best interests of the minor children.

5. Defendant was in no way precluded from challenging Plaintiff's testimony through cross-examination or the presentation of other evidence.

6. Defendant was in no way precluded from objecting to the introduction of evidence by Plaintiff related to the parties' expenses on the basis that the evidence was unfairly prejudicial or for any other appropriate reason.

7. The determination of the "appropriate" and reasonable amount of child support is the province of the Court and the Court is not solely bound by the contentions of either party in that regard.

8. The child support provisions in this Order are in such amount as to meet the reasonable needs of the minor children for their health, education and maintenance, giving due regard to the estates, earnings, conditions, and accustomed standard of

living of the minor children and the parties, the child care and homemaker contributions of each party, and the facts set forth herein.

9. The amount of child support set forth in the parties' Agreement is not entitled to a presumption of reasonableness (see *Pataky v. Pataky*, 160 NC App. 289, 585 SE2d 404 (2003)); however, even if the "presumption of reasonableness" related to the amount of child support established by the parties' Agreement did apply in this case, the presumption has been rebutted by the evidence presented as set forth herein.

10. Defendant previously dismissed her claims for attorneys' fees incurred prior to June 30, 2004, and subsequently dismissed her claim for attorney's fees during the hearing and she is therefore not entitled to recover her attorney's fees. Notwithstanding Defendant's dismissals of her claims for attorney's fees, and assuming the oral motion for attorney's fees made on Defendant's behalf would have otherwise supported her request for attorney's fees, Plaintiff has paid an appropriate amount of child support which was adequate under the circumstances existing at the time of the filing of his Motion in the Cause and Defendant is not entitled to an award of attorneys' fees.

11. Any Findings of Fact set forth in this Order which are more appropriately deemed Conclusions of Law are incorporated herein by reference as if set forth in full.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. Effective October 1, 2007, Plaintiff is to pay monthly support to Defendant in the amount of $9,147 per month.

2. Plaintiff is entitled to a child support credit of $70,236 for amounts paid to Defendant following the filing of his Motion in the Cause, which shall be paid as follows:

a. If the former marital residence sells within twelve (12) months of the entry of this order, Defendant shall pay Plaintiff the balance of the credit then due from her share of the net sales proceeds from the former marital residence;

b. If the former marital residence has not sold within twelve (12) months of the entry of this order, Defendant shall pay Plaintiff the full amount of the credit due by no later than two weeks after the twelve month period has elapsed.

3. Plaintiff is to provide health (medical, dental and vision) coverage for the minor children, and is responsible for payment of all premiums.

4. Plaintiff is to pay 100% of the children's necessary unreimbursed health care costs including medical, dental (including orthodontia), vision, and mental health care. Within 14 days of incurring any health care costs, Defendant will submit receipts to Plaintiff. He will reimburse Defendant for her out of pocket expenses within 14 days and will be responsible for filing insurance claims. Plaintiff's current health insurance typically covers 100% of medical and dental expenses for the minor children; however, if Defendant chooses to take the minor children to a non-emergency health or dental care service provider that is not covered by Plaintiff's insurance, then Defendant shall be responsible for paying any such unreimbursed medical or dental expenses.

5. Plaintiff is to pay 100% of all the children's extracurricular activities (including lessons, registration fees, clothing, equipment, supplies, and transportation to events located outside of Wake County) for activities in which he and Defendant mutually agree the children should participate. The clothing, supplies and equipment for which Plaintiff shall be responsible, shall be such clothing, supplies and equipment specifically required and related to the participation of the minor children at the agreed upon activity and shall not include the purchase of supplies for use in the Defendant's residence. The parties shall consult with one another before purchasing clothing, supplies and equipment for the minor children's extra-curricular activities to make sure that they are not buying duplicative items. Within 14 days of incurring any expenses related to the children's extracurricular activities, Defendant will submit receipts to Plaintiff, who will reimburse Defendant within 14 days after receiving the receipts.

6. To the extent that the educational funds do not cover the children's educational expenses (as expenses are defined by the Agreement) through and including high school, Plaintiff is responsible for paying for all remaining reasonable and necessary educational expenses for the children's primary and secondary education. Within 14 days of incurring reasonable and necessary educational expenses for which there are insufficient funds in the Education Account, Defendant will submit receipts to Plaintiff, who will reimburse Defendant within 14 days.

7. Plaintiff shall be entitled to claim the dependency exemptions related to all three children on his income tax returns.

8. Defendant's claim for attorneys' fees is denied.

9. Defendant's Motion in Limine is denied.

10. The court retains jurisdiction of this matter for the entry of further orders as necessary and appropriate.

This the _____ day of _____, 2007.

_____

The Honorable [redacted]
District Court Judge Presiding

ATTACHMENT A

Plaintiff's reasonable expenses*[*]
Relating to the support of the children

Expense	Plaintiff's Current	Children's Current	Additional Findings
Mortgage/rent	5300		Plaintiff is paying an interest only loan on the former marital residence. He has reduced the principal amount to $1,000,000.
Residence insurance	294		
Taxes not included in the mortgage	1569		
House and appliance repair/maintenance	293		
Electricity*	434		
Gas, heating fuel, oil*	142		
Water*	139		
Garbage*	22		
Cable, digital TV	56		
Telephone	86		
Internet service	0		Included in telephone costs
Yard maintenance	637		
Home security system	0		
House cleaning service	325		
Pest Control services	100		
Auto payment	509		
Auto insurance	85		
Gasoline*	197		
Auto repair, registration, taxes	62		
Food and household supplies*	334		
Pets	0		
Other: pool maintenance	415		
SUB TOTAL – PART I	**10999**		

[*] Expenses noted with an "*" are directly impacted by the fact that the children are only with Plaintiff 40% of the time.

Medical insurance premiums	0	0	Plaintiff's employer fully covers the cost of Plaintiff's health insurance for Plaintiff and the children.
Dental/Vision insurance premiums	0	0	
Uninsured medical	0	0	
Uninsured dental	0	0	
Uninsured medication	0	0	
Other uninsured medical expenses	0	0	
Other insurance premiums	0	0	
Work-related child care	0	867	Defendant and Plaintiff currently share a nanny at a cost of $500 per week. Plaintiff pays for 2/5 of this cost, or $867 per month.
Cell phone	113	0	
Eating Out	200	59	
School lunches	0	0	
Newspapers, Magazines	0	11	
Clothing and Accessories	170	27	
Personal upkeep	0	0	
Dry cleaning	9	0	
Education	0	0	
Babysitting (not included above)	0	0	
Dues	0	0	
Extracurricular	0	347	This is an average amount spent on the children on Tae Kwon Do, piano, soccer, and baseball. It does not include money Defendant spent on hockey lessons, tennis, gymnastics and dance ($1000).
Church donations	0	0	
Other charitable contributions	0	0	
Entertainment/recreation	0	0	
Club dues and assessments	45	45	
Annual vacation	110	330	

Gifts	375	39	
Professional fees	1472	0	
Savings	0	0	
College Fund	0	0	
Other: Gold (TPC)	470	0	
Other: ATM Cash withdrawals	213	638	
Target expenditures	46	100	Plaintiff spends $146 per month at target, primarily on children's clothing. However the expense also includes household items, and toiletries.
Dicks Sporting Goods expenditures	0	27	Extracurricular activities for the children
SUB TOTAL—PART II	**3223**	**2490**	
GRAND TOTAL	**15122**	**2490**	

ATTACHMENT B

Defendant's reasonable expenses [**]
Relating to the support of the Children

Expense	Defendant's Current	Children's Current	Additional Findings
Mortgage/rent	5,961		This figure includes principal, interest, taxes and insurance. Defendant has been making additional payments on the principal but only the mortgage amount due pursuant to the loan is reasonable
Taxes not included in mortgage	0		Defendant's affidavit lists expenses of $3,556.67 for taxes on the Indiana home and state/federal taxes. The state and federal taxes are accounted for above. The taxes on the Indiana home are not a reasonable expense on behalf of the children.
Electricity**	447.47		
Gas, heating fuel, oil**	209.18		
Water**	0		Defendant has a well; therefore no monthly water expense.
Garbage**	27.19		
Cable, digital TV	80.56		
Telephone	105.82		
Computer maintenance/Internet service	67.19		
Yard maintenance	637.00		See findings above about yard maintenance costs.
Home security system	41.67		
House cleaning service	325.00		See findings above about house cleaning costs.
Pest Control services	65.83		
Auto payment	548.00		See findings above about auto payments
Gasoline**	269.78		
Auto insurance, repair, registration, taxes	130.76		Defendant spends $261.52 per month for two vehicles. The cost for one vehicle is reasonable.
Groceries**	863.44		
Household supplies and maintenance	326.24		Defendant incurs routine costs for household supplies and maintenance. She paid $12,172.50 for a non-recurring

[**] Expenses noted with an "**" are directly impacted by the fact that the children are only with Plaintiff 40% of the time.

			repair of the entrance road to the residence, and she included this cost in her $1,340.62 monthly expense. It is not reasonable to include the road repair costs in her monthly expenses for this item
Pets	102.36		At the time Defendant owned a dog and two cats, she was spending approximately $153.54 per month for insurance, vet bills, food and kennel costs. At this time, Defendant owns only the two cats. Her costs for pets at the time of the hearing would be less than the amount in her affidavit. It is reasonable to allocate two-thirds of actual costs to the costs of the cats.
Pool expenses	345.16		
Culligan water*	21.88		
SUB TOTAL – PART I	**10,575.53**		
Medical insurance premiums	0	0	
Dental/Vision insurance premiums	0	0	
Uninsured medical, dental and vision	400.78	0	Plaintiff is obligated by the terms of the Agreement to pay the children's unreimbursed health related costs, and he remains obligated under the provisions of this Order to pay these expenses. As such has Defendant will have no ongoing expense for this item.
Cell phone	85.00	0	There was no reasonable evidence presented that children of this age (9, 8, 7) have or need a cell phone.
Eating Out	453.06	460.44	
School	0	69.00	School lunches, supplies, class party supplies and projects for volunteering are included.
Newspapers, Magazines	363.08	0	Defendant spends $363.08 on newspapers and magazines. The evidence is insufficient to determine how much of this expense is for the children materials.
Clothing and Accessories	711.74	573.57	See findings above about clothing expenses.
Personal upkeep	388.20	117.60	
Dry cleaning	37.21	0	
Babysitting (not included above)	0	0	See findings above about nanny cost.

Extracurricular	0	0	Pursuant to the Agreement, Plaintiff is to pay for all of the children's extracurricular activities. Under the terms of this Order, Plaintiff is responsible for paying all expense related to the children's extracurricular activities to which he has agreed. As such Defendant has no ongoing expense for this item.
Children's pictures	0	194.75	See findings above about children's pictures
Other charitable contributions	269.90	0	
Entertainment/recreation	99.63	355	See findings above about entertainment expenses
Personal exercise	233.77	0	
Club dues and assessments	86.68	75	
Annual vacation	782.22	420	See findings above with regard to annual vacation.
Gifts	2430.80	516.87	
Professional fees (including accounting and investment fees)	1455.07	0	
Parenting class	0	0	Plaintiff presented insufficient evidence that the parenting class she took in September 2006 is recurring or that she is currently paying for this class.
Life Insurance	0	0	
Savings	0	0	In 2001, the parties were saving approximately $100,000 per month. Defendant has presented insufficient evidence from which to find her current savings expense.
SUB TOTAL—PART II	**7797.14**	**2782.23**	
GRAND TOTAL			

STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
08 CVD 16887

KEITH [redacted],
Plaintiff,

v.

MARIE [redacted],
Defendant.

CHILD SUPPORT ORDER

This matter came before the undersigned District Court Judge [redacted] on Defendant's counterclaims for permanent child support on May 5, 2009 and May 15, 2009. Plaintiff was present in court and represented by his attorney of record, Scott [redacted]; Defendant was present in court and represented by her attorney of record, Suzanne [redacted]. The Court having heard and considered testimony and evidence presented by the parties and their witnesses and the arguments made on behalf of each party by their respective attorneys, enters the following:

FINDINGS OF FACT

1. Plaintiff is a citizen and resident of Wake County, North Carolina and has been so for at least six consecutive months immediately preceding the filing of the action.

2. Defendant is a citizen and resident of Wake County, North Carolina.

3. Plaintiff filed his Complaint in this matter on July 28, 2008.

4. Defendant filed her Answer and Counterclaim in this matter on October 21, 2008, seeking, among other things, child support and attorney fees.

5. The parties were married to each other on or about October, 2002, and separated from each other on March 24, 2008.

6. The parties are the parents of one minor child born of their marriage, to wit: T[redacted], born October 6, 2006.

7. Plaintiff is employed as a full-time nurse at Presbyterian Hospital. Plaintiff is guaranteed to work thirty-six hours per week, but the number of days that Plaintiff works and the differential pay he receives varies. Plaintiff has considerable control over his work schedule and on how many hours he works per pay period. For example, during the time period from March 1, 2009 and March 14, 2009, Plaintiff earned $3,845.07, which is $8,330.98 on a monthly basis.

8. Plaintiff's 2008 income averaged $8,425.46 per month. Plaintiff had three different employers in 2008.

9. Plaintiff's income from March 20, 2009 through May 1, 2009 averaged $6,838.90 per month, although one pay period (the pay period from March 1, 2009 through March 14, 2009) was more in-line with Plaintiff's 2008 income average.

10. Plaintiff's current income is $8,330.98.

11. Defendant is employed as an executive assistant at Pharmaceutical Product Development. She works from 8:30 a.m. until 5:00 p.m. on Mondays through Thursdays, and a half-day on Fridays from 8:30 a.m. until 12:30 p.m.

12. Defendant earns monthly income of $3.998.83.

13. Defendant provides medical and dental insurance coverage for the minor child at a cost of $110.04 per month.

14. The child support amount shall be calculated using the North Carolina Child Support Guidelines, Worksheet B, wherein the Plaintiff shall have a total of 137 overnights with the minor child and the Defendant shall have 228 overnights.

15. The parties currently do not make any direct payments for work-related child care costs. Defendant and the minor child reside with Defendant's parents and they provide child care for the minor child, and no child care cost shall be included at this time for the calculation of child support under this Order.

16. The minor child will begin attending preschool as of the 2009-2010 school year, and that this expense is not used in the calculation of child support under this Order but will be paid pro rata.

Based upon the foregoing Findings of Fact, the Court enters the following:

CONCLUSIONS OF LAW

1. This Court has personal jurisdiction of the parties and subject matter jurisdiction of this matter.

2. Defendant is entitled to child support payments from Plaintiff for the support and maintenance of the parties' minor child, as set forth in the decretal portion of this Order.

3. The child support provisions set forth in the decretal portion of this Order are consistent with the North Carolina Child Support Guidelines and the parties have the ability to comply with this Order.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. Beginning June 1, 2009, Plaintiff shall pay child support to Defendant for the support and maintenance of the parties' child in the amount of $639.00 per month.

2. Defendant shall continue to maintain health insurance for the minor child for so long as it continues to be available to her through her employment at a reasonable cost.

3. The parties shall divide all unreimbursed healthcare costs, including all medical, dental, orthodontia, prescription, and counseling expenses, incurred for the benefit of the minor child with Plaintiff paying 67% and Defendant paying 33% of such costs. The party incurring the expenses shall provide the other with documentation of the payment within thirty days of incurring the same and the other party shall provide reimbursement for his or her share within thirty days of receiving such documentation.

4. The parties shall divide any and all fees, including, but not limited to, registration fees and any monthly tuition for the minor child to attend preschool beginning in the 2009-2010 school year. These fees shall be paid directly to the preschool provider on time and pro rata with the Plaintiff paying 67% and the Defendant paying 33%. In the event the preschool requires single monthly payments, however, Plaintiff shall pay his share directly to Defendant each month on or before the first day of each month.

5. Plaintiff shall mail all of his child support payments, including monthly payments, medical expense reimbursements, and preschool payments if applicable, to Defendant by regular mail in a timely manner so they are received on or before the due date. Defendant shall provide e-mail confirmation to Plaintiff of her receipt of each payment she receives within twenty-four hours of receiving the payment. Plaintiff shall not deliver any payments directly to Defendant, whether at custodial exchanges or other times, nor shall he send such payments by certified mail. All payments shall be made payable to Defendant in her legal name, currently Marie Henry. Defendant shall promptly inform Plaintiff of any change in her legal name or mailing address.

This the _____ day of July, 2009.

_____

The Honorable [redacted]

STATE OF NORTH CAROLINA

WAKE County

File No.	IV-D Case No.
08 CVD 16887	
Case No. (Code)	UIFSA Case No.

In The General Court Of Justice
☐ District ☐ Superior Court Division

☒ Civil: ☐ Criminal:

Plaintiff KEITH [redacted]

STATE

VERSUS

Name Of Defendant
MARIE [redacted]

WORKSHEET B
CHILD SUPPORT OBLIGATION
JOINT OR SHARED
PHYSICAL CUSTODY

G.S. 50-13.4(c)

Children	Date Of Birth	Children	Date Of Birth
T[redacted]			

STOP **STOP HERE IF** *the number of overnights with either parent is less than 123, shared physical custody does not apply (see Worksheet A).*

	Plaintiff	Defendant	Combined
1. MONTHLY GROSS INCOME	$ 8,330.98	$ 3,998.83	
a. Minus pre-existing child support payment	–	–	
b. Minus responsibility for other children	–	–	
2. MONTHLY ADJUSTED GROSS INCOME	$ 8,330.98	$ 3,998.83	$ 12,329.81
3. PERCENTAGE SHARE OF INCOME *(line 2 for each parent's income divided by combined income)*	67.57 %	32.43 %	
4. BASIC CHILD SUPPORT OBLIGATION *(apply line 2 to Combined Child Support Schedule, see AOC-A-162, Rev. 10/06)*			$ (2011) 1,253.00
5. SHARED CUSTODY BASIC OBLIGATION *(multiply line 4 x 1.5)*			$ 1,879.50
6. EACH PARENT'S PORTION OF SHARED CUSTODY SUPPORT OBLIGATION *(line 3 x line 5 for each parent)*	$ 1269.98	$ 609.52	
7. OVERNIGHTS with each parent *(must total 365 x total number of children))*	137	228	365
8. PERCENTAGE WITH EACH PARENT *[line 7 divided by (365 X total number of children)]*	37.53 %	62.47 %	
9. SUPPORT OBLIGATION FOR TIME WITH OTHER PARENT *(line 6 x other parent's line 8)*	$ 793.36	$ 228.75	
10. ADJUSTMENTS *(expenses paid directly by each parent)* a. Work-related child care costs	$	$	
b. Health Insurance premium costs - children's portion only	$	$ 110.04	
c. Extraordinary expenses	$	$	
d. Total Adjustments *(For each col., add 10a, 10b, and 10c. Add two totals for combined amount.)*	$	$ 110.04	$ 110.04
11. EACH PARENT'S FAIR SHARE OF ADJUSTMENTS (line 10d combined x line 3 for each parent)	$ 74.00	$ 36.00	
12. ADJUSTMENTS PAID IN EXCESS OF FAIR SHARE *(Line 10d minus line 11. If negative number, enter zero.)*	$	$ 74.00	
13. EACH PARENT'S ADJUSTED SUPPORT OBLIGATION *(Line 9 minus line 12.)*	$ 793.00	$ 154.00	
14. RECOMMENDED CHILD SUPPORT ORDER *(subtract lesser amount from greater amount in line 13 and enter result under greater amount.)*	$ 639.00	$	

Date	Prepared By (Type Or Print)

(**NOTE:** *This form may be used in both civil and criminal cases.*)

(Over)

INSTRUCTIONS FOR COMPLETING CHILD SUPPORT WORKSHEET B
PARENTS WITH JOINT OR SHARED CUSTODY

Worksheet B should be used when the parents share joint physical custody of at least one of the child(ren) for whom support is sought. Legal custody of the child(ren) is not relevant with respect to this determination. Worksheet B should be used if one parent has sole legal custody but, in fact, the parents exercise joint physical custody of the child(ren) as defined below. On the other hand, the worksheet should not be used simply because the parents share joint legal custody of the child(ren).

Joint physical custody is defined as custody for at least one-third of the year (more than 122 overnights per year) - not one-third of a shorter period of time, e.g. one-third of a particular month. For example, child support would not be abated merely because the child spends an entire month with one parent during the summer. **Worksheet B should be used only if both parents have custody of the child(ren) for at least one-third of the year and the situation involves a true sharing of expenses, rather than extended visitation with one parent that exceeds 122 overnights.** Parents share custody of a child if the child lives with each parent for at least 123 nights during the year and each parent assumes financial responsibility for the child's expenses during the time the child lives with that parent. A parent does not have shared custody of a child when that parent has visitation rights that allow the child to spend less than 123 nights per year with the parent and the other parent has primary physical custody of the child. Split custody refers to cases in which one parent has primary custody of the other child or children. Child support computations for shared and split custody are determined without regard to whether a parent has primary, shared, or joint legal custody of a child.

In cases involving joint or shared physical custody, the basic child support obligation is multiplied by 1.5 to take into account the increased cost of maintaining two primary homes for the child(ren). Each parent's child support obligation is calculated based on the percentage of time that the child(ren) spends with the other parent. The support obligations of both parents are then offset against each other, and the parent with the higher support obligation pays the difference between the two amounts.

Lines 1 through 4 of Worksheet B are calculated in the same manner as lines 1 through 4 of Worksheet A. Multiply line 4 by 1.5 and enter the result on line 5. On line 6, multiply line 5 by each parent's percentage share of income (line 3) and enter the result under the appropriate column for each parent.

On lines 7 and 8, enter the number of nights the child(ren) spend with each parent during the year and calculate the percentage of total overnights spent with each parent. If at least one of the children does not spend at least 123 overnights with each parent, Worksheet B should not be used. The total number of nights should equal 365 times the total number of children. On line 9, multiply plaintiff's line 6 by defendant's line 8 and enter the result under the column for plaintiff, then multiply defendant's line 6 by plaintiff's line 8 and enter the result under the column for defendant.

Lines 10a through 10d of Worksheet B are calculated in the same manner as lines 5a through 5d of Worksheet A. On line 11, multiply line 10d (Combined) by line 3 for each parent and enter the result under the column for that parent. Subtract line 11 from line 10d for each parent and enter the result on line 12 (if negative, enter zero).

Subtract line 12 from line 9 for each parent and enter the result on line 13 under the appropriate column. In some cases, the result may be a negative number. If the result is negative, enter it as a negative number on line 13, not as a positive number or as a zero. If plaintiff's line 13 is greater than defendant's line 13, enter the difference between these two amounts on line 14 under plaintiff's column and leave defendant's column blank. If defendant's line 13 is greater than plaintiff's line 13, enter the difference between these two amounts on line 14 under defendant's column and leave plaintiff's column blank. [Note that if either of the number on line 13 is a negative number, you must change the signs when you subtract. For example, $100 minus negative $50 equals $150.]

NOTE TO PLAINTIFF AND DEFENDANT: *The information required to complete the worksheet is known only to the parties. It is the responsibility of the parties to provide this information to the Court so that the Court can set the appropriate amount of child support. The Clerk of Superior Court CANNOT obtain this information or fill out this worksheet for you. If you need assistance, you may contact an attorney or apply for assistance at the IV-D agency within your county.*

NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. 07 CVD 13255

MARSHA [redacted],)
Plaintiff,)
)
v.)
)
RICHARD [redacted],)
Defendant.)
)

TEMPORARY CHILD SUPPORT ORDER AND NOTICE OF HEARING

THIS CAUSE coming to be heard before the Honorable [redacted], District Court Judge, Tenth Judicial District, Wake County, North Carolina, presiding over the regular domestic session beginning September 17, 2010, on Defendant's motion filed on June 8, 2010 seeking a modification of child support.

IT APPEARING TO THE COURT that both parties were present, and neither party was represented by counsel.

THE COURT having reviewed the record and considered the evidence makes the following:

FINDINGS OF FACT

1. Plaintiff is a citizen and resident of Wake County, North Carolina.

2. Defendant is a citizen and resident of Wake County, North Carolina.

3. The parties were married to each other on June 22, 1985 and separated from each other on or about January 22, 2007.

4. Two children were born of the parties' marriage, both of which were minors when the Complaint was filed in this action: N[redacted], born January 2, 1990, and N[redacted], born October 11, 1994.

5. On February 27, 2008, a Consent order for Support and Custody was entered in this matter. This order shall be referred to herein as the "Child Support Order".

6. At the time the Child Support Order was entered, N[redacted] and N[redacted] were both minors, and the children resided primarily with Plaintiff, spending less than 123 overnights each year with Defendant. Sometime after the Child Support Order was entered, N[redacted] turned 18 (and is now 20 years old) and graduated from high school. N[redacted] continues to reside with Plaintiff, and his custodial time with his father has not increased.

7. Pursuant to the terms of the Child Support Order, Defendant was ordered to pay child support in the amount of $1,300 per month from December 1, 2007 until

June 30, 2008. From July 1, 2008, Defendant is ordered to pay $1,000 per month in child support. The parties are to share all unreimbursed health care costs for the minor children with Defendant paying 65% and Plaintiff paying 35%.

8. At the time the Child Support Order was entered, Plaintiff was providing health insurance for the minor children. She continues to provide health insurance coverage (medical and dental) for N[redacted] at a cost of $249.56 (this represents N[redacted]' share only).

9. At the time the Child Support Order was entered:

a. Plaintiff was employed part-time at American Airlines;
b. Defendant was employed by Amherst Industries, Incorporated, a sub-chapter "S" corporation that he owned. He was earning between $54,000 and $55,000 per year at that time;
c. Neither party incurred any child care expenses;
d. Plaintiff was providing health insurance for the minor children, which was available though her employment.

10. Amherst Industries ceased operation on or about December 31, 2009. Defendant's last pay check from Amherst was in November 2009. In 2009, Defendant earned $54,331 from Amherst. Amherst declared a loss of $40,578 in 2009.

11. Since the end of 2009, Defendant has been unemployed. He started receiving unemployment benefits in February 2010, and he continues to receive these benefits. The benefits have been extended, and he expects to receive them for another eighteen weeks. He currently earns $530 per week (or $2,297 per month) in unemployment benefits.

12. In addition to his unemployment benefits, he earns income from doing odd jobs. He also has received reductions in his rent in exchange for doing odd jobs for his landlord. He estimates that he earned $1,000 this year from these jobs. However, some of the work he has done is seasonal work (yard maintenance) and he no longer has the opportunity for reduced rent.

13. Defendant has consistently paid the full amount of his child support obligation, and of the date of this Order, he does not have any child support arrears.

14. Defendant has not applied for any jobs in the last three months. He has had only one job interview this year. He has focused his job search on sales jobs, disregarding other areas of employment. Defendant has not made sufficient efforts to obtain employment, ignoring jobs that would provide the same or more income than his unemployment benefits (but less income than he earned from Amherst). Defendant has disregarded his child support obligation by failing to take sufficient steps to locate full-time employment.

15. At this time, Defendant's current documented income is limited to his unemployment benefits - $2,297 per month.

16. N[redacted] continues to primarily reside with Plaintiff, with Defendant having less than 123 overnights with the child per year. There are currently no work related child care costs.

17. Plaintiff remains employed part-time with American Airlines, and she earns $2,193.59 per month.

18. Plaintiff has health insurance coverage available for the minor children through her employment, and she pays $259 per month for his coverage.

19. The parties' combined income falls within the North Carolina Child Support Guidelines. Child support should be calculated pursuant to Schedule A. The appropriate amount of child support pursuant to the Guidelines is for Defendant to pay $522 per month to Plaintiff (see attached Worksheet A).

20. Defendant has the ability to pay the support ordered herein.

21. It is appropriate under the circumstances to enter a temporary modification to the Child Support Order.

22. Plaintiff indicated at the call of the calendar that Alice [redacted] is no longer representing her and asked that she be released as her attorney of record.

Based upon the foregoing findings of fact, the court **CONCLUDES AS A MATTER OF LAW:**

1. Plaintiff and Defendant are properly before the Court, and the Court has jurisdiction over the parties and subject matter herein.

2. There exist facts justifying this Court to temporarily modify the amount of child support paid by Defendant to Plaintiff.

3. The temporary child support provisions herein are appropriate given the reasonable needs and expenses of the minor children and each parent's respective ability to provide support for the maintenance of the minor children.

4. It is appropriate to make this a temporary reduction, subject to further court review, in order to see if Defendant will be able to secure employment.

5. The parties are able to comply with the terms of the Order as set forth hereafter.

6. The above Findings of Facts are incorporated herein to the extent that they represent Conclusions of Law.

Based upon the foregoing findings of fact and conclusion of law, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

1. The Consent Order for Support and Custody entered on February 27, 2008 remains in full force and effect except as expressly modified herein.

2. Effective with October 1, 2010, Defendant is ordered to pay temporary child support to Plaintiff in the amount of $522 per month. Other than the change in the amount of child support, the child support payments will continue to be made as provided in the Child Support Order.

3. The pro-rata split of unreimbursed healthcare expenses for N[redacted] is modified so that plaintiff pays 49% and Defendant pays 51% of these costs.

4. For the 2010 tax year, Plaintiff shall be entitled to claim N[redacted] as a dependent on her income tax returns. She will continue to be entitled to claim N[redacted] as a dependent on her income tax returns.

5. Although the Court orally ordered Defendant to participate in the Working for Kids program established by Wake County Human Services, this program is no longer in service. Therefore, Defendant must fully utilize the Capital Area JobLink Career Center. The link for this website is http://www.joblinkcc.com/. Defendant must utilize all appropriate services offered through the JobLink Career Center at Swinburne.

4. This matter shall be heard on a review of the temporary child support order on **January 5, 2011 at 9:00 am in Courtroom 9B, Wake County Courthouse.** Each party must bring copies of their paystubs for the last 3 months. In addition, Defendant must bring three (3) copies of all of his bank statements from January 2010 through December 2010, documentation for all income he has earned since the entry of this Order, and he must bring documentation of his job search and his participation with JobLink since the entry of this Order.

5. Alice [redacted] and the law firm of Tharrington Smith, LLP are hereby released as attorney of record for Plaintiff.

This the 17th day of September, 2010.

_____

The Honorable [redacted]

NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. 07 CVD 13255

MARSHA [redacted],)
Plaintiff,)
)
v.)
)
RICHARD [redacted],)
Defendant.)
)

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the foregoing Order was served on Plaintiff and Defendant by mailing a copy thereof first class mail, postage prepaid, addressed as follows:

Ms. Marsha [redacted]
[redacted]
Cary, NC [redacted]

Mr. Richard [redacted]
[redacted]
Raleigh, NC [redacted]

A courtesy copy is also served on:
Ms. Alice [redacted]
Tharrington Smith, LLP
[redacted]
Raleigh, NC [redacted]

This the __ day of September, 2010.

_____
Laura [redacted], Family Court Case Coordinator

Tab: Determining Income

Income Issues

Discussion Questions

1. Obligor testifies he has no income except unemployment of $2000 per month
   He lost job as accountant for SAS one year ago
   Can't find another job
   Has decided to go into private practice
   Custodial parent offers last two income tax returns showing gross income of $180,000 each year

   Do you:
   Choice 1: Find annual income of $180,000
   Choice 2: Find income of $2000 per month
   Choice 3: Enter temporary order based on unemployment income; bring parties back in 6 to 8 months
   Choice 4: Ask for more evidence
   Choice 5: None of the above

Notes:

2. Obligor earned $60,000 during year immediately preceding hearing from a landscaping business
   Earned average of $60,000 each of five previous years
   Defendant's expert testified drought will definitely hurt obligor's business

Testifies defendant "will be lucky" to make enough to pay expenses. His "best guess" is she will make around $30,000 this year

Do you:
Choice 1: Find present income of $60,000
Choice 2: Find present income of $30,000
Choice 3: Find present income of $45,000 (split the difference)
Choice 4: None of the above

Notes:

3. 30 year-old obligor testifies to sporadic work history; presently unemployed
   Obligor is "able-bodied" but has low skill
   Tax return shows last year's gross income $15,000
   Obligor testifies she is looking for work but has no car

   Do you:
   Choice 1: Find present income of $15,000
   Choice 2: Impute income in amount of last full-time job
   Choice 3: Continue case and order her to look for work
   Choice 4: Dismiss case for failure to show present income
   Choice 5: None of the above

Notes:

4. Obligor is tobacco farmer
   Tax returns for past 5 years show net losses
   Obligor testifies he has nothing but debt
   Custodial parent shows expenses of parties while living together (separated 6 months ago)

Expenses show very comfortable lifestyle (new cars and annual family vacations) and new farm equipment each year

Do you:
Choice 1: Find no income and dismiss case
Choice 2: Find income based on expenses shown by custodial parent
Choice 3: Examine tax return to determine reasonable business expenses
Choice 4: A combination of choice 2 and 3 to determine present income
Choice 5: None of the above

Notes:

Determining Income

Family Law for Judges

Child Support

Answers to Practice Questions

1

Question 1

- Oligor testifies he has no income except unemployment of $2000 per month
- He lost his job as accountant for SAS one year ago
- He has decided to go into private practice
- Custodial parent offers last two income tax returns showing gross income of $180,000 each year

2

Question 1 – options?

1. Find annual income of $180,000
2. Find income of $2000 per month
3. Enter temporary order based on unemployment income; bring parties back in 6 to 8 months
4. Ask for more evidence
5. None of the above

3

Question 1

- **Choice 1:** Because he has lost his job and does not presently earn $180,000, only use this amount if you impute income. Is going into private practice a deliberate disregard of child support obligation?
- **Choice 2:** $2000 is the actual present income
- **Choice 3:** Would be within your discretion
- **Choice 4:** Can do it – what would you want?
- **Choice 5:** ????? Other ideas?

4

Question 2

- Obligor earned $60,000 during year immediately preceding hearing from a landscaping business
- Earned average of $60,000 each of five previous years
- Expert says drought will hurt business – obligor "will be lucky" to pay expenses
- Expert's "best guess" is he'll earn $30,000 this year

5

Question 2 – options?

1. Find present income of $60,000
2. Find present income of $30,000
3. Find present income of $45,000 (split the difference)
4. None of the above

6

Question 2

- **Choice 1:** Correct present income if you are not completely convinced by expert
  - See *Hartsell* (NC App March 4, 2008)
- **Choice 2:** Correct present income if you are convinced by expert
  - See *Glass,* 131 NC App 784 (1998)
- **Choice 3:** Probably not correct, unless there is testimony or evidence to support it
- **Choice 4:** Other ideas ?????

7

Question 3

- 30year-old obligor testifies to sporadic work history; presently unemployed
- Obligor is "able-bodied" but has low skill
- Tax return shows income from last year of $15,000
- Obligor testifies she is looking for work but has no car

8

Question 3 – options?

- Find present income of $15,000
- Impute income in amount of last full-time job
- Continue case and order her to look for work
- Dismiss case for failure to show present income
- None of the above

9

Question 3

- Choice 1: Only if you impute – can you support finding deliberate disregard?
- Choice 2: Same as Choice 1 – can you impute? If so, is last full-time job more reflective of ability than income tax return? Need findings
- Choice 3: Maybe.
- Choice 4: Probably not. No clear burden of proof

10

Question 4

- Obligor is tobacco farmer
- Tax returns for last 5 years show net losses
- Obligors testifies he has nothing but debt
- Custodial parent shows expenses of parties while living together (separated 6 months)
- Expenses show very comfortable lifestyle and new farm equipment each year

11

Question 4 – options?

1. Find no income and dismiss case
2. Find income based on expenses shown by custodial parent
3. Examine tax return to determine reasonable business expenses
4. A combination of choice 2 and 3 to determine present income
5. None of the above

12

Question 4

- Choice 1: probably not – no clear burden
- Choice 2: maybe – *see Ahern*, 63 NC App 728 (1983)(alimony case)
- Choice 3: Okay if have enough information to determine gross income and all reasonable expenses
- Choice 4: probably best choice
- Choice 5: Other ideas???

Cheryl Howell

DEFINING INCOME

1

Self Test

- #1: Plaintiff's attorney offers affidavit of defendant stating income - signed 18 months before hearing; no other evidence of income offered.
- Is the affidavit sufficient to establish income income?
- If not, should child support action be dismissed?

2

Self Test

- #2: Obligor received $50,000 personal injury settlement three months before child support hearing.
- Is the award income?

3

Self Test

- #3: Grandparents provide housing to custodial parent and children.
- Is the rental value of housing counted as income of custodial parent?

4

Income When?

- Order MUST contain finding of PRESENT actual income
  - "Parents' current income at time the order is entered"
    - Guidelines
  - Party's actual income at time order is made or modified"
    - *Armstrong v. Droessler*, 177 NC App 673 (2006)
    - *Holland*, 169 NC App 564 (2005)

5

Proof of Income

- Who has burden of proof??????
  - Probably the judge ☺
- "Verified through documentation of both current and past incomes." Guidelines
  - One full month of pay stubs, employer statement, receipts, expenses
  - Most recent tax return "to verify earnings over longer period of time"

6

Proof of Income

- Sanctions can be imposed for failure to comply. Guidelines
- Financial affidavit is binding
  - *Row v. Row*, NC App (2007): trial court correct to use obligor's affidavit rather than testimony of obligor's expert witness at trial
- Signed statement by employer is admissible to prove income
  - GS 110-139(c1) – both IV-D and non-IV-D

7

Using Past Income to Find Present

- "Court must determine gross income at time the support order was originally entered, not as of the time of remand *nor on the basis of the parent's average monthly income over the years preceding the trial."*
  - Holland v. Holland, 169 NC App 564 (2005)

8

Using Past Income to Find Present

- "Legislature never contemplated the court would select the earnings for a single year in the past and use that as a basis for the award *when that year does not fairly represent defendant's current nor the average of his earnings for several years."*
  - Conrad v. Conrad, 252 NC 412 (1960)

9

Using Past Income to Find Present

- "While we believe the trial court could have used plaintiff's 2001 income to determine his [2002] income, the order fails to support this approach with the necessary findings of fact."
  - *Holland*

10

????????

- Cannot use past to "impute" income or determine earning capacity
- But you can use past income to determine present "capacity to continue to earn" the same amount in the future
  - *Hartsell v. Hartsell,* NC App (March 4, 2008)

11

Examples

- Problems on Appeal
  - *Hodges v. Hodges,* 147 NC App 478 (2001)
  - *Williams,* 635 SE2d 495 (2006)
  - *Glass,* 131 NC App 784 (1998)
  - *Gatlin,* NC App (unpublished Jan. 15, 2008)
- Upheld on Appeal
  - *Hartsell,* NC App (March 4, 2008)
  - *Diehl,* 177 NC App 642 (2006)
  - *Spicer,* 168 NC App 283 (2005)

12

Self Test

- #1: Plaintiff's attorney offers affidavit of defendant stating income - signed 18 months before hearing; no other evidence of income offered.
- Can amount in affidavit alone support finding of present income?
- Not without more – *Williams*
- If not, should child support action be dismissed?
- No clear burden of proof; order parties to produce evidence

13

What is Income?

- Use Gross Income
  - Before taxes, retirement, or any other withholding
- Includes "income from any source"
- Does not have to be income from employment
  - *Squires*, 178 NC App 251 (2006)(all investment income)
  - *But cf. Gatlin*, NC App (unpublished Jan. 15, 2008)
- Includes income from self-employment
  - Gross receipts minus ordinary and necessary business expenses

14

Income From Any Source

- Long list in guidelines
- Income received on "irregular, non-recurring or one-time basis"
- Court may "average or pro-rate the income over a specified period", or
- "Require obligor to pay a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support."
  - *See Spicer* (settlement proceeds)
  - *Cf. Glass* (bonuses)

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Income From Any Source

- Sale of a house?
  - No – not without evidence of gain
  - *McKyer v. McKyer*, 179 NC App 132 (2006)
- Sale of a truck?
  - Of course – must include "income from any source"
  - *Hartsell v. Hartsell*, NC App (March 4, 2008)

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Income from Any Source

- Gifts or maintenance from someone other than a party to the action
  - *Spicer*, 168 NC App 283 ($300 included for rent-free housing provided by parents)
  - *Williams*, 179 NC App 838 (2006)(rent and utility payments paid by parent should be included)
  - *Cf. Easter v. Easter*, 344 NC 166 (1996)(payments from third parties should be factors to consider in deviation)
  - What about "maintenance" from new spouse?

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Excluded from Income

- "Means-tested public assistance programs"
  - Maybe educational loans: *McKyer*
- Alimony or maintenance received from party to action
- Child support received for another child
- Employer payments for SS, Medicare, Insurance
- Income of children
  - *Miller v. Miller*, 168 NC App 577 (2005) (adoption assistance payments are income of children)
  - *See Browne*, 101 NC App 617 (1991)(estates of children not considered)
- Income of any person who is not a parent of the child
  - *Kennedy*, 107 NC App 695 (1992)(rental income belonging to new spouse)

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Self Test

- #2: Obligor received $50,000 personal injury settlement three months before child support hearing.
- Is entire award counted as income?
- Yes – probably
  - *See Spicer*, 168 NC App 283 (2005)(no exception for "pain and suffering" compensation
  - *See Freeze*, 159 NC App 228 (unpublished 2003)(error not to include lump sum workers' comp settlement)
    - No mention of when obligor received the payment)

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Self Test

- #3: Grandparents provide housing to custodial parent and children.
- Is rental value of housing included as income of custodial parent?
- Yes, according to *Williams*
- Consider deviation instead??? *Easter*

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Consider…….

- Child support enforcement attorney asks you to impute minimum wage to unemployed parent.
- Can you impute minimum wage?

21

What Is Imputed Income?

Imputed income (earning capacity) is
- The amount of income that a parent
- Could reasonably be expected to receive
- If he or she took reasonable steps
- To fully exercise his or her capacity
- To earn income through employment/other

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Actual vs. Imputed Income

- Actual income
  - Income actually received at time of hearing
- Imputed income
  - Not actually received by parent
  - Imputed based on parent's capacity to earn
  - Based on work history, etc.
  - Treated as if actually received by parent

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The "Bad Faith" Rule

- Court may *not* impute potential income *unless*
  - Parent is *voluntarily* unemployed
    - Or *voluntarily* underemployed
- *and*
  - Parent is acting in "bad faith"
    - Failure to exercise earning capacity due to
    - "Deliberate disregard" of duty to support child

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The "Bad Faith" Rule

- Court must make *specific* finding of "bad faith"
  - Failure to make finding is reversible error
    - *Ford v. Wright,* 170 NC App 89 (2005)
- Evidence must support "bad faith" finding
  - Voluntary reduction in income insufficient
    - *Pataky v. Pataky,* 160 NC App 289 (2003)

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Determining Potential Income

Potential income must be supported with findings about parent's "earning capacity"

- Parent's employment potential & probable earnings
- Parent's recent work history
- Parent's occupational qualifications
- Prevailing job opportunities in the community
- Prevailing earning levels in the community

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Determining Potential Income

Potential income generally shouldn't be less than

- 35-hour work week minimum wage
  - If parent is capable of working full-time (and is acting in bad faith)
  - Has no recent work history or vocational training
  - And full-time minimum wage employment available
  - *See Roberts v. McAllister*, 174 NC App 369 (2005)

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Determining Potential Income

- Court must make *specific* findings of fact
  - Regarding *amount* of potential income
    - *McKyer v. McKyer* (NC Ct. App. 2006)
- Findings supported by evidence in record
  - Can't *assume* parent's potential earnings
    - Based solely on parent's prior earnings

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Practice

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Question 1

- Oligor testifies he has no income except unemployment of $2000 per month
- He lost his job as accountant for SAS one year ago
- He has decided to go into private practice
- Custodial parent offers last two income tax returns showing gross income of $180,000 each year

30

Question 1 – options?

1. Find annual income of $180,000
2. Find income of $2000 per month
3. Enter temporary order based on unemployment income; bring parties back in 6 to 8 months
4. Ask for more evidence
5. None of the above

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Question 2

- Obligor earned $60,000 during year immediately preceding hearing from a landscaping business
- Earned average of $60,000 each of five previous years
- Expert says drought will hurt business – obligor "will be lucky" to pay expenses
- Expert's "best guess" is he'll earn $30,000 this year

32

Question 2 – options?

1. Find present income of $60,000
2. Find present income of $30,000
3. Find present income of $45,000 (split the difference)
4. None of the above

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Question 3

- 30 year-old obligor testifies to sporadic work history; presently unemployed
- Obligor is "able-bodied" but has low skill
- Tax return shows income from last year of $15,000
- Obligor testifies she is looking for work but has no car

34

Question 3 – options?

- Find present income of $15,000
- Impute income in amount of last full-time job
- Continue case and order her to look for work
- Dismiss case for failure to show present income
- None of the above

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Question 4

- Obligor is tobacco farmer
- Tax returns for last 5 years show net losses
- Obligors testifies he has nothing but debt
- Custodial parent shows expenses of parties while living together (separated 6 months)
- Expenses show very comfortable lifestyle and new farm equipment each year

36

Question 4 – options?

1. Find no income and dismiss case
2. Find income based on expenses shown by custodial parent
3. Examine tax return to determine reasonable business expenses
4. A combination of choice 2 and 3 to determine present income
5. None of the above

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And They Said It Again: Never Use Earning Capacity Without Bad Faith

Last September, I began a blog post with the following statement; “Beware. A child support or alimony order should never contain the word “capacity” or the words “ability to earn” unless it also contains the words ‘bad faith.’” Imputing Income: Voluntary Unemployment is Not Enough. On April 5, 2016, the court of appeals once again reminded us that this overly dramatic generalization of the law frequently proves true. Lasecki v. Lasecki is a great opinion to read for a review of the law relating to establishing and enforcing child support when parents have an unincorporated separation agreement and it is yet another statement by the court that we should never consider a parent’s capacity to earn at any stage of a child support proceeding unless we first determine that the parent is intentionally depressing income in deliberate disregard of a support obligation.

What Happened in Lasecki?

The parties entered into a separation agreement in 2012 providing that plaintiff would pay child support in the amount of $2,900 per month and alimony in the amount of $3,600 per month. The agreement was not incorporated. In 2013, father filed a complaint asking the court to set child support pursuant to the guidelines, alleging that the amount set in the agreement was no longer reasonable because his income had substantially decreased due to his loss of employment. Defendant mother counterclaimed alleging breach of the agreement and asking for an order of specific performance.

Following trial, the court determined that father failed to rebut the *Pataky* presumption that the amount of child support set in the agreement was reasonable and refused to set a new support order pursuant to the Guidelines. In addition, the court ruled that father had breached both the child support and alimony provisions of the agreement and entered a money judgment for the arrearages established for each. The trial court also granted mother’s request for an order of specific performance for prospective payments, ordering specific performance of the full amount of child support ($2,900) but only a portion of the alimony ($1385) based on the court’s determination of father’s ability to pay.

The trial court order specifically found that defendant was unemployed at the time of the hearing. It also specifically stated that income was not being imputed to father and that the court was not concluding father was intentionally depressing his income in bad faith. Instead, the court explained that both the determination that the amount of support provided in the agreement of the parties was reasonable and the determination that father had the ability to comply with the order of specific performance was made in light of all of the circumstances of the case, including father’s earning capacity.

The *Pataky* Presumption

In *Pataky v. Pataky*, 160 NC App 289 (2003), the court of appeals held that while a parent can ask the court for a Guideline child support order even when there is an unincorporated separation agreement providing for child support in a different amount, the court cannot enter an order for Guideline support unless the parent first overcomes the presumption that the amount of support provided in the agreement is reasonable. The presumption of reasonableness is rebutted only when the court determines, by "taking into account the needs of the children existing at the time of the hearing and considering the factors enumerated in the first sentence of GS 50-13.4(c)," that the amount in the agreement is not reasonable.

The first sentence of GS 50-13.4(c) provides that child support should be an amount determined to meet the needs of the child "having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case."

The father's contention that the agreement amount was not reasonable was based entirely on the fact that he no longer had income due to his loss of employment. To support the conclusion that father failed to rebut the presumption that the amount of support in the agreement was reasonable, the trial court made numerous findings of fact as to the expenses of the parties, the needs of the children, the present income of mom, the past income of the father and the accustomed standard of living of the parties during the marriage. Concluding that father generally had provided for 81% of the family's income during the marriage, the court ruled that the agreement providing that father should pay an amount of support sufficient to meet approximately 81% of the present needs of the children was reasonable. The trial court held that in making this conclusion, the court was not imputing income to father but was instead, determining support in accordance with the standard set out in GS 50-13.4(c).

Specific Performance

To support the order for specific performance for the prospective support obligations in the agreement, the trial court made additional findings as to father's past employment history and his present capacity to find employment. The trial court found that "[b]ased on his past experience, contacts in the industry and prior job performance, he has the ability to quickly find employment earning at least $150,000 per year." But again, the trial court stated that it was not imputing income to father and was not finding he was acting in bad faith. Instead, the trial court stated that the order of specific performance was supported by the court's conclusion that father had the actual ability to pay, a conclusion based on findings regarding a number of factors, including father's present capacity to go out and find a job earning an amount similar to what he had earned in the past.

Earning Capacity Means Imputed Income – At Least for Child Support

The court of appeals rejected the trial court's assertion that it was not imputing income both when it determined the contract support was reasonable and when it determined father had the ability to

comply with the order of specific performance. Stating that the rule that, absent a finding of bad faith, child support cannot be based upon a determination of what a parent should be earning as opposed to a parent's actual present income "applies throughout the entire child support determination," the court of appeals vacated the child support order.

The court of appeals also vacated the order of specific performance of the alimony provisions. But the topic of earning capacity in the context of alimony is a topic for another day.

Child Support: Maintenance and Gifts Are Actual Income??

The NC Child Support Guidelines provide that the term gross income "includes income from any source" and the Court of Appeal s has held repeatedly that the term should be construed very broadly. *See e.g. Spicer v. Spicer*, 168 NC App 283 (2005)(even the pain and suffering component of a personal injury settlement is income) and *Moore v. Onafowora*, 208 NC App 674 (2010)(bonuses received on a regular basis are included as recurring income). Unlike many other states, the NC Guidelines even count nonrecurring and one-time lump sum payments as income.

In an unpublished opinion issued last week, the Court of Appeals reaffirmed a line of cases holding that gifts and 'maintenance' received from third parties also must be included as income.
In Cumberland County v. Cheeks, May 3, 2016, the Court of Appeals held that BAH (Basic Allowance for Housing) payments received by military personnel who do not live in government housing must be counted as income because the payments offset the living expenses of the service member.

Guideline Definition of Income

In addition to the statement that income includes "income from any source," the Child Support Guidelines contain a nonexclusive list of benefits that should be counted as actual income. That list includes, for example, salary, severance pay, capital gains, retirement and pension payments, workers compensation benefits, disability pay and insurance benefits. In addition, the list defines income to include "*gifts* or prizes" and "alimony or *maintenance* received from a person who is not a party to the pending child support action." (emphasis added)

The list of excluded benefits is much smaller. That list includes any benefit received through a means-tested public benefits program, such as TANF funds and SSI payments, and payments made by an employer directly to a third party or entity for the benefit of an employee when the payments made by the employer are not deducted from the pay of the employee. This category includes, for example, payments made by an employer for future Social Security and Medicare payments for an employee and amounts paid by the employer for the employee's health, life or retirement benefits above the amounts paid by the employee.

Court of Appeals Decisions Regarding Gifts and Maintenance

Beginning with the *Spicer* opinion in 2005, the Court of Appeals has held that payments or benefits provided by third parties that reduce the living expenses of a parent should be considered as income, holding that such benefits are either gifts or "maintenance received from a third person who is not a party to the pending child support action." In *Spicer*, the court held that $300 should be added to father's monthly income to account for the value of the free housing being provided to him by his parents. Similarly, in *Williams v. Williams*, 179 NC App 838 (2006), the court held that

the amount mother's father was paying to cover her vehicle and housing payments must be included as mother's income. In another unpublished opinion, the court held that a friend's consistent and recurring deposits into a parent's bank account that occurred over a period of two to three months before the child support hearing should be included in the calculation of the parent's income. *Eggleston v. Willingham*, 199 NC App 755 (2009).

In Cumberland County v. Cheek , the court cited *Spicer* as support for including the BAH payments as income, and also cited Professor Suzanne Reynolds comments in Lee's NC Family Law, section 10.8, that "expense reimbursements or in-kind payments, such as a company car, free housing or reimbursed meals, if they are significant and reduce personal living expenses," should be included in gross income.

In each of these cases, the trial court found that the payments were being made on an on-going basis and counted the benefits as recurring income. While none of the third parties were under a legal obligation to continue to make the payments into the future, there was no indication in the facts of any of the cases that the payments would stop being made in the immediate future.

If a gift or maintenance payment is a one-time occurrence and is determined to be income, the guidelines provide that it will be included as nonrecurring income. Nonrecurring income is either prorated as a part of the support order for a specific period of time or the court orders a parent to pay a percentage of the lump sum in an amount that is equal to the percentage of the parent's recurring income that the parent pays in support. Guidelines.

This is NOT Imputing Income

In several of the cases listed above, the Court of Appeals made it clear that including these benefits and payments as income is not imputing income to a parent. Instead, these amounts are a part of the parent's actual present income. There is no requirement, therefore, that the court find that a parent is deliberately depressing his or her income in bad faith before including these amounts in the calculation.

The Supreme Court's Take on It

The Supreme Court did not review any of the Court of Appeals decisions listed above. However, that court did address the issue of accounting for payments received from third parties in the case of *Guilford County ex. rel. Easter v. Easter*, 344 NC 166 (1996). In that case, the grandparents of the children regularly gave money to the father to help him with living expenses. The trial court did not count the payments as father's income but did use the payments as a basis for deviating from the guidelines after concluding that because of the grandfather's payments, the guideline amount would exceed the reasonable needs of the children. The court of appeals reversed the trial court, concluding that deviation was inappropriate because the grandfather was under no legal obligation to continue making the payments. The Supreme Court disagreed with the Court of Appeals and

held that contributions from third parties to the needs of the children can support deviation under appropriate circumstances.

The Supreme Court pointed out that deviation is the way other states address payments made and benefits provided by third parties. The court held that deviation is not required when such benefits are received by a parent; instead, deviation always is in the discretion of the trial judge. The trial court "must examine the extent and nature of the contributions in order to determine whether a deviation from the guidelines is appropriate considering the criteria for deviation set out in GS 50-13.4(c)."

So What About Living Expenses Covered by a New Spouse?

One significant unanswered question raised by the Court of Appeals opinions on this issue is whether support provided by a new spouse must be included as income to a parent. The broad language in the cases would indicate that yes, if the new spouse makes payments that significantly reduce the living expenses of the parent or provides in-kind items to a parent such as a car or a home, those payments and in-kind items should be included as income.

However, the guidelines clearly state that "income of a person who is not a parent of the child for whom support is being determined" is excluded from the income of the parent, "regardless of whether that person is married to or lives with the child's parent or has physical custody of the child." Guidelines. This seems to be a very clear statement that the drafters of the Guidelines do not intend that the income of the new spouse be counted as a source of support for the children.

It seems that deviation is the best way to handle this situation. What do others think?

Imputing Income: So What is Bad Faith?

In my last post, Imputing Income: Voluntary Unemployment is Not Enough, I wrote about the bad faith rule; the long-established rule that child support and alimony orders must be based on the actual present income of the parties unless there is cause to impute income. When income is imputed, a support order is based on earning capacity rather than actual income. The bad faith rule provides that earning capacity can be used only when a party is intentionally depressing actual income in deliberate disregard of a support obligation.

So what findings of fact are sufficient to establish bad faith?

General Bad Conduct

The court of appeals addressed this issue most recently in *Juhnn v. Juhnn*, NC App (July 7, 2015), when it affirmed the trial court decision to impute income to father in setting child support and alimony after concluding he had acted in bad faith. The findings of fact uncontested on appeal included findings that defendant:

- Intentionally shut down his brokerage business;
- Intentionally understated his brokerage business's corporate income;
- Prepared "spurious" tax returns that contained falsified and inaccurate information;
- Provided for his paramour and her children while refusing to provide support for his wife and children; and
- Engaged in voluntary unemployment or underemployment since wife filed her claim for divorce.

Quoting *Wolf v. Wolf*, 151 NC App 523 (2002), the court in Juhnn stated that in determining bad faith:

- [T]the dispositive issue is whether a party is motivated by a desire to avoid his reasonable support obligations. To apply the earnings capacity rule, the trial court must have sufficient evidence of the proscribed intent.

According to the court of appeals, the uncontested findings above were sufficient to support the trial court's conclusions of law that defendant:

- failed to exercise his reasonable capacity to earn;
- deliberately avoided family financial responsibilities;
- acted in deliberate disregard of his support obligations;
- refused to seek or keep gainful employment;
- willfully refused to secure or take a job;
- deliberately did not apply himself to his business;
- intentionally depressed income;
- intentionally left employment to go into another business
- intended to avoid his duty of support to Plaintiff and their children; and
- acted in bad faith such that income may be imputed to him.

It is clear from Juhnn and other cases that the court of appeals is willing to allow trial judges to infer "the proscribed intent" from a party's actions. As long as the court makes findings of fact and explicitly concludes that the party has acted in bad faith, the appellate court gives great deference to the trial court's decision to impute income.

Voluntarily Unemployed

Despite this deference however, the court of appeals has made it clear that a finding that a party is voluntarily unemployed or underemployed alone is insufficient to support a conclusion of bad faith. See *Nicks v. Nicks*, NC App (June 16, 2015)(error to impute income to doctor who decided to stay at home with child experiencing mental health issues); *Godwin v. Williams*, 179 NC App 838 (2006)(error to impute income to teenage father who left his job to attend college full-time); *Pataky v. Pataky*, 160 NC App 289 (2003)(error to impute income to father who quit work to return to school when father had made arrangements for the support of his children before leaving his job); *Cook v. Cook*, 159 NC App 657 (2003)(resigning from job is not alone an indication of bad faith).

However, when a few more facts are added to the voluntarily un- or underemployment, the court of appeals allows the trial court to make the call. For example, in *Roberts v. McAllister*, 174 NC App 369 (2005), the mom always had been a stay-at-home mom. She stayed home with the children who ended up living with their father when mom's first marriage ended and she stayed home with the child of her second marriage. The trial court imputed income to mom in setting her support obligation for the children of her first marriage after concluding that her continued voluntary unemployment in the face of the financial insecurity of those children and the high standard of living she enjoyed with her new husband illustrated a "naïve indifference" on her part to the needs of her children. The court of appeals affirmed the trial court decision that this naïve indifference supported the conclusion that her refusal to work was the result of her bad faith disregard of her support obligation.

Similarly, the court of appeals has upheld trial court decisions to impute income to parents who

voluntarily chose to retire. In two cases the court of appeals affirmed trial court conclusions that fathers acted in bad faith by taking early retirement and significantly reducing the amount of support available for young children when both fathers were middle-aged, able-bodied men who had the ability to earn significantly more than the amount of retirement income. See *Osborne v. Osborne*, 129 NC App 34 (1998)(51 year-old father took early retirement) and *Mason v. Erwin, 1*57 NC App 284 (2003)(52 year-old father who had been "reluctant" to support his young daughter in the past and retired after his second wife won the lottery. The trial court found "unpersuasive" his testimony that he retired for health reasons).

Involuntarily Unemployed

While being unemployed due to involuntary job loss generally is not an indication of bad faith, *see* *Ludlam v. Miller*, 225 NC App 350 (2013)(error to impute minimum wage to parents who lost their jobs and had been searching for employment without success), misconduct that leads to an involuntary job loss generally is a sufficient basis to impute income. *See Wolf v. Wolf*, 151 NC App 523 (2002)(father's actions at work which resulted in "an entirely predictable termination" of his employment were taken in conscious and reckless disregard of his support obligation), and *Metz v. Metz,* 212 NC App 494 (2011)(father's job loss was the foreseeable result of his criminal conduct outside of work).

Imputing Income: Voluntary Unemployment is Not Enough

Beware. A child support or alimony order should never contain the word “capacity” or the words “ability to earn” unless it also contains the words “bad faith.”

Maybe that statement is a little extreme, but it is intended to make a point. Alimony and child support obligations must be determined based on actual present income. Earning capacity rather than actual income can be used only when a party is intentionally depressing actual income in deliberate disregard of a support obligation. In other words, it is not appropriate for an order to be based on what a person should be earning- or on minimum wage - rather than on what that person actually is earning unless evidence shows the party is acting in bad faith and the court actually includes that conclusion of law in the order.

The Bad Faith Rule

The Child Support Guidelines state:

"If the court finds that a parent’s voluntary unemployment or underemployment is the result of the parent’s bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent’s potential, rather than actual, income".

This bad faith rule was not created by the child support guidelines but instead is a rule established years ago in case law. *See e.g., O’Neal v. Wynn,* 64 NC App 149 (1983)(absent a finding that [parent] is acting in a deliberate disregard of his obligation to provide reasonable support for his child, his ability to pay child support is determined by his actual income at the time the award is modified).

Despite the fact that the law has been well-settled for a long time, the Court of Appeals frequently must remand cases to the trial courts because income is imputed without a determination of bad faith.

Voluntary unemployment or underemployment

One of the most recent examples is Nicks v. Nicks, NC App (June 16, 2015). In that case, the trial court imputed income to mother when considering both her motion to modify child support due to her substantial reduction in income and her request for alimony. Evidence established that mom was a doctor who earned $8,000 per month working part-time at the time the original child support order was entered in 2011. After the original child support order was entered in 2011 but before the

trial court heard her request for alimony in 2013, mom became unemployed because the clinic where she worked closed. She was offered another full time position but declined it in order to stay home with the teenaged daughter of the parties who was experiencing severe emotional problems that required treatment though medication and counseling.

The trial court made findings that mom was voluntarily unemployed and had the capacity to earn at least $8,000 per month. After imputing income to mom, the trial court denied her motion to modify child support, concluding there had been no change in circumstances. Regarding alimony, the court concluded mom's reasonable expenses were approximately $11,000 but that she should be able to meet $8,000 of that total by working.

The court of appeals remanded both the child support and the alimony determination to the trial court after holding that the trial court erred by imputing income without finding that mom was depressing her income in bad faith. Citing the long-standing bad faith rule, the court in *Nicks* stated "the dispositive issue is whether the party is motivated by a desire to avoid her reasonable support obligations." Explaining the application of the rule to alimony cases, the court held:

In the context of alimony, bad faith means that the spouse is not living up to income potential in order to avoid or frustrate the support obligation. Bad faith for the dependent spouse means shirking the duty of self-support.

The court of appeals did not indicate whether evidence in this case was sufficient to support a finding of bad faith by the trial court, stating instead:

"We believe the trial court could find competent evidence to support a determination in either direction without abusing its discretion as long as its conclusion is supported by sufficient findings of fact."

Even minimum wage is improper without bad faith

When there is no evidence that a parent has any income at all, it is not uncommon for a court to enter an order, especially a child support order, imputing minimum wage. Case law is clear that this violates the bad faith rule as well.

A recent example is Ludlam v. Miller, 225 NC App 350 (2013). In that child support case, neither parent was employed at the time of the hearing. Both had been searching for employment without success. The trial court entered a child support order after imputing minimum wage to both parents and the court of appeals reversed. The trial court has no authority to enter an order based on earning capacity rather than actual income – even an order that imputes only minimum wage – unless the court making findings and reaches the conclusion that the parents are intentionally depressing income in deliberate disregard of their child support obligation. See also Godwin v. Williams, 179 NC App 838 (2006)(error to impute income to teenage father who left his job to

attend college full-time without finding bad faith).

So what facts are sufficient to show bad faith?

The trial court has a great deal of discretion in determining when a party has acted in bad faith. Some case examples will be the subject of my next post.

Tab: Child Support Modification

Modification of Child Support Orders

Discussion Questions

1. Obligor is required to pay $1000 per month for three children based on order entered 4 years ago. She files motion seeking modification, alleging she was laid off from a local company due to the company's financial difficulties. She has been looking for a job but has not been able to find one. (you know jobs are hard to come by in your area at the present time) She no longer receives unemployment compensation and she is living with a friend until she gets back on her feet. She tells you she will be happy to pay when she finds work but asks that you "suspend" the support order for now.

    a. Do you modify the order? Why or why not?

    b. If you modify, how much support would you order?

2. In exchange for father assuming responsibility for all of the marital debt (which was substantial) and conveying title of marital residence and one car to mom, mom agreed in separation agreement that husband would pay only $200 per month as child support for the three children born of the marriage. Agreement was incorporated into consent judgment. At time of incorporation, application of guidelines would have resulted in support of $2000 per month.
    a. Mom files motion to modify support within one month of incorporation. She argues she is entitled to guideline support. Do you modify the support order? Why or why not?

    b. Mom waits three years and two months following incorporation to file motion to modify. By this time, application of guidelines would result in an award of $2500. Do you modify? Why or why not?

c. Assume the agreement was not incorporated. Three years and two months following execution of the agreement, she files action seeking child support. She argues she is entitled to a child support order in accordance with guidelines because $200 per month does not even begin to meet the needs of the children. Do you set support? Why or why not?

3. Dad is car salesman. At time original support order entered for two kids, his annual salary averaged $50,000 and the dealership supplied him with a car to drive. The original order (correctly) included the value of the car in his income. Now – six months later – the dealership has stopped supplying the car and dad has car payment in amount of $300 each month. In addition, mom has moved to Virginia and gas prices are increasing daily, increasing the amount he spends to visit the kids. He files motion to modify, asking for reduction to account for these new expenses. Do you modify? Why or why not?

4. Obligor mom was a paralegal at time support order was entered four years ago. Dad has custody of two kids. He recently became partner in his law firm, and received significant increase in pay. Mom was accepted to law school recently. She quit her job as paralegal and is now a full time student. She works a part-time job in the evenings but she makes much less than she did as a paralegal. She filed motion to modify. She tells you she started law school years ago (at the same time dad started) but quit during her first year when their first child was born. She asks that you set support in accordance with guidelines. Do you modify? Why or why not?

5. Child support order entered. One year later, obligor takes a new job where he is earning 40% more than when order was entered. Custodial mom has long been worried about the quality of her child's education in the local public school. In addition, the child has been the victim of bullying by older classmates during the last year. The bullying was severe enough to cause the school counselor to advise mom to seek psychological counseling for the child, which she did. When she learns of dad's new job, mom decides to enroll child in private school. Because she cannot afford the tuition, she files motion to modify the order to cover the cost of the school.
    a. Do you modify child support? Why or why not?

    b. Can you order dad to reimburse mom for a portion of the private school expenses she paid before filing the motion to modify? If so, do you order reimbursement?

6. Support order sets support obligation for three children. The oldest child graduated from high school and turned 18 one month later. Six months following the oldest child's birthday, obligor files a motion to modify support. Due to the heavy child support docket in the district, the case is heard six months after the motion was filed. You find a substantial change based on age of oldest child. Assuming you decide to modify the amount:
    a. Do you modify the amount due between time child turned 18 and day motion to modify was filed? Why or why not?

    b. Do you modify amount due between date of filing of the motion to modify and the date of your order allowing modification? Why or why not? Would your answer be different if obligor had paid all support required under the order until the date of hearing (meaning you will have to order custodial parent to reimburse amounts paid or give obligor credit on future support payments)?

Modification of child support orders

Modification

- Two Step Process
  - **Substantial change in circumstances**
  - **If find substantial change, set new award**
    - Guidelines
    - Deviation

Changed Circumstances

- Order over 3 years old plus 15% change in guideline amount
- Substantial involuntary decrease in income
  - Either supporting or custodial parent
- Substantial change in needs of child
- Substantial change in custody or visitation

Problem 1

- Changed Circumstances
  - Involuntary decrease
  - 3 years and 15% change
- New award?
  - Case law requires modification if find changed circumstances
  - What do you do?

Agreements

- Incorporated agreements can be modified as any other court order
- Requires change in circumstances since time of incorporation – not time agreement executed

Agreements – Problem 2b

- 3 years and 15% difference
- Presume substantial change
- Guideline amount $2500
- Consider deviation?

Agreements

- No incorporation means no modification
- Party can initiate action for initial award of support
- *Pataky v. Pataky*, 160 NC App 289 (2004)
  - Presume agreement is "reasonable"
  - If presumption rebutted – use guidelines(deviate) to set support

Pataky Presumption

- Rebut presumption of reasonableness by "taking into account needs of children existing at time of hearing and considering the factors enumerated in first sentence of GS 50-13.4."

Rebutting Presumption of Reasonableness

- GS 50-13.4
  - "reasonable needs of the child ..., having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case."

Problem 3

- Change in circumstances must be substantial
- Cannot "tweak" order without finding substantial change

Problem 4

- Dad's increase is not a substantial change
- Mom's change is voluntary
- Voluntary change without change in needs of child is not changed circumstances
- What about 3 years/15% change in guideline amount?

Problem 4

- If substantial change -
- Do you impute income?
  - ***Pataky*: voluntary reduction alone is insufficient**
  - ***Roberts*: Naïve indifference**

Problem 5

- Significant change in needs of child is changed circumstances
- "Reasonable" needs only?
- Private school expense an extraordinary expense when you deem it "appropriate"

Modification

- Effective as of date of motion filed, or any date thereafter
  - Discretionary call
- Support accruing before filing date generally cannot be modified (increased or decreased)
  - GS 50-13.10

Retroactive Modification

- Allowed if obligor could not file before payments accrued due to:
  - Physical disability
  - Mental incapacity
  - Indigency
  - Misrepresentation of another party, or
  - Other compelling reason

"Reimbursement"

- May be able to "reimburse" child care expenses if:
  - "true emergency situation required the expenditure of funds in excess of existing child support order" and
  - Obligor had ability to help pay at the time the expenses were incurred

Termination of Support

- Support order generally automatically terminates when child:
  - Becomes emancipated
  - Turns 18 and is not in school
  - Finishes school after 18
  - Turns 20

Termination

- When order covers more than one child, "aging out" of one child does not automatically reduce support
- No modification without court order

Retroactive Modification

- Obligation vests when it accrues and cannot be modified
- No vesting occurs when:
  - Child or obligor dies
  - Child lives with obligor pursuant to order or agreement changing custody, or
  - Obligor is incarcerated, not on work release, and has no resources to pay

Problem 6

- Effective date of modification?
  - Can go as far back as date motion filed
- Require pay back or credit?
  - Consideration of needs of other children?

Sample Orders

***provided by judges**

NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. 01 CV 4438

MELINDA [redacted] (formerly [redacted])
Plaintiff,

v.

KEITH [redacted],
Defendant.

CHILD SUPPORT MODIFICATION ORDER

THIS CAUSE coming to be heard before the Honorable [redacted], District Court Judge, Tenth Judicial District, Wake County, North Carolina, presiding over the regular domestic session on October 27, 2008, on Defendant's motion filed in August 2008 for modification of child support order.

IT APPEARING TO THE COURT that both parties were present, and neither party was represented by counsel.

THE COURT having reviewed the record and considered the evidence makes the following:

FINDINGS OF FACT

1. Plaintiff is a citizen and resident of Wake County, North Carolina.

2. Defendant is a citizen and resident of Woodbridge, Virginia.

3. The parties were formerly married to each other and are now divorced.

4. One child was born of the parties' marriage: A[redacted], born March 13, 1993.

5. On August 13, 2001, a Consent Order was entered in this matter, which resolved the issue of child support.

6. Pursuant to the terms of the Consent Order, Plaintiff was to pay child support to Defendant in the amount of $240 per month. Both parties were ordered to continue to provide the health insurance he or she had in place for the minor child, and the parties were ordered to equally divide the cost of all uncovered medical and dental expenses.

7. The Consent Order is the current order regarding child support in this matter.

8. In August 2008, Defendant filed a motion to modify child support.

9. At the time the Consent Order was entered, the Court found that: Plaintiff was earning $1,862 per month, and Defendant was earning $3,750 per month; Defendant had remarried, and he and his new wife, Joan, had two children together; Joan earned approximately $50,000 per year; Plaintiff had remarried, but has no children other than A[redacted]; and both parties were providing health insurance coverage for A[redacted].

10. The Consent Order further provides that the parties agreed to child support in the amount of $240 per month, which was a downward deviation from the North Carolina Child Support Guidelines amount of $258 (calculated with both parties providing health insurance for the minor child).

11. Currently, Plaintiff is employed by Security and Energy Technology in Chantilly, Virginia. She testified that she earns $19 per hour and works 40 hours per week ($3,293 per month), but had no documentation to support this testimony. Plaintiff's current income is $3,293 per month.

12. Defendant is concerned that Plaintiff has not provided him or the Court with any documentation regarding her income.

13. Plaintiff provides health insurance coverage for the minor child. The child's medical coverage is provided through her husband at a cost of $28.75 for the child. Plaintiff provides dental and vision insurance for the child, but she does not know at what cost.

14. Plaintiff would like to pay her child support obligation by automatic draft from her bank account to be deposited into Defendant's bank account.

15. Currently, Defendant is employed by Security Force, Inc., where he has worked for about one year. He earns $400 per week plus commission. As of October 17, 2008, he had earned $29,357.50, which is an average of $716 per week (or $3,102 per month). Defendant's current income is $3,102 per month.

16. Defendant provides medical and dental coverage for the child at a cost of approximately $93.00 per month.

17. Neither parent incurs any work related child care costs.

18. Defendant's wife Joan and their two children still reside with Defendant. Joan earns approximately $866 per month.

19. The minor child is involved in Sea Cadets. This activity costs approximately $40 per month.

20. The minor child resides with Plaintiff less than 123 overnights per year, which was consistent from the custodial arrangement that existed at the time the Consent Order was entered.

21. The parties' combined income falls within the North Carolina Child Support Guidelines range. Child support should be calculated pursuant to Schedule A. The appropriate amount of child support pursuant to the Guidelines is for Plaintiff to pay $538 per month to Defendant (see attached Worksheet A).

22. Substantial changes in circumstances have occurred since the Consent Order was entered, to wit: the Consent Order is seven years old, and there has been a substantial increase (over 100%) in the Guidelines Child Support amount.

23. Plaintiff's modified child support obligation should be effective with September 2008, the month following the filing of Defendant's motion to modify.

24. In September and October 2008, Plaintiff paid $340 per month in child support – an increase of $100 per month over the amount in the Consent Order. Taking into account Plaintiff's modified amount of child support obligation and Plaintiff's payments for September and October, Plaintiff has net child support arrears for September and October totaling $198 per month (or $396).

25. Plaintiff has the ability to pay the support ordered herein.

Based upon the foregoing findings of fact, the court **CONCLUDES AS A MATTER OF LAW:**

1. Plaintiff and Defendant are properly before the Court, and the Court has jurisdiction over the parties and subject matter herein.

2. There exist facts justifying this Court to modify the amount of child support paid by Plaintiff to Defendant based upon a substantial change in circumstances pursuant to the provisions of N.C.G.S. §50-13.7.

3. The child support provisions herein are fair, reasonable and adequate, given the reasonable needs and expenses of the minor children and each parent's respective ability to provide support for the maintenance of the minor child.

4. The parties are able to comply with the terms of the Order as set forth hereafter.

5. The above Findings of Facts are incorporated herein to the extent that they represent Conclusions of Law.

Based upon the foregoing findings of fact and conclusion of law, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

1. The Consent Order entered August 13, 2001 is replaced in its entirety by this Order.

2, Effective September 2008, Plaintiff is ordered to pay child support to Defendant in the amount of $538 per month. Plaintiff shall pay to Defendant the amount

of $538 per month as child support for the use and benefit of the parties' minor child, on or before the first day of every month, beginning with and including November 1, 2008.

3. Plaintiff's child support arrears balance is $396. In addition to her base child support as provided above, Plaintiff is ordered to pay an additional $12 per month as a child support arrears payment to be made at the same time as her base child support payment, for a total of $550 per month until her arrears balance is paid in full. At that time, Defendant's child support obligation will revert to $538 per month.

4. Plaintiff shall make her child support payment by direct deposit into Defendant's bank account. Within one week of entry of this Order, Defendant shall provide Plaintiff with a voided deposit slip from his bank account and any other documents needed to set up the direct deposit. Within one week of receipt of the voided deposit slip, Plaintiff shall arrange for the payment of child support through direct deposit into Defendant's bank account. Until the automatic payment is arranged, Plaintiff shall timely pay her child support obligation by mail to Defendant.

5. Defendant shall provide health insurance coverage (medical and dental) for the minor child for so long as it is available to him through his employment at a reasonable cost.

6. The parties shall divide all healthcare related expenses (including medical, dental, orthodontic, optometric, and prescription drug expenses) that are not reimbursed by insurance with Plaintiff paying 56% and Defendant paying 44%. The parent incurring the cost shall submit a receipt to the other parent within two weeks of incurring the expense, and the other parent shall pay his or her share of the expense within two weeks of receiving the documentation.

7. At or before the time of the minor child's next visit with Plaintiff, Defendant must provide Plaintiff with a copy of his insurance card. Defendant must timely provide Plaintiff with copies of all updated insurance cards.

8. On or before November 3, 2008, Plaintiff must provide to Defendant a copy of her most recent pay stub and other documentation regarding her year to date income. If requested by Defendant, Plaintiff shall cooperate in having her employer complete an Employer Affidavit of Income and Benefits (form Wake-DOM-12). Upon receipt of Plaintiff's wage information, if Defendant believes that Plaintiff has misstated her income, he may file a motion with the Court to alter or amend the child support order based on Plaintiff's inaccurate disclosure of income.

9. The Court retains jurisdiction over this matter.

This the 28th day of October, 2008.

_____

The Honorable [redacted]

NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. 01 CV 4438

MELINDA [redacted] (formerly [redacted]))
Plaintiff,)
)
v.)
)
KEITH [redacted],)
Defendant.)
)

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the foregoing Child Support Modification Order was served on Plaintiff and Defendant by mailing a copy thereof first class mail, postage prepaid, addressed as follows:

Ms. Melinda [redacted]
[redacted]
Woodbridge, Virginia [redacted]

Mr. Keith [redacted]
[redacted]
Apex, North Carolina [redacted]

This the 28th day of October 2008.

_____
Judge Presiding

NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. 02 CVD 2724

ROBERT [redacted],
Plaintiff,

v.

LAURIE [redacted]
(formerly Laurie [redacted]),
Defendant.

ORDER

THIS CAUSE coming on to be heard and being heard before the Honorable [redacted], District Court Judge, Tenth Judicial District, Wake County, North Carolina, presiding over the regular domestic session on November 2, 2007 on Defendant's Motion for Modification of Child Support Order.

IT APPEARING TO THE COURT that Defendant appeared *pro se*, and that Plaintiff did not appear, but that attorney Elizabeth [redacted] made a limited appearance on Plaintiff's behalf representing to the Court that Plaintiff did not object to Defendant's motion.

THE COURT, having considered the evidence and testimony and having reviewed the record, makes the following:

FINDINGS OF FACT

1. On September 20, 2007, Defendant filed a Motion for Modification of Child Support Order.

2. On July 10, 2002, a Temporary Child Support Order (hereinafter the "Child Support Order") was entered in this matter requiring Defendant to pay ongoing child support to Plaintiff in the amount of $502.00 per month. It appears from the Court file that no other child support order was ever entered in this matter.

3. The children who are the subject of the Child Support Order are T[redacted], born November 7, 1985, now age 21, and K[redacted], born October 12, 1989, now age 18.

4. T[redacted] graduated from high school in June of 2003. K[redacted] graduated from high school in June of 2007.

5. Defendant is no longer legally obligated to support either of her children, both children having reached the age of eighteen and successfully graduated from high school.

Based upon the foregoing findings of fact, the court **CONCLUDES AS A MATTER OF LAW:**

1. The Court has personal jurisdiction of the parties and subject matter jurisdiction over the claims asserted herein.

2. Defendant's child support obligation terminated November 1, 2007 – the month following the month her youngest child turned 18.

3. The above Findings of Facts are incorporated herein to the extent that they represent Conclusions of Law.

Based upon the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that:

1. Defendant's child support obligation is **TERMINATED** effective November 2007.

This the ____ day of November, 2007.

_____
The Honorable [redacted]
Judge Presiding

NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. 02 CVD 2724

ROBERT [redacted],
Plaintiff,

v.

LAURIE [redacted]
(formerly Laurie [redacted]),
Defendant.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the foregoing Order was served on Plaintiff, counsel for Plaintiff, and on Defendant by mailing a copy thereof first class mail, postage prepaid, addressed as follows:

Mr. Robert [redacted]
[redacted]
Cary, North Carolina [redacted]

Ms. Elizabeth [redacted]
Attorney at Law
[redacted]
Cary, North Carolina [redacted]

Ms. Laurie [redacted]
[redacted]
Berlin, Maryland [redacted]

This the ____ day of November, 2007.

_____
Judge Presiding

Child Support Modification: Yes, we're still supposed to file a motion to modify

In 2016, the court of appeals held that a voluntary support agreement that modified an existing child support order was void because neither party filed a motion to modify as required by GS 50-13.7. Catawba County ex. Rel. Rackley, 784 SE2d 620 (N.C. App. 2016). On September 29, 2017, the North Carolina Supreme Court reversed the court of appeals and held that the order was not void.

This is important. Among other things, this decision means that if a court accepts a consent order for modification and the requirements of GS 50-13.7 have not been met, the consent order nevertheless is valid and enforceable. However, GS 50-13.7 still requires that a motion be filed and that the court conclude there has been a substantial change in circumstances before modifying a child support or a child custody order can be modified. The failure to comply with the statute is legal error that will support reversal by the court of appeals if there is a direct appeal.

What happened in Rackley?

In 1999, Shawna Rackly and Jason Loggins signed a Voluntary Support Agreement and the court approved the agreement, making it a court order for support. The agreement provided that Loggins would pay $0 monthly child support, assign all unemployment benefits to the child support agency, reimburse the State $1,996 for public assistance paid on behalf of his children, and provide health insurance for the children whenever it became available to him through his employment.

In 2000, a motion to show cause for contempt was filed, alleging defendant had failed to reimburse the public assistance as ordered in the 1999 order. As a result of the contempt proceedings, defendant paid a portion of the amount owed and agreed to a modification of the 1999 order. In June 2001, the court entered a “Modified Voluntary Support Agreement and Order” with the consent of all parties providing that defendant would pay $419 per month in child support starting July 1, 2001 and reimburse the State $422 for assistance provided to his children. No motion to modify was filed before the modified order was entered by the court.

In the years that followed, a number of show cause orders were issued and a number of modification orders were entered, only one of which was preceded by the filing of a motion to modify. In April 2011, defendant filed a motion to modify the most recent support order, alleging that he was unemployed and the children had become emancipated. The trial court entered an order in September 2011, reducing defendant’s support obligation and setting his arrears at $6,640.75.

In 2014, defendant filed a motion pursuant to Rule 60 of the Rules of Civil Procedure alleging that the 2001 “Modified Voluntary Support Agreement and Order” was void because no motion to

modify had been filed. As a result, he contended that the only valid order was the original 1999 order setting his monthly support obligation at $0. The trial court agreed and set aside the 2001 order.

The Court of Appeals decision

The court of appeals agreed with the trial court that the 2001 order was void. The court reasoned that because the clear language of GS 50-13.7 requires that a motion in the cause be filed before the court enters a child support order that modifies an existing permanent order, a trial court has no subject matter jurisdiction to act if a motion is not filed. A trial court generally has no jurisdiction to act in a civil case once a final judgment has been entered absent the filing of an appropriate post-judgment motion. Because the motion is required to invoke the subject matter jurisdiction of the court, the fact that the order was entered by consent is 'irrelevant'. Subject matter jurisdiction cannot be conferred upon the court by consent of the parties.

The Supreme Court decision

The supreme court reversed the court of appeals, holding that the failure to file a motion to modify did not divest the district court of jurisdiction. Because the court had subject matter jurisdiction, the consent order was not void.

The court listed the following as the reasons the trial court retained jurisdiction to modify the original support order:

1. The trial court maintained continuing jurisdiction over the child support issue until the child reached majority or until the death of one of the parties;
2. The language of GS 50-13.7(a) does not create a jurisdictional prerequisite that would divest the court of jurisdiction;
3. The legislative history of this statutory provision suggests that the General Assembly did not intend to create a jurisdictional prerequisite;
4. The provision requiring a motion to modify a child support order to be filed so as to prompt a district court's review of an existing child support order is directory rather than mandatory, and therefore did not deprive the court of jurisdiction; and
5. The VSA filed by plaintiff satisfied the legislative purpose of GS 50-13.7(a).

Two justices concurred in the result only, arguing that the failure to file a motion does deprive the trial court of jurisdiction but concluding that the VSA filed by consent in this case "served as the functional equivalent of a motion."

GS 50-13.7 still applies

It is important to remember that this case holds only that the failure to file a motion does not render

a modification void. GS 50-13.7(a) clearly requires that a motion be filed and requires that the court conclude there has been a substantial change in circumstances before the court modifies a support or a custody order. The failure to follow the requirements of the statute is a legal error that can be challenged in a direct appeal by a party who does not waive objection to the error.

It also is important to remember that the court's decision in this case relies substantially on the fact that a trial court retains continuing jurisdiction in a child support or custody case until a child reaches majority or a party dies. A trial court does not have continuing jurisdiction in other types of civil cases. *See Whitworth v. Whitworth*, 222 NC App 771 (2012)(trial court has no jurisdiction to act in an equitable distribution case following final judgment absent an appropriate post-judgment motion).

Tab: Child Support Enforcement

Legal Issues in Enforcement

1

Question 1

- Show cause issued for contempt for failure to pay child support
- Dad filed motion to terminate support and requested blood tests
- Paternity and support order entered by consent 4 years ago
- "She told me 3 months ago that I am not dad."

2

Question 1

- Can you order blood tests?

3

Paternity as a Defense

- Correct answer was no until Jan 1, 2012.
  - *See Bright v. Fleskrud*, 148 NC App 710 (2002)(no blood tests can be ordered after paternity has been established by court order until paternity order is set aside pursuant to Rule 60(b))
- New statute G.S. 50-13.13: Relief from support order based on finding of nonpaternity
  - If verified motion complies with statute, court shall order paternity testing

4

GS 50-13.13

- Verified motion must be filed within 1 year of obligor learning he is not the father
- Must state with particularity:
  - Why he believes he is not the father
  - That he has not acknowledged the child or acknowledged only while believing he was the father
  - That he has not adopted or legitimated the child(including legitimation by marrying mother)
  - That he did not prevent the biological father from asserting parental rights

5

G.S. 50-13.13

- Moving party pays costs of testing
- If testing shows he is not the father and court finds he did not acknowledge child, support obligation may be terminated prospectively only
- Arrears remain due and owing
- Mother can be ordered to reimburse support paid after motion filed only if court finds fraud on her part

6

Relief from Paternity Judgment

- New statute GS 49-14(h)
  - Paternity judgment can be set aside at any time if putative father shows judgment entered as result of fraud, duress, mutual mistake, or excusable neglect, and genetic tests show he is not the father
  - If judgment set aside pursuant to this statute, obligor can request termination of child support pursuant to GS 50-13.13(f)

7

Other Relief from Paternity Judgment

Rule 60(b) motion to set aside paternity judgment

- *Bright v. Flaskrud*, 148 NC App 710 (2002)

Paternity must be attacked in case establishing paternity.

- *See Leach v. Alford*, 63 NC App 118 (1983)
  - No collateral attack; must be filed in case establishing paternity
- *See Reid v. Dixon*, 136 NC App 438 (2000)
  - No collateral attack of paternity in UIFSA enforcement proceeding

8

Rule 60(b) Relief from Judgment

- Within one year – Rule 60(b)(1), (2) and (3)
  - Mistake
    - *See Leach v. Alford* (motion based on "mutual mistake as to paternity")
  - Excusable neglect
  - Newly discovered evidence
    - *See Leach* (blood test result may be newly discovered evidence)
  - Fraud, misrepresentation or misconduct

9

Relief from Judgment

- Within "reasonable" time - Rule 60(b)(6)
  - For "any other reason" (compelling)
  - Meritorious defense
  - Broad discretion to grant or deny
  - But not intended to cover situations that would be covered under 60(b)(1), (2) or (3)
    - *Davis v. Adams*, 153 NC App 512 (2002)

10

Acknowledgment of Paternity
GS 110-132

- Can be rescinded by putative father within 60 days of execution
- After 60 days, court can set aside if putative father shows:
  - Fraud, duress, mistake or excusable neglect, and
  - Genetic tests prove he is not father

11

Question #2

Order: Dad pay medical expenses plus $200 per month

Mom: Dad stopped paying when he lost job in landscaping: he has work skills in furniture industry; he is young and 'able-bodied'

Dad: "I don't like to work inside" - Still looking for outdoor job.

Is this enough to support finding of contempt?

12

Question #2

- Answer is No
- Facts like this are not enough alone to support finding that dad's noncompliance was willful, or that he has the present ability to comply with a purge condition (civil contempt)
  - *See Clark. Gragg*, 171 NC App 120(2005)

13

Civil Contempt

- Order remains in effect
- Purpose of order may still be served by compliance
- Noncompliance is willful; and
- Obligor has present ability to comply or to take reasonable steps to comply GS 5A-21(a)

14

Civil Contempt

- Willfulness – 2 required findings:
  - Actual ability to comply at time of default, and
  - Deliberate and intentional failure to comply

15

Civil Contempt

- Evidence to support finding of ability to comply:
  - "able-bodied" insufficient
  - "some income" insufficient
  - Need "inventory of obligor's financial condition"
    - *Mauney*, 268 NC 254 (1966)
    - *Burnett*, 821 SE2d 840 (2018)(trial court must consider "inventory" of income and expenses and must allow obligor "basic subsistence needs"

16

Burden of Proof

- Initiated by show cause order: burden on obligor
- Initiated by aggrieved party pursuant to GS 5A-23(a1): burden on aggrieved party

17

Burden of Proof

- **Either** case:
  - Order must contain findings re: willful noncompliance and present ability to pay, and
  - Evidence must support the findings
    - GS 5A-23(e)

18

Question #3

Show cause issued for contempt

Alleges defendant in arrears six months

Defendant does not show for hearing

Can you issue an order for arrest?

19

Question #3

- Answer is yes for criminal contempt– can issue order for arrest
  - Civil contempt:
    - No statute or case law authorizes order for arrest for civil contempt
  - Criminal contempt:
    - Both GS 5A-16(b) and GS 15A-305(b)(8) specifically authorize arrest for failure to appear in response to show cause order in criminal contempt proceeding.

20

Question #3a

- Would you
  - Choice #1: issue order for arrest and set new hearing date for contempt?
  - Choice #2: Proceed with contempt hearing without him?

21

Question #3b

Assume you order arrest

You must set conditions of pretrial release pursuant to GS 15A-534

Your order includes bond

Defendant posted bond to secure release

At contempt hearing, can you order bond paid to custodial parent in satisfaction of arrears?

22

Question #3b

- Answer is No
- Bond posted pursuant to GS 15A-534 is an appearance bond.
- If bond forfeited, money goes to schools
- If bond returned to obligor before contempt hearing:
  - May be considered when determining ability to pay
  - May be subject to garnishment

23

Bonds to Secure Support

Compare Compliance Bonds

- GS 50-13.4(f)(1)

Compare Appeal Bonds

- *Clark v. Gragg*, 171 NC App 120 (2005)
- GS 1-289(a) allows bond to stay contempt order of incarceration pending appeal
- Okay to order bond in full amount of arrears, payable directly to custodial parent if contempt order affirmed on appeal

24

Question 4

Support order reduced arrears to judgment

Judgment orders defendant to pay $15,000 to plaintiff

Mom files motion for civil contempt, alleging defendant has not paid judgment

Can you consider contempt in this case?

25

Question 4

- Answer is No
- Cannot use contempt to enforce a judgment – unless the judgment orders periodic payments
  - *See Brown v. Brown*, 171 NC App 358 (2005)
  - GS 50-13.4

26

Question 5

Show cause order said "Appear and show cause regarding contempt"

At hearing, defendant asks you to require plaintiff to "elect" civil or criminal contempt.

Do you force plaintiff to elect?

27

Question 5a

- Plaintiff elects civil
- At end of hearing, you want to find defendant in criminal contempt.
- Can you?

28

Question 5a

- Answer to both uncertain but probably can require election or not; probably also can decide to use criminal rather than civil
  - Issue is adequate notice and protection of constitutional rights
- But see GS 5A-23(g)
  - Before 2000: "A judge conducting hearing on civil contempt may find person in criminal contempt for same conduct."
  - After 2000: "Person found in civil contempt shall not be found in criminal contempt for same conduct."

29

Judicial Child Support Enforcement Remedies (Other Than Contempt)

Remedy[1] Legal Authority	IV-D or Non-IV-D	Arrearage "Trigger"	Willful[2]	"Delinquent"[3]	Notes
Income Withholding GS 110-136.3 et seq.	Non-IV-D	Arrearage equals at least one month of current support (unless "erratic").	No	Yes (unless "erratic")	Applies only to "periodic" payments of income. Income includes earnings from employment or self-employment (wages, salary, commissions, overtime, bonus pay, severance pay, etc.), workers compensation payments, pension and retirement benefits, annuities, dividends, etc. but *not* unemployment compensation or public assistance payments. Initial child support orders entered on or after 1/1/94 may require immediate income withholding. Withholding may include current support plus an additional amount to liquidate arrearages (or may be implemented in arrearages only cases) but may not exceed 40% of obligor's "disposable" income (45% or 50% if there is more than one order). If there is more than one order, current support has priority over arrearages and payments are prorated based on amount of orders. Payors must make payments through centralized collection unit and are liable for failure to withhold support as required by law.
Income Withholding GS 110-136.3 et seq.	IV-D	Arrearage equals at least one month of current support.	No	No	Income includes unemployment benefits but maximum withholding rate for unemployment benefits is 25%. Obligor is subject to income withholding based on nonpayment if order was entered before 1/1/96. Income withholding may be implemented administratively without prior court order but obligor may seek judicial review. Obligor is subject to income withholding based on obligee's request if order was entered before 1/1/89. Obligor is subject to immediate income withholding under new or modified child support orders entered on or after 1/1/89. IV-D agency may increase amount of withholding to liquidate arrearage.

[1] Use of a particular child support enforcement remedy generally does not preclude the use of other appropriate remedies. Griffin v. Griffin, 103 N.C. App. 65, 404 S.E.2d 478 (1991). The court is *not* required to appoint a lawyer to represent an indigent obligor in a civil child support enforcement proceeding (other than a proceeding involving civil or criminal contempt). A court may require an obligor to pay the obligee's reasonable attorneys fees pursuant to GS 50-13.6 in connection with a civil child support enforcement proceeding.

[2] "No" means that a finding of "willful" nonpayment of court-ordered child support is not required. "Yes" means that the remedy requires a finding of "willful" nonpayment of support.

[3] "No" means that a finding that the obligor is or has been "delinquent" in paying court-ordered child support is not required. "Yes" means that the remedy requires a finding that the obligor is or has been "delinquent." An obligor is "delinquent" if he or she has failed to pay court-ordered child support *and* has failed to comply with the provisions of any court order requiring him or her to satisfy the child support arrearages he or she owes. Davis v. N.C. Dept. of Human Resources, 126 N.C. App. 383, 485 S.E.2d 342 (1997), *aff'd in part and rev'd in part* 349 N.C. 208, 505 S.E.2d 77 (1998).

Remedy Legal Authority	IV-D or Non-IV-D	Arrearage "Trigger"	Willful	"Delinquent"	Notes
Judgment **GS 50-13.4(f)(8)**	Both	No arrearage trigger specified.	No[4]	No	Statute of limitations may be raised as defense with respect to payments due more than 10 years before motion or action.[5] Judgment may require liquidation of arrearage via periodic payment.
Execution of Judgment **GS 50-13.4(f)(10), GS 1-302 et seq., GS 1-339.41 et seq., GS 1-352 et seq.**	Both				Constitutional and statutory exemptions are inapplicable.[6] Judgment constitutes lien on obligor's real property in county in which docketed. Judgment lien does not apply to property owned by obligor and spouse as tenants by the entireties. Judgment may be enforced by execution and levy with respect to tangible personal property in obligor's possession or through supplemental proceedings with respect to intangible property, obligor's property in possession of third parties, and debts owed to obligor by third parties.
General Lien **GS 44-86, 44-87**	Both	Arrearage equals at least three months of current support or $3,000, whichever less.	No	No[7]	Lien applies to obligor's real and personal property (other than property owned as tenants by the entireties). Lien attaches to real property in county when docketed. Lien attaches to personal property upon levy. Perfected lien may be enforced in same manner as civil judgment (see above). Lien may be discharged by full payment to clerk or obligee.
Lien on Insurance **GS 58-3-185**	Both	No arrearage trigger specified.	No	No	Applies only if insurance benefit of at least $3,000 is payable to obligor as claimant or beneficiary. Lien is subordinate to liens under GS 44-49 and 44-50 and claims of health care providers under health benefit plans other than disability income insurance. Lien attaches extrajudicially but obligor may seek judicial review and obligee may seek judicial enforcement.
Lien on Bank Account **GS 110-139.2(b1)**	IV-D	Arrearage equals at least six months of current support or $1,000, whichever less.	No	No	Lien is imposed administratively without court order but obligor or co-owner may seek judicial review.

[4] Bogan v. Bogan, 134 N.C. App. 176, 516 S.E.2d 641 (1999).
[5] GS 1-47; State ex rel. Pruitt v. Pruitt, 94 N.C. App. 713, 380 S.E.2d 809 (1989).
[6] GS 1C-1601(e)(9); Walker v. Walker, 204 N.C. 210, 167 S.E. 818 (1933); Barber v. Barber, 217 N.C. 422, 8 S.E.2d 204 (1940) (alimony).
[7] Because G.S. 44-86(b) defines "delinquent" as owing arrears that equal at least $3,000 or three months' support, whichever is less, the definition of "delinquent" in *Davis* probably does not apply.

Remedy **Legal Authority**	**IV-D or Non-IV-D**	**Arrearage "Trigger"**	**Willful**	**"Delinquent"**	**Notes**
License Revocation **GS 110-142 et seq.**	IV-D	At least 90 days in arrears in making child support payments.	Yes	Yes (if IV-D agency has agreed to payment schedule)	Applies to NC drivers licenses and motor vehicle registration, and NC hunting, fishing, and trapping licenses. License revocation may be stayed on conditions requiring payment of current support and liquidation of arrearage within reasonable period of time. Initial payment on arrearage must be at least $500 or 5% of arrearage, whichever is less. Payments for current support and arrears generally may not exceed 40% of obligor's disposable income. State occupational, professional, and business licensing privileges may be revoked administratively without court order but obligor may seek judicial review of license revocation.
License Revocation **GS 50-13.12**	Non-IV-D	Arrearage equals at least one month of current support.	Yes	Yes	Applies to NC drivers licenses (regular and commercial), NC occupational, professional, and business, and NC hunting, fishing, and trapping licenses. License revocation may be stayed on conditions requiring obligor to pay current support and pay off arrearage over time. Licensing privileges may be reinstated if obligor pays arrearages.
Compliance Bond **GS 50-13.4(f)(1)**	Both	Arrearage trigger should be specified in bond or order.			A compliance bond secures the obligor's *future* payment of court-ordered child support and may be forfeited, in whole or in part, upon the obligor's *subsequent* default in paying child support. A compliance bond may be secured by cash deposit, lien, or third party sureties. Any bond that is posted as a condition of the obligor's pretrial release is an appearance, not a compliance, bond.
Injunction **GS 50-13.4(f)(5), GS 1-485 et seq., GS 1A-1, Rule 65**	Both	No arrearage trigger specified.	No	No	Injunction may be issued against obligor and persons acting in concert with obligor to restrain fraudulent removal or disposition of property.
Transfer of Property **GS 50-13.4(f)(2), GS 50-13.4(e), GS 1-228, GS 1A-1, Rule 70**	Both	No arrearage trigger specified.	No	No	Court may order obligor to transfer title to solely-owned real property to pay child support arrears if net value of property does not exceed arrearage.
Mortgage or Security Interest **GS 50-13.4(f)(1)**	Both	No arrearage trigger specified.	No	No	A mortgage or other security interest in the obligor's property secures the obligor's *future* payment of court-ordered child support and may be enforced or foreclosed upon the obligor's *subsequent* default in paying child support. If the court orders the obligor to execute a mortgage or security interest and the obligor refuses to do so, the court may enter an order pursuant to GS 1-228 and GS 1A-1, Rule 70 to create the mortgage or security interest.

Remedy Legal Authority	IV-D or Non-IV-D	Arrearage "Trigger"	Willful	"Delinquent"	Notes
Fraudulent Transfer GS 50-13.4(f)(7), GS 39-23.1 et seq.	Both	No arrearage trigger specified.	No	No	Obligor's transfer of property may be fraudulent if it is made with intent to hinder, delay, or defraud obligee.
Receiver GS 50-13.4(f)(6), GS 1-501 et seq.	Both	No arrearage trigger specified.	No	No	Court may appoint receiver to dispose of obligor's property as required by the order, to preserve property pending appeal, or to satisfy judgment for child support when a writ of execution has been returned unsatisfied and the obligor refuses to apply his or her property to satisfy the judgment.
Assignment of Wages or Income GS 50-13.4(f)(1), GS 110-136.1, GS 95-31	Both	No arrearage trigger specified.	No	No	Obligor's employer is not required to honor wage assignment. Workers compensation benefits are not assignable. Some public assistance and pension benefits may not be assignable.
Military Pay Allotment 42 USC 665, 32 CFR 54.3 et seq.	Non-IV-D	Arrearage equals at least two months of current support.	No	No	May be quicker, easier, and better than income withholding. Can be requested administratively without court order in IV-D cases.
Job Search and Work Activities GS 110-136.3(a1)	IV-D	No arrearage trigger specified.	No	No	May not be ordered unless income withholding cannot be implemented and obligor is not incapacitated. Work activities include community service, job search, job training, etc.
State Income Tax Refund Offset GS 105A-1 et seq	IV-D	Arrearage of at least $50.	No	No	Applies to state income tax refunds of at least $50. Offset is implemented administratively without court order but obligor may request administrative hearing and seek judicial review in superior court under GS Ch 150B.
Federal Income Tax Refund Offset 42 USC 664, 45 CFR 303.72	IV-D	Arrearage is at least $500 (or at least $150 if assigned for public assistance).	No	Yes	Offset is implemented administratively without court order but obligor may request administrative hearing and seek judicial review in superior court under GS Ch 150B.
Arrest & Bail GS 50-13.4(f)(3), GS 1-410 et seq.	Both				Arrest and bail is a pre-judgment remedy and may not be used as a remedy to collect past-due child support arrearages.
Attachment & Garnishment GS 50-13.4(f)(4), GS 1-440.2 et seq.	Both				Attachment and garnishment is a pre-judgment remedy and may not be used as a remedy to collect past-due child support arrearages.

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No Default Judgment in Contempt

Author : Cheryl Howell

Categories : Civil Law, Civil Practice, Family Law

Tagged as : Contempt; child support

Date : May 1, 2015

Even when contempt is based upon the failure to pay child support, the contempt order must contain the conclusion of law that respondent willfully violated the court order. That conclusion must be supported by findings of fact showing respondent actually has/had the ability to comply or to take reasonable steps to comply and deliberately failed to do so. Those findings of fact must be based on evidence.

In other words, a contempt order cannot be entered by default - a court cannot assume a respondent has the ability to comply simply because the respondent fails to prove he/she does not have the ability to comply.

Civil Contempt

A civil contempt proceeding can be initiated in one of three ways:

- Pursuant to GS 5A-23(a1), by filing a verified motion, or a motion along with an affidavit, and a notice of hearing on the contempt motion; or
- Pursuant to GS 5A-23(a), by filing a verified motion, or a motion along with an affidavit, that includes a request for a show cause order;
- And for child support contempt only, pursuant to GS 50-13.9(d), by filing an affidavit and asking a judge or a clerk to issue a show cause order.

In all three situations, the court can hold the respondent in civil contempt only if the court concludes:

- The order being violated remains in force;
- The purpose of the order may still be served with the respondent's compliance with the order;
- The respondent's failure to comply with order is **willful**; and
- The respondent **has the present ability to comply** with the order in whole or in part or take reasonable steps that would enable him/her to comply in whole or in part.

GS 5A- 21(a).

Since the purpose of civil contempt is to force compliance, the only remedy is imprisonment until the respondent complies with the order. GS 5A-21. The court must ensure the respondent "holds the keys to the jail" by ordering a purge that respondent has the actual present ability to perform. *Jolly v. Wright*, 300 NC 83 (1980)(respondent must have the actual present ability to purge himself of contempt at the time he is jailed).

Who Issues the Show Cause in Civil Contempt?

For civil contempt actions pursuant to GS 5A-23(a), only a judge can issue the show cause order. Moss v. Moss, 222 NC App 75 (2012). In child support cases, GS 50-13.9(d) allows the show cause to be issued either by a judge or by a clerk of court.

When Can a Show Cause Order be Issued?

No show cause should be issued unless there are facts in the verified motion or affidavit that will support the conclusions required for contempt. This is because the show cause is issued only upon a finding of **probable cause** to believe obligor is in contempt. GS 5A-23(a). This means that in addition to alleging respondent has failed to comply with an order, the motion/affidavit also must contain credible allegations that provide a reasonable ground for believing the respondent is willfully failing to comply with the order. Young v. Mastrom, Inc., 149 NC App 483 (2002).

'Burden of Proof'

When contempt is initiated pursuant to GS 5A-23(a1) by motion and notice of hearing, the moving party has the burden of going forward with evidence at the contempt hearing to establish the factual basis for contempt. GS 5A-23(a1).

When contempt is initiated by a verified motion or affidavit and the issuance of a show cause order, either pursuant to GS 5A-23(a) or GS 50-13.9(d), the burden of going forward with evidence at the hearing is upon respondent. Shumaker v. Shumaker, 137 NC App 72 (2000). However, this is only because a judge or clerk previously determined – based on specific factual allegations in the verified motion or affidavit – there is probable cause to believe respondent is in contempt.

Despite this shifting of the burden of proof, no contempt order can be entered without sufficient evidence to support the conclusion that respondent acted willfully and has the present ability to comply with the purge ordered by the court. *Henderson v. Henderson*, 307 NC 401 (1983); *Lamm v. Lamm*, 229 NC 248 (1948). While appellate courts have stated that a respondent who fails to make an effort to show a lack of ability to comply "does so at his own peril", *Hartsell v. Hartsell*, 90 NC App 380 (199), it is clear there can be no default contempt order.

Criminal Contempt

There is only one way to initiate an indirect criminal contempt proceeding. GS 5A-15(a) provides that a judicial official – either a clerk or a judge – initiates the proceeding by issuing a show cause order. The statute does not require a verified motion or affidavit, but the show cause order must contain adequate information to put respondent on notice of the allegations forming the basis for the charge. *O'Briant v. O'Briant*, 313 NC 432 (1985).

The purpose of criminal contempt is to punish, so the focus is on the past behavior of respondent. So for example, if contempt is based on the failure to pay child support, criminal contempt must be based on the conclusion – adequately supported by factual findings that are adequately supported by evidence – respondent willfully failed to pay at some point in the past. In criminal proceedings, despite the fact that the action is initiated by a show cause order, the burden of presenting evidence at trial always remains with the moving party and the court must find willful disobedience beyond a reasonable doubt. GS 5A-15(f).

As the goal of criminal contempt is to punish rather than force compliance, the court has the option of ordering imprisonment, a fine, or censure. GS 5A-12. None of these require the court to conclude respondent has the present ability to comply **at the time the contempt order is entered**, as is required with a purge in civil contempt.

Ability to Pay

So what evidence is sufficient to show actual ability to comply? That's the topic of my next blog. Stay tuned.

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Contempt: Establishing Ability to Pay

Author : Cheryl Howell

Categories : Civil Law, Civil Practice, Family Law

Tagged as : Contempt; Ability to pay; Child support

Date : May 8, 2015

In my last post, No Default Judgment in Contempt**,** I wrote about the requirement that all contempt orders contain the conclusion that respondent acted willfully when committing the act that is the basis for contempt. Of course, that conclusion must be supported by findings of fact, which in turn must be based on evidence.

So what findings are sufficient to support the required conclusion when contempt is based on the failure to pay money, such as child support?

Ability to Pay

When contempt is based on the failure to pay, willfulness must be established by evidence that the respondent has or had the ability to pay all or some portion of the amount owing and deliberately failed to do so. *Mauney v. Mauney,* 268 NC 254 (1966). Ability to pay is established by showing either that respondent has income or cash sufficient to pay or that there are steps respondent can take that would allow him/her to pay some or all of the amount owing. *Jones v. Jones*, 62 NC App 748 (1983).

Ability to Pay When?

Criminal contempt is to punish past conduct. So to support an adjudication of criminal contempt for failure to pay support, the court must conclude respondent had the ability to pay when the payment became due or at some time thereafter. *Mauney, id.* Because the purpose of criminal contempt is to punish past behavior, a person can be held in criminal contempt even if that person has fully complied with the order by the time of the contempt hearing. Reynolds v. Reynolds, 147 NC App 566 (2001)(dissent adopted by 356 NC 287 (2002)).

On the other hand, civil contempt is to force compliance with the court order. Therefore, to support an adjudication of civil contempt for failure to pay, the court must conclude respondent has the present ability to pay at the time of the hearing. *Mauney, id.* Because the only purpose of civil contempt it to force compliance, a respondent cannot be held in civil contempt if respondent has fully complied with the order to pay by the time of the contempt hearing. Ruth v. Ruth, 158 NC App 123 (2003). A civil contempt order also must find respondent has the present ability to comply with the purge condition that is imposed as a result of the contempt adjudication. A respondent must actually "hold the keys to the jail" at the time (s)he is incarcerated for civil contempt. Shippen v. Shippen, 204 NC 188 (2010); *Jolly v. Wright,* 300 NC 83 (1980).

Able-bodied, under no disability, enough?

Mauney and other opinions established the rule that when a contempt charge is based on the failure to pay, the court must make an investigation into the current financial status of respondent to determine if (s)he has the present ability to pay the amounts set by order of the court. *Moore v. Moore*, 35 NC App 748 (1978). The trial court in *Mauney* supported contempt with these findings:

[T]he defendant 'is a healthy, able bodied man, 55 years old, presently employed …and has been so employed for many months; that he owns a Thunderbird automobile; he has not been in ill health or incapacitated since the date of [the] order…; the defendant has the ability to earn good wages in that he is a trained and able salesman, and is experienced in the restaurant business; and has been continuously employed since the order.

Mauney, 268 NC at 266.

The Supreme Court held these findings insufficient, stating:

The finding of facts in this case is not a sufficient basis for the conclusion that defendant's conduct was willful and deliberate. [Citing *Vaughan v. Vaughan*, 213 N.C. 1989], **the court below should take an inventory of the property of the plaintiff; find what are his assets and liabilities and his ability to pay and work -an inventory of his financial condition.'**

Mauney, 268 NC at 268.

See also Clark v. Gragg, 171 NC App 120 (2005)("able-bodied, 32 year old with tenth grade education and work experience" insufficient), and *Hodges v. Hodges*, 64 NC App 550 (1983)("able-bodied" and "was capable of and had the means or should have had the means" to make payments insufficient).

Must respondent have cash on hand?

Ability to pay can be shown by evidence that respondent has sufficient cash or income to pay. *McMiller v. McMiller*, 77 NC App 808 (1985). *See also Ahern v. Ahern*, 63 NC App 728 (1983) (income can be established by showing how much respondent spends). Or, ability to pay can be shown by evidence that there are reasonable steps respondent can take that would enable him/her to pay but respondent is deliberately failing to take those steps. *Adkins v. Adkins*, 82 NC App 289 (1986)(reasonable steps include liquidating assets); *McMiller*, *id.* (same).

While deliberately and in bad faith failing to look for work or accept employment will support contempt*, Frank v. Glanville*, 45 NC App 313 (1980), a court cannot base contempt on failure to work unless there is evidence that jobs actually are available. *Self v. Self*, 55 NC App 651 (1982).

Right to Appointed Counsel

The law regarding the need for evidence of actual ability to pay before a person can be held in contempt for failure to pay child support is not new. However, parents are incarcerated on a regular basis in this State and throughout the country based on court orders entered without appropriate findings and conclusions.

Recognizing this as a problem, the North Carolina Supreme Court held in *McBride v. McBride*, 334 NC 124 (1993), that respondents in contempt cases have the right to court-appointed counsel if indigent and if there is a likelihood of incarceration. In overturning previous precedent to the contrary, the court held:

An examination of civil contempt cases … indicates that the failure of trial courts to make a determination of a contemnor's ability to comply is not altogether infrequent… Despite the statutory requirements, experience … has shown that trial courts do at times order the imprisonment of an unrepresented civil contemnor in a nonsupport case without determining whether he is able to pay… .

McBride, 334 NC at 131 and n.4.

Unfortunately, appellate cases continue to show a problem in the trial courts. While appointed counsel should help, it is everyone's responsibility to ensure parents are not jailed simply because they fail to pay support.

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NO FINES FOR CIVIL CONTEMPT

Author : Cheryl Howell

Categories : Civil Law, Civil Practice, Contempt, Domestic Violence, Family Law

Tagged as : Civil contempt; fine

Date : August 21, 2015

This Post was written by Professor Michael Crowell, UNC School of Government.

The question about fines for civil contempt is now resolved. Just over a year after the court of appeals allowed the use of a fine for civil contempt the General Assembly stepped in to say no, fines are not allowed for civil contempt, the only sanction is confinement until the person complies with the court order. In doing so, the legislature restored the law to what most thought it was before the appellate court ruling.

This all began with the court of appeals' May 2014 decision in Tyll v. Berry, a case from Orange County. Toward the end of 2012 the district court found Berry in contempt for having sent emails to the Tylls in June 2012 in violation of a Chapter 50C no-contact order. As its sanction the court ordered Berry jailed until he "purged" the contempt by paying $2,500 to the Tylls. The order went on to say that he would be fined $2,500 for each future violation of the no-contact order.

The court of appeals upheld the district court order. The appellate panel found, first, that the district court order, which did not specify whether it was for civil or criminal contempt, was for civil contempt. The court then said a fine was a permissible sanction for civil contempt, although the statute seemed to provide only for jailing the offender. (The criminal contempt statute, on the other hand, provides for imposition of a fine or imprisonment for a set time, generally limited to 30 days.) And the court treated the $2,500 as a fine even though it was to be paid to the other parties in the case.

As discussed in a June 2014 post on the School of Government's Criminal Law Blog, the *Tyll v. Berry* decision appeared to break new ground in North Carolina. Based on previous law one would have thought the contempt was criminal rather than civil because it was punishment for past conduct, the previous violation of the no-contact order. Civil contempt, by contrast, is used when the court is not interested in punishment for past behavior but is still attempting to get the defendant to obey a court order. The court does that by locking up the defendant not for a set time, as with criminal contempt, but only until the defendant purges the contempt by complying with the order — paying the money owed, signing the document, whatever has not been done. The defendant is released as soon as the purge is complete, whether it be one day or several months since the incarceration began. Because the only purpose of civil contempt is to obtain compliance with a court order, and because the statute only listed jail as a sanction, it was thought before *Tyll v. Berry* that a fine was not allowed.

The opinion in *Tyll v. Berry* confused both judges and lawyers because it seemed to change the nature of civil contempt and upset the common understanding that fines were reserved for criminal contempt and not available in civil contempt. The questions reached the General Assembly in Raleigh and it enacted Session Law 2015-210, signed by governor McCrory on August 11th. Section 1 of the act amends G.S. 5A-21 by adding a new subsection that says, "A person who is found in civil contempt under this Article is not subject to the imposition of a fine." That portion of the act takes effect October 1, 2015, and applies to contempt orders entered on or after that date.

The new legislation appears to definitively answer the questions generated by *Tyll v. Berry.* The answer is that a fine is not available as a sanction for civil contempt.

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New Regulations Regarding Contempt in IV-D Child Support Cases

Author : Cheryl Howell

Categories : Contempt, Family Law

Tagged as : child support, child support enforcment, contemptIV-D

Date : June 30, 2017

Effective January 19, 2017, the federal Department of Health and Human Services (DHHS) adopted a final rule titled "Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs." 81 Federal Register 93492 (Dec. 20, 2016). This rule mandates numerous changes to the policies and procedures of state child support enforcement programs, but one change of particular importance to state trial courts involves the use of contempt procedures to enforce child support obligations. According to the Comments to the new rules, the change in the federal regulations regarding the use of contempt is intended to ensure that the "constitutional principles articulated in Turner v. Rogers, 564 U.S. 431 (2011)[addressing the rights of obligors in child support contempt proceedings], are carried out in the child support program, that child support case outcomes are just and comport with due process, and that enforcement proceedings are cost-effective and in the best interest of the child." 81 FR at 93532.

Federal Direction to State Enforcement Programs

The new federal rule amends 45 CFR 303.6 to require all state enforcement programs to develop guidelines for the use of civil contempt as an enforcement mechanism in child support cases. The Comment to the new rule focuses on the US Supreme Court decision in Turner v. Rogers as justification for clarifying the need to better protect the due process rights of obligors in contempt proceedings. The Comment states:

"As the U.S. Supreme Court stated in Turner, a noncustodial parent's ability to pay constitutes the critical question in a civil contempt case. … Contempt is an important tool for collection of child support when used in appropriate cases where evidence exists that the noncustodial parent has the income and assets to pay the ordered monthly support obligations, but willfully fails to do so, and the purge amounts or conditions are within the noncustodial parent's ability to pay or meet. The Turner opinion provides the child support program with a guide for conducting fundamentally fair and constitutionally acceptable proceedings."

81 FR at 93532.

Effective January 19, 2017, 45 C.F.R. 303.6(c)(4) requires that all state child support offices establish guidelines for the use of civil contempt in IV-D cases. The guidelines must:

"include requirements that the IV–D agency:

(i) Screen the case for information regarding the noncustodial parent's ability to pay or otherwise comply with the order;

(ii) Provide the court with such information regarding the noncustodial parent's ability to pay, or otherwise comply with the order, which may assist the court in making a factual determination regarding the noncustodial parent's ability to pay the purge amount or comply with the purge conditions; and

(iii) Provide clear notice to the noncustodial parent that his or her ability to pay constitutes the critical question in the civil contempt action."

North Carolina Response to the New Regulation

The North Carolina Child Support Enforcement Agency has complied with the new federal mandate by adopting the following guidelines, published in the Child Support Services Manual found on the website of the NC Department of Health and Human Services, https://www2.ncdhhs.gov/info/olm/manuals/dss/cse/man/ :

GUIDELINES FOR USE OF CIVIL CONTEMPT IN IV-D CASES

"The federal Office of Child Support Enforcement (OCSE) has stated: "Civil contempt that leads to incarceration is not, nor should it be, standard or routine child support practice." Prior to considering the use of contempt proceedings in a delinquent case, CSS caseworkers should consider the use of administrative enforcement remedies. If a repayment plan can be negotiated successfully, this approach can be considered as a cost savings to the CSS agency.

…

If caseworkers determine other enforcement remedies to be inadequate, then prior to initiating a contempt proceeding in court, they must screen the case for information regarding the NCP's [NCP is the noncustodial parent] ability to pay (or otherwise comply with the order, if appropriate). This review of the case is important because the NCP's ability to pay will be a critical issue at the contempt hearing, since the court must find that the NCP has the ability to comply with the underlying order before holding the NCP in civil contempt. Caseworkers must share the results of this review with the IV-D attorney, so that the IV-D attorney can present this information to the court, either if the court requests it or as is otherwise appropriate.

Alternatively, if the results of the review indicate that the amount of the current court-ordered obligation may no longer be consistent with the NCP's ability to pay, caseworkers should consider whether modification of the order might be appropriate.

Prior to a civil contempt hearing, the NCP must also be given notice that his/her ability to pay will be a critical question at the hearing. This notice is included in the Order To Appear And Show Cause (DSS-4663). However, if a county does not use the DSS-4663, then the county must ensure that this notice is provided to the NCP. "

Show Cause Orders

As I said in my earlier blog post "No Contempt by Default," North Carolina law allows a show cause order to be issued to initiate a contempt proceeding only upon the establishment of probable cause that the obligor is in contempt of court. The information the state guidelines now require child support enforcement to obtain should provide the court with the information necessary to determine whether the party seeking the show cause order has the evidence necessary to support a contempt order. *See also* On The Civil Side blog post "Contempt: Establishing Ability to Pay."

Civil Contempt and "Springing" Orders for Arrest

The following post was written by Daniel Spiegel, a North Carolina Assistant Appellate Defender. It addresses the legality of a purge condition frequently imposed in civil contempt orders entered in child support enforcement proceedings across North Carolina.

This is a very important topic. Please share your thoughts and reactions.

MEMORANDUM ON THE UNLAWFULNESS OF "SPRINGING" ORDERS FOR ARREST UPON FUTURE NONPAYMENT OF PURGE PAYMENTS IN CHILD SUPPORT CIVIL CONTEMPT PROCEEDINGS WITHOUT CONTEMPORANEOUS INQUIRY INTO ABILITY TO PAY

In child support proceedings throughout North Carolina, it is a practice in some counties to include in civil contempt orders a provision calling for the immediate issuance of an order for arrest upon future nonpayment of a "purge payment." After a contested hearing or with the agreement of the parties, a civil contempt order is entered assigning a schedule of "purge payments" that must be satisfied to avoid future incarceration. Under the terms of the order, any failure to make a "purge payment" automatically results in an order for arrest being issued pursuant to "continuing civil contempt." However, as shown below, such a provision calling for "springing" orders for arrest in the civil contempt context is unlawful.[1] [2]

Analysis

North Carolina's civil contempt statutes "require that a person have the present ability to comply with the conditions for purging the contempt before that person may be imprisoned for civil contempt." *McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985); *see also Jolly v. Wright*, 300 N.C. 83, 92, 265 S.E.2d 135, 142 (1980) (defendant in a civil contempt action will be fined or incarcerated only after a determination is made that defendant is capable of complying with the order of the court). For this reason, courts have repeatedly described those incarcerated for civil contempt as "holding the keys to their own jail." *See McBride v. McBride*, 334 N.C. 124, 128, 431 S.E.2d 14, 17 (1993); *see also Turner v. Rogers*, 564 U.S. 431, 442, 180 L. Ed. 2d 452, 462 (2011). In issuing an order calling for the automatic issuance of an order for arrest upon future nonpayment of a "purge payment," the court unlawfully dispenses with a contemporaneous finding that defendant is, at the time of nonpayment, in fact able to make payment and thus able to obtain freedom.

In *Tigani v. Tigani*, __ N.C. App. __, 805 S.E.2d 546 (2017), the North Carolina Court of Appeals reversed a civil contempt order because the record did not contain support for the proposition that the defendant had the present ability to comply with an order to pay attorneys' fees. Defendant was given a "suspended sentence" on July 25, 2016, ordering that he make payment by August 15, 2016, or be incarcerated for civil contempt. The plaintiff submitted bank statements purporting

to show that the defendant had the ability to pay. However, the bank statements covered a period between November 2015 and March 2016. Our Court of Appeals held that these "records did not reflect defendant's financial circumstances on 25 July 2016, which is the relevant time for purposes of determining defendant's *present* ability to pay." *Id.* (emphasis in original) Holding that the contempt order was unsupported by record evidence, the Court reversed. *Tigani* demonstrates that evidence showing ability to pay on a particular date is not adequate to show ability to pay after some months have passed. The inquiry into ability to pay must be contemporaneous with the order finding the defendant in contempt. *Id.* ("in order to address the requirement of willfulness, 'the trial court must make findings as to the ability of the [contemnor] to comply with the court order during the period when in default.' . . . Second, once the trial court has found that the party had the means to comply with the prior order and deliberately refused to do so, 'the court may commit such [party] to jail[.] . . . At that point, however, . . . the court must find that the party has the present ability to pay the total outstanding amount'" (quoting *Clark v. Gragg*, 171 N.C. App. 120, 122-23, 614 S.E.2d 356, 358-59 (2005)).

N.C. Gen. Stat. § 5A-21 clearly states that failure to comply with a court order is only a "continuing civil contempt [where] noncompliance by the person to whom the order is directed is willful. . . and the person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order." This Court cannot make a future determination of what constitutes a continuing civil contempt because this Court cannot possibly know whether a future failure to make a "purge payment" is willful or whether the individual is simply unable to comply with the order for some unforeseen reason. *See Bearden v. Georgia*, 461 U.S. 660, 672-673, 76 L. Ed. 2d 221, 233 (1983) (it is contrary to the fundamental fairness guaranteed by the Fourteenth Amendment for an individual to be incarcerated due to an inability to make payment for reasons outside of the individual's control); *see also Turner v. Rogers*, 564 U.S. 431, 445, 180 L. Ed. 2d 452, 464 (the threatened loss of liberty in civil contempt proceedings "demands" Due Process protection; "[g]iven the importance of the interest at stake, it is obviously important to ensure accurate decisionmaking in respect to the key 'ability to pay' question").

There is no statutory authority for this Court to call for the issuance of an order for arrest upon future nonpayment of a purge payment. An order for arrest under the Criminal Procedure Act can only be issued under certain circumstances, including failure to appear in a criminal proceeding, violation of the conditions of probation, or to secure an alleged contemnor's appearance for a criminal contempt proceeding. N.C. Gen. Stat. § 15A-305(b)(2), (4), (8) & (9). Chapter 5A references arrest as a means to assure the alleged contemnor's presence for proceedings when a person has been charged with direct or indirect criminal contempt, as permitted under § 15A-305(b)(9).[3] But there is no provision in the civil contempt statutes authorizing the issuance of an order for arrest upon future noncompliance with purge requirements, such as in a criminal probation violation.

N.C. Gen. Stat. § 5A-23 clearly sets forth the "proceedings for civil contempt." The proper

procedure calls for a motion directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt. There is no authority to arrest an individual prior to providing the individual with an opportunity to show cause why the nonpayment was not willful.

In conclusion, the practice of calling for "springing" orders for arrest upon future nonpayment of purge payments is not lawful. Instead, courts should substitute a provision calling for the issuance of a show cause motion upon nonpayment providing the Defendant with an opportunity to be heard on the question of willfulness.

[1]A provision calling for an order for arrest to be issued upon nonpayment of a future regular child support obligation is also unlawful. *See Bennett v. Bennett*, 71 N.C. App. 424, 322 S.E.2d 439 (1984) (error for court to require defendant to make child support payments that accrued after his incarceration in order to obtain his release).

[2]To clarify, the analysis set forth in this memorandum may not apply where the trial court makes clear findings upon entry of a civil contempt order that the defendant is presently able to pay the sum total of all purge payments ordered. *See Abernethy v. Abernethy*, 64 N.C. App. 386, 307 S.E.2d 396 (1983). In such a case, it is within the defendant's power to pay the entire amount at the time the order is entered, and any delay in payment may fairly be deemed a willful violation. However, absent express findings that the defendant has the present ability to pay the sum total of all purge payments, a trial court cannot predetermine that a future failure to make a purge payment constitutes a willful violation of a court order.

[3]*See* N.C. Gen. Stat. § 5A-16 (requiring, in the context of plenary proceedings for criminal contempt, a finding of probable cause to believe the person ordered to appear will not appear, based on sworn statement or affidavit, before an order for arrest can be issued).

No Contempt for the Nonpayment of Money Without Actual Evidence of Ability to Pay

In 2015, I wrote two blog posts summarizing the law relating to the use of contempt to enforce orders to pay support. No Default Judgment in Contempt (May 1, 2015) and Contempt: Establishing Ability to Pay (May 8, 2015). Recent appellate opinions justify revisiting this topic.

No Default Judgment for Contempt

Because case law holds that the entry of a show cause order for civil contempt shifts the burden in the contempt hearing to the alleged contemnor to establish why he or she is not in civil contempt, *see .e.g*. *Shumaker v. Shumaker, 137 NC App 72 (2000)*, it is not uncommon for petitioners to argue that if no evidence of ability to pay is offered or if the court does not find the evidence of the respondent to be credible, the respondent should be held in contempt by default. The court of appeals repeatedly has rejected this argument. In the recent case of Tigani v. Tigani, _ N.C. App. _, 805 SE2d 546 (October 17, 2017), the court of appeals reiterated that a party cannot be held in civil contempt for the nonpayment of money unless evidence is introduced sufficient to establish the parent has the actual present ability to pay**.**

In Tigani, the trial court ordered Defendant to pay attorney fees but he did not pay. Plaintiff filed a motion requesting defendant be held in civil contempt. Defendant did not appear for the contempt hearing and the trial court concluded he had the ability to pay and held him in civil contempt. On appeal, defendant argued there was insufficient evidence in the record to establish that he had the present ability to pay the attorney fee at the time of the contempt hearing and the court of appeals agreed. The court noted that while the trial court reviewed bank account records of the defendant during the contempt hearing, the records were not introduced into evidence during the hearing and no witness testified. Therefore, there was no evidence in the record at all. The court of appeals also rejected plaintiff's argument that defendant waived any objection to the lack of evidence by not attending the contempt hearing and producing evidence of his inability to pay. The court of appeals held that a defendant's failure to participate in the hearing does not relieve the court of the need to make findings of fact regarding defendant's present ability to comply with the court order and the purge being imposed before holding a party in contempt. Those findings of fact must be supported by evidence in the record.

For cases involving a child support enforcement agency, recently revised federal regulations require that the IV-D agency provide the trial court with evidence regarding a parent's ability to pay in contempt proceedings. *See* blog post New Regulations Regarding Contempt in IV-D Cases (June 30, 2017).

Evidence Sufficient to Establish Ability to Pay

The court of appeals also recently reaffirmed the NC Supreme Court opinion in *Mauney v. Mauney,* 268 N.C. 254 (1966), holding that conclusory findings by a trial court that a respondent has the ability to pay are not sufficient. Rather, a trial court must take an "inventory" of a party's "financial condition" in order to support a finding that the party has the ability to pay.

In County of Durham ex rel. Wilson and King v. Burnette, _ N.C. App. _, S.E.2d (October 16, 2018), the trial court held father in civil contempt for failure to pay child support. Plaintiff presented no evidence in the contempt hearing other than the amount of arrears owed by father. Father presented evidence that he had no income and no ability to pay. The trial court order concluded that father acted willfully and had the ability to pay support based on findings that he:

"owns a boat, owns a car, spends money on gas, spends money on food, has medical issues that do not keep him from working, prepares and delivers food, repairs cars for money, pays for car insurance, and receives in-kind income from his sister."

The court of appeals held that while the evidence in the record supported these specific findings, the evidence and the trial court findings did not support the conclusion father had the ability to pay support or to pay the purge amount set by the trial court. According to the court of appeals, a trial court must "take an inventory" of a parent's "financial condition" in order to support the conclusion that the parent willfully failed to pay and has the present ability to comply with the purge condition. A trial court "must consider both sides of the equation: income or assets available to pay and reasonable subsistence needs of the [parent]".

The findings of fact in this case did not establish, for example, how much the boat or the car was worth, whether father needed the car to care for himself, how much money he makes from repairing cars or delivering food, or how much income he receives from his sister. In addition, there was no evidence in the record to establish father's subsistence needs. According to the court of appeals, "the central deficiency of the trial court's order is the complete failure to consider defendant's living expenses." Without such findings, the trial court cannot hold a parent in contempt for failure to pay support. The court of appeals further explained that the court must allow a parent "legitimate reasonable needs and expenses" and held that a "defendant has the ability to pay only to the extent that he has funds or assets remaining after those expenses."

Ability to work. The court of appeals also held that the trial court had no evidence to support the finding that father had the ability to work. Plaintiff presented no evidence of his ability to work and father presented evidence from a doctor that father had suffered a work related injury and had recurring pain that significantly restricted his movement. Plaintiff argued on appeal that the trial court simply did not find father's evidence credible. The court of appeals held that while the trial court is the sole judge of credibility, "the lack of evidence is not evidence." In other words, even if the trial court did not believe father's evidence of his inability to work, the trial court erred in finding that he could work without evidence to support that finding.

In addition, the court of appeals held that “the ability to work means more than the ability to perform some personal household tasks; it means the present ability to maintain a wage-paying job.”