

# Family Law Update

Judge Samantha Cabe

Cheryl Howell

October 2024

# Child Custody

# Is it a temporary order?

2 separate issues:

1. Was it temporary when it was entered?
2. If it was temporary when entered, did it convert to a permanent order due to the passage of time?

*Lawrence*  
p. 2

- Jan. 16, 2019: custody claim filed
- Jan. 18, 2019: ordered to mediation
- **Jan. 31, 2019: Consent “temporary order”**
- October 7, 2019: Calendar request/notice of hearing for custody;
- December 2, 2019: Motion for “Christmas visitation”
- Jan. 23, 2020: Mediation (not successful)
- Aug. 21, 2020: Calendar request for custody; set for Aug. 31, 2020
- Numerous continuances
- **Feb. 18, 2022: Hearing: Is order temporary or permanent?**

# *Lawrence v. Lawrence*, p. 2

- Citing the “*Senner* test” (*Senner v. Senner*, 161 NC App 78 (2003), an order is **temporary when entered** if:
  - It is entered without prejudice,
  - It states a clear and specific reconvening time, and the time interval between the two hearings is reasonably brief, or
  - It does not determine all issues

# Lawrence v. Lawrence

A temporary order may become permanent by operation of time, when neither party requests a hearing within a reasonable time.

The focus is on when the hearing is requested, not when it is heard.

A reasonable time is determined on a case-by-case basis

*LaValley*, 151 NC App 290 (2002)(23 months was not reasonable, order became permanent)

*Senner*, 161 NC App 78 (2003)(20 months was not unreasonable because parties were negotiating a new custody arrangement)

# *Lawrence*

- Order was temporary because “parties intended it to be entered without loss of rights or otherwise prejudicial to either party.”
  - Specific language “without prejudice” is not required
- Order did not “become a permanent order by acquiescence” where plaintiff “was actively seeking court hearings on the issue of permanent custody”



# *Harney v. Harney*, p. 5

- New York custody stipulation was a temporary order
  - It was an emergency order entered 2 weeks after the birth of the child
  - Granted immediate custody rights to grandfather
  - Did not determine all issues; set requirements for mother to regain physical custody
- New York order **did not become a permanent order** during the year between the entry of the order and the filing of grandfather's complaint for custody in North Carolina



# “Self-executing” modification provisions

- *Madison v. Gonzalez-Madison*, p. 3
  - Cannot provide for change in custody when parties relocate
- See also *Cox*, 238 NC App 22 (2014)
  - Cannot provide for change of custody when dad improves
- And *Hibshman*, 212 NC App 113 (2011)
  - Parties cannot stipulate to modification without changed circumstances
- *Cf. Burger v. Smith*, 243 NC App 233 (2015)
  - Okay to provide for change when young child starts kindergarten



# DIVORCE

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Service of Process; Collateral Attack; Rule 11

# **Tuminski** **v.** **Norlin**

No. COA24-15

\_\_N.C. App. \_\_, \_\_S.E.2d\_\_(September 3, 2024)

Court did not err in denying Plaintiff's Motion to Set Aside Divorce Judgment pursuant to Rule 60(b)

- Service Proper—Service by Certified Mail with filed Affidavit of Service showing compliance with statutory requirements raises the presumption of valid service.
- Collateral Attack on Divorce Judgment Improper if Proper Service of Process





# EQUITABLE DISTRIBUTION

- Sapia v. Sapia, 903 S.E.2d 444 (N.C. App., June 18, 2024)
- Kerslake v. Kerslake, \_\_N.C. App. \_\_, \_\_ S.E.2d \_\_ (September 3, 2024)
- Phillips v. Phillips, 292 N.C. App. 549, 897 S.E.2d 181 (2024) (*unpublished*)

# Sapia v. Sapia

903 S.E. 2d 444 (N.C. App., June 18, 2024)

Court Properly Classified Property and Debt.  
Equal Division was Equitable  
Distributive Award Overturned

- Name on Marital Debt is irrelevant!
- Student Loan Debt may be both marital and separate—depends on “joint benefit.”
- Delay of 9 months between trial and entry of judgment not prejudicial here.
- Distributive Award requires finding that in-kind is not equitable and that the paying party has sufficient assets from which to pay the award.

# **Kerslake v. Kerslake**

\_N.C.App.\_, \_S.E.2d\_ (September 3, 2024)

Court of Appeals addressed classification of various property and debts, agreed that findings were sufficient to support a distributive award, and analyzed the trial court's treatment of credits for post-separation payments of mortgage.

- Husband entitled to credit in distribution for wife's postseparation occupation of the marital residence because he paid Mortgage with separate funds.
- Wife entitled to credit in distribution for postseparation payments she made on the marital residence with separate funds because house was distributed to Husband.

# Phillips v. Phillips

292 N.C. App 549, 897 S.E.2d 181 (2024).  
*Unpublished*

Court of Appeals agreed with the trial court that it had no jurisdiction over Equitable Distribution after all pending issues had been resolved.

- Complaint was only for Child Custody
- Defendant alleged counterclaims for custody, child support, equitable distribution, PSS, alimony and attorney fees. Plaintiff alleged affirmative defenses to Defendant's counterclaims in reply.
- Custody was settled by Consent Order and Defendant voluntarily dismissed counterclaims
- Consent to Voluntary Dismissal Key

# Spousal Agreements/Contracts





## *Baer v. Baer*, p. 11

- A separation agreement is unenforceable if it is unconscionable or procured by duress, coercion, or fraud.
  - An agreement procured by duress, coercion, or fraud is enforceable if ratified following execution, unless the duress, coercion, or fraud continued at the time of ratification.
  - Evidence of husband's duress and anxiety caused by wife's continuing threat to obtain an ex parte DVPO was sufficient to prohibit summary judgment.
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# Civil No-Contact Orders

# Workplace Violence Prevention Act GS 95-260, *et. seq.*

- An employer can seek a civil no-contact order when an employee has been the victim of unlawful conduct that can be carried out or was carried out at the employer's workplace
- Protection order can order defendant not to assault, harass, or otherwise interfere with an employee at the employee's workplace, along with other provisions authorized by statute
- Order can be made effective no longer than one year, but can be renewed for good cause
- ***Durham County DSS v. Wallace, p. 12***