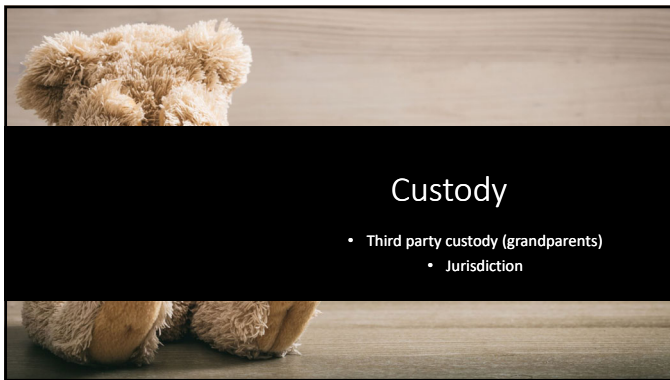




Family Law Update

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June 2021

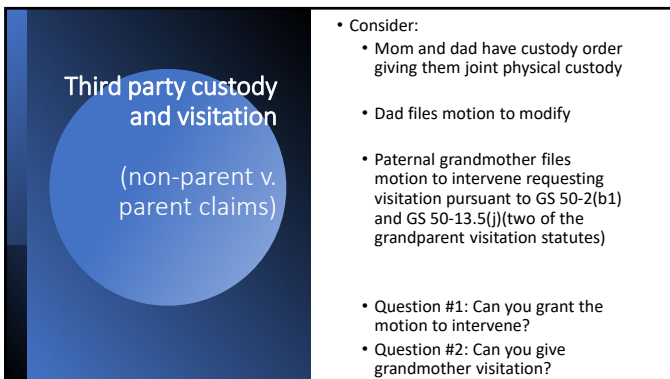
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Custody

- Third party custody (grandparents)
 - Jurisdiction

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Third party custody and visitation
(non-parent v. parent claims)

- Consider:
 - Mom and dad have custody order giving them joint physical custody
 - Dad files motion to modify
 - Paternal grandmother files motion to intervene requesting visitation pursuant to GS 50-2(b1) and GS 50-13.5(j)(two of the grandparent visitation statutes)
- Question #1: Can you grant the motion to intervene?
- Question #2: Can you give grandmother visitation?

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Intervention

Rule 24. Intervention

- (a) Intervention of right. - Upon timely application anyone shall be permitted to intervene in an action:
 - (1) When a statute confers an unconditional right to intervene;
- (b) Permissive intervention. - Upon timely application anyone may be permitted to intervene in an action.
 - (1) When a statute confers a conditional right to intervene; ...
- (c) Procedure. - A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and **shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.**

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Statutes grandparents can use to request custody/visitation

| G.S. 50-13.1 | G.S. 50-13.2(b1) | G.S. 50-13.5(j) | G.S. 50-13.2A |
|--|--|--|--|
| <ul style="list-style-type: none"> • Any person seeking custody can request custody (including just visitation) pursuant to this statute • A general statute; anyone can use, including grandparents • Custody determined by best interest analysis • Parent v. Nonparent: no best interest unless parent has lost constitutional right to exclusive custody | <ul style="list-style-type: none"> • Court can grant grandparent visitation as part of any custody order • Grandparent can request only when claim pending between parents | <ul style="list-style-type: none"> • Court can grant grandparent visitation when modifying custody order • Grandparent can request only when claim pending between parents | <ul style="list-style-type: none"> • Court can grant grandparent visitation when stepparent/relative adoption |

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Alexander v. Alexander
[p. 4 of case summaries]

- Parents settled custody by consent order
- A few years later, dad filed motion to modify
- After motion to modify filed, paternal grandparents filed request to intervene seeking visitation pursuant to GS 50-13.2(b1) and GS 50-13.5(j)
- Trial court allowed intervention
- Father died
- Trial court modified custody to give mother primary physical and legal and grandparents extensive visitation

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Effect of dad's death?

Generally, when one parent dies, custody action/order between the two parents abates

- Custody reverts automatically to surviving parent
- See also *Adams v. Langdon*, 264 NC App 251 (2019)

Action will survive if third person is a party to the action

- Grandparents became parties when motion to intervene was granted

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Statutory right to intervene??

- GS 50-13.2(b1) and GS 50-13.5(j) gave grandparents right to assert claim for visitation because there was an on-going dispute between the parents when grandparents were allowed to intervene.

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Alexander

- Did the award of visitation to grandparents in this case violate mother's federal Due Process right to exclusive care, custody and control of her child?

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Petersen v. Rogers, 337 NC 397 (1994)

- o "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."



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Petersen v. Rogers (1994)

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




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Price v. Howard, 346 NC 68 (1997)

- o 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."

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Troxel v. Granville, 530 US 57 (2000)



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

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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

Trial court can grant visitation pursuant to the grandparent visitation statutes only when:

- There is an on-going custody dispute between the parents;
- Grandparents overcome the presumption that the parents’ decision regarding visitation with the grandparents is in the best interest of the child, and
- The visitation awarded does not adversely interfere with the parent/child relationship

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Consider.....

- Existing custody order granted grandparents primary physical and legal custody, granted father visitation and mother supervised visitation
- Custody order does not conclude parents lost their constitutional right to exclusive custody
- Dad files a motion to modify
- Must trial court conclude parents have lost constitutional rights before entering a new custody order awarding custody/visitation to grandparents?

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Fecteau v. Spierer
[p. 6 case summaries]

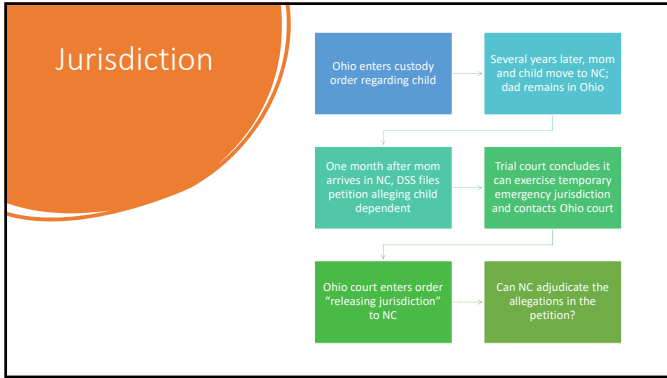
- **No**
- Once custody has been granted to nonparent in a case between the nonparent and parents, modification is controlled by GS 50-13.7
 - Person seeking modification must establish substantial change in circumstances affecting child
 - If substantial change affecting child, court determines whether best interest requires modification
 - Constitutional rights of parents are not implicated

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Fecteau

- **Modification**
- Father's "series of developments" in his life constituted a substantial change in circumstances that had a "self-evident" impact on the welfare of the child
- Developments:
 - New and stable employment
 - Health insurance, paid vacation and more flexibility to spend time with child
 - New marriage to person with whom child had developed close and supportive relationship

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GS 50A-203. Jurisdiction to modify determination.

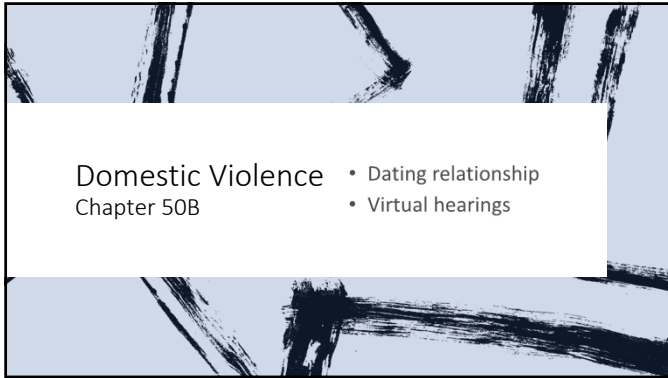
- Except as otherwise provided in G.S. 50A-204, a court of this State may not modify a child-custody determination made by a court of another state **unless a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2).** AND:
 - (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
 - (2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

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In re K.R. [p. 7 in case summaries]

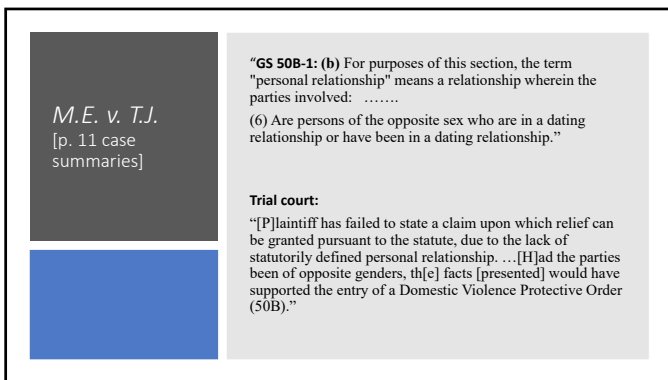
- NC court had no jurisdiction to adjudicate:
 - Not the home state of the child when petition was filed;
 - Even if Ohio did not remain home state, NC did not have significant connection/substantial evidence jurisdiction
- See also *In re T.R.*, 250 NC App 386 (2016)

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Domestic Violence • Dating relationship
Chapter 50B • Virtual hearings

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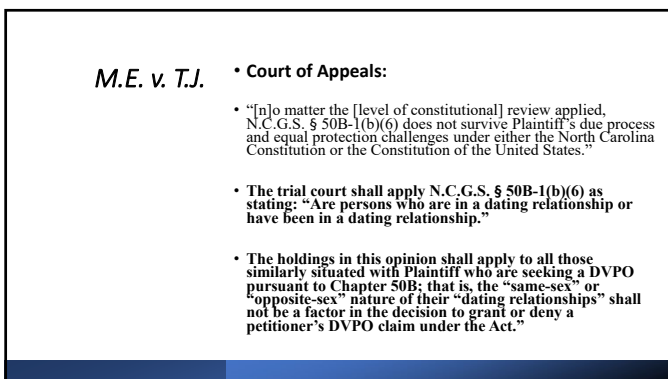
M.E. v. T.J.
[p. 11 case summaries]

GS 50B-1: (b) For purposes of this section, the term "personal relationship" means a relationship wherein the parties involved:

(6) Are persons of the opposite sex who are in a dating relationship or have been in a dating relationship."

Trial court:
"[P]laintiff has failed to state a claim upon which relief can be granted pursuant to the statute, due to the lack of statutorily defined personal relationship. ... [H]ad the parties been of opposite genders, th[e] facts [presented] would have supported the entry of a Domestic Violence Protective Order (50B)."

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M.E. v. T.J. • **Court of Appeals:**

- "[n]o matter the [level of constitutional] review applied, N.C.G.S. § 50B-1(b)(6) does not survive Plaintiff's due process and equal protection challenges under either the North Carolina Constitution or the Constitution of the United States."
- The trial court shall apply N.C.G.S. § 50B-1(b)(6) as stating: "Are persons who are in a dating relationship or have been in a dating relationship."
- The holdings in this opinion shall apply to all those similarly situated with Plaintiff who are seeking a DVPO pursuant to Chapter 50B; that is, the "same-sex" or "opposite-sex" nature of their "dating relationships" shall not be a factor in the decision to grant or deny a petitioner's DVPO claim under the Act."

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S.L. 2021-47
S 255

Removes prohibition of virtual hearings for permanent orders in Chapter 50B and 50C

Adds new section 7A-49.6:

- Authorizes virtual hearings in all civil proceedings
- Party can object for good cause
- Jury trial: witnesses testify by videoconference only for good cause

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What do you think?

- Child suffers from sever mental illness and is in a residential treatment program. Mom asks that cost of program and cost of travel to visit the child be included in the calculation of dad's child support obligation
- Can you include these costs?
- If you include the costs, is it a deviation from the guidelines?
- If you include the costs, are you required to make findings of fact regarding the need for the treatment/travel and the reasonableness of the costs?

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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 Guidelines, p. 5

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- **Extraordinary expenses:**
 - Trial court has discretion to determine whether an expense is an extraordinary expense
 - Trial court has discretion to determine how expense should be apportioned between the parties
 - Extraordinary expenses are added to calculation of Guideline support
 - Not a deviation
 - No findings of fact are required to support inclusion of amount in support obligation


Madar v. Madar
[p. 13 of case summaries]

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Kincheloe v. Kincheloe

[p. 16 of case summaries]

- Trial court order:
 - Father's "gross income" is \$9,216 per month
 - In addition, father earns regular bonuses
 - Father to pay guideline support based on \$9,216 per month
 - Father to pay 2% of his annual bonuses as additional support



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Non-recurring income

- Guidelines, p. 3:

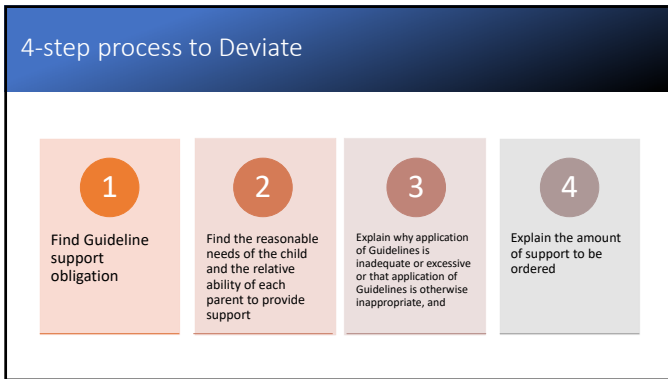
"When income is received on an irregular, non-recurring, or one-time basis, the court may average or prorate the income over a specified period of time or require an obligor to pay as child support a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support."

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Kincheloe

- Bonuses in this case were recurring income (to be included in calculation of gross income)
- Because trial court did not order father to pay a percentage of the bonus income "that is equivalent to the percentage of his or her recurring income paid for child support", trial court deviated from the Guidelines
- Order contained insufficient findings of fact to support deviation

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Liability of sperm donor for support

- *Warren County DSS ex rel. Glenn v. Garrelts*
[p. 17 of case summaries]
- Contract formed in Virginia between mother and sperm donor
- Virginia law provides donors are not responsible for support
- Law of state where cause of action accrues determines substantive rights of parties
- Donor not liable for support

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GS 5A-21

- (b) A person who is found in civil contempt may be imprisoned as long as the civil contempt continues, subject to the limitations provided in ... (b2) of this section. Notwithstanding subsection (b2) of this section, if a person is found in civil contempt for failure to pay child support or failure to comply with a court order to perform an act that does not require the payment of a monetary judgment, the person may be imprisoned as long as the civil contempt continues without further hearing.
- (b2) The period of imprisonment for a person found in civil contempt shall not exceed 90 days for the same act of disobedience or refusal to comply with an order of the court. A person who has not purged himself or herself of the contempt within the period of imprisonment imposed by the court under this subsection may be recommitted for one or more successive periods of imprisonment, each not to exceed 90 days. However, the total period of imprisonment for the same act of disobedience or refusal to comply with the order of the court shall not exceed 12 months, including both the initial period of imprisonment imposed under this section and any additional period of imprisonment imposed under this subsection. **Before the court may recommit a person to any additional period of imprisonment under this subsection, the court shall conduct a hearing de novo.**

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McKenzie v. McKenzie
[p. 19 of case summaries]

- Husband found to be in civil contempt and ordered to purge
- Husband failed to purge
- Another civil contempt hearing held
- Husband found to be in continuing civil contempt; different purge ordered
- Court of appeals:
 - Second hearing on civil contempt was a de novo hearing based on GS 5A-21(b1)
 - Judge at second hearing not bound by purge imposed in first contempt order

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Chapter 50C

Civil No-Contact Orders

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GS 50C-1

(6) Stalking. - On more than one occasion, following or otherwise harassing, as defined in G.S. 14-277.3A(b)(2), another person without legal purpose **with the intent to do any of the following:**

- a. Place the person in reasonable fear either for the person's safety or the safety of the person's immediate family or close personal associates.
- b. Cause that person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment and that in fact causes that person substantial emotional distress.

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Does stalking require finding of specific intent?

Yes

- *Diprima v. Vann*
- [p. 23 of case summaries]

No

- *Alicia v. Vaughn*
- *unpublished opinion*, 852 S.E.2d 737 (2020)

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