

**Family Law
Case Update**
District Court Judges' Summer Conference
June 2022

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Custody

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Contempt

- *Hirschler*
 - Trial court erred when it held defendant in civil contempt when show cause referenced only criminal contempt
 - Insufficient notice
 - Civil contempt is not a "lesser form of criminal contempt"

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Contempt: notice requirements

- Criminal contempt: GS 5A-15
 - Show cause must direct a hearing at a "reasonable time"
 - Copy of show cause "must be furnished to the person charged"
- Civil contempt: GS 5A-23(a), (a1)
 - Order/notice/motion must be served on respondent at least 5 days in advance of hearing unless good cause shown

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Malone-Pass

- N.Y. order granted parents joint physical custody, dad primary physical, visitation to mom
- N.Y. court "relinquished jurisdiction" to N.C.
- Mom registered order in N.C.
- After dad and child in NC for at least 6 months, both parents filed motions to modify
- N.C. court modified N.Y. order
 - Sole custody to dad
 - No visitation for mom

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Modification jurisdiction??

GS 50A-203

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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Decline jurisdiction?

GS 50A-208

(a) Except as otherwise provided in G.S. 50A-204 or by other law of this State, if a court of this State has jurisdiction under this Article because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

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

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Denying visitation to a parent

• GS 50-13.5(i)

• “[T]he 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.”

• The constitutionally protected status of parents applicable in third party cases is “irrelevant in a custody proceeding between two parents.”

• *Routten v. Routten*, 374 NC 571 (2020)

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Thomas v. Oxendine

• Grandparent(s) establish standing to seek custody pursuant to GS 50-13.1 by alleging in complaint or motion:

- That they are a grandparent (no need to show ‘parent-like relationship), and
- Facts sufficient to support the conclusion that the parent(s) have waived their constitutional right to custody

• Standing is established on the pleading alone; evidentiary hearing is not required

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Parental conduct inconsistent with protected status

- *In the Matter of B.R.W., B.G.W.*
 - Parent’s temporary relinquishment of custody to third party alone is insufficient
 - Relinquishment without indicating the relinquishment is temporary and without staying in contact with child may be sufficient
 - “allow the other family unit to flourish in a relationship of love and duty with no expectation that it would be terminated.”
 - Can consider bond between child and caretaker, and the emotional impact on child of terminating the relationship
 - Conduct must be viewed cumulatively, with past and current circumstances of the parent being relevant

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Child Support

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Modification of support in unincorporated agreement

Jackson v. Jackson

- When parties have an unincorporated separation agreement providing for child support, one party can request a court order for support.
- Court must enter order for support in the amount provided in the separation agreement unless the party requesting the support order shows that amount in agreement fails to meet or substantially exceeds the reasonable needs of the child(ren) at the time of the hearing.
 - *Pataky v. Pataky*, 160 NC App 289 (2003)(the amount in the unincorporated agreement is presumed sufficient to meet the reasonable needs of the child(ren)).
- Court must have actual evidence of the reasonable needs of the child(ren) at the time of the hearing.

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Breach of separation agreement

- *Jackson v. Jackson*
- Father was not released from his obligation to pay support because of a change in custody where agreement set out all terminating events and change of custody was not listed
- Trial court can award attorney fees to party bringing breach of contract action if the contract provides for attorney fees
 - Award of fees to mother upheld where she prevailed in her breach of contract action and agreement allowed for fees to party who prevails in an action to enforce the agreement

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Extraordinary expenses

- Trial court is not required to make findings of fact to support the inclusion or denial of inclusion of extraordinary expenses in calculation of child support
 - *Wadsworth v. Wadsworth*
- Trial court has the discretion to include or refuse to include extraordinary expenses in calculation of support and to refuse to hear evidence of extraordinary expenses during support hearing
 - *Mendez v. Mendez*

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Mendez

- Imputing income
 - Cannot impute income without first concluding party deliberately depressed income to avoid paying support (bad faith)
 - A voluntary reduction of income alone is insufficient to show bad faith
 - Father did not act in bad faith when he changed careers due to physical conditions that impacted his ability to work

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Mendez

- Attorney fees
 - In support only cases (no custody issue), GS 50-13.6 requires findings that:
 - Party seeking fees was acting in good faith, and
 - Party seeking fees had insufficient means to defray cost of litigation, and
 - Party ordered to pay support refused to pay support that was adequate under the circumstances

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Barus v. Coffey

- Motion to modify
 - AOC form CV-660 was sufficient to state a claim
 - Father wrote on form that order was more than 3 years old and change in guideline support would be 15% or more
 - Motion to modify does not need income of parties or detailed financial information to state a claim

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Domestic Violence

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Walker-Snyder

- Mom was plaintiff; dad was defendant
- Mom requested relief for herself and for 17-year old daughter
- Daughter turned 18 before entry of one-year DVPO
- Trial court granted DVPO for daughter but not for mom

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Walker-Snyder

- Trial court did not lose jurisdiction when child turned 18
 - Jurisdiction is established at time of filing
- Evidence did not support conclusion that father committed an act of domestic violence
 - "Hurtful" texts that made daughter "anxious and upset" did not constitute DV

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M.E. v. T.J.

- GS 50B-1(b):.. 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.

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M.E. v. T.J.

- Court of Appeals:
 - Denial of plaintiff’s request for relief because she was in a same-sex relationship with defendant violated her constitutional rights of due process and equal protection
 - Trial courts shall read G.S. 50B-1(b)(6) as stating “Are persons who are in a dating relationship or have been in a dating relationship.”
- Supreme Court:
 - The holding of the court of appeals “stands undisturbed”

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Equitable Distribution

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Purvis v. Purvis

- Marital debt is debt:
 - Owed by either or both parties on the date of separation
 - That was incurred during the marriage
 - For the joint benefit of the parties
- Debt for loans obtained in the name of the husband during the marriage to finance the college education of the adult daughter of the parties was marital debt

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Asare v. Asare

• GS 50-20(b)

(4) "Divisible property" means all real and personal property as set forth below:

a. All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.

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Distribution

• As long as trial court makes findings about all distribution factors supported by the evidence, the court had discretion to determine how much of the marital and divisible estate is distributed to each party

• *Asare v. Asare*

• The trial court is not required to state how much weight is assigned to each distribution factor

• *Brady v. Brady*

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PSS and Alimony

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Wadsworth

- GS 50-16.7(b) allows the court to secure the payment of support “by means of a bond, mortgage or deed of trust, or other means ordinarily used to secure an obligation to pay money.”
- Order requiring party to maintain life insurance policy payable to dependent spouse upon death of supporting spouse was not appropriate security for the order for alimony and child support

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Asare

- Unless imputing income based on bad faith by one party, alimony is based on the actual income and financial circumstances of the parties at the time of the alimony hearing.
- The court has the discretion to order both periodic payments and a lump sum award, as long as findings show a reason for doing so

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