# Family Law Update
# Cases Decided and Legislation Enacted
# May 20, 2008 through September 16, 2008

**North Carolina Association of District Court Judges**
**Fall Conference**
**October 2008**
**Crowne Plaza Resort**
**Asheville, N.C.**

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# Child Custody
## Cases Decided Between May 20, 2008 and September 16, 2008
## Legislation Enacted 2008

**Heatzig v. Maclean, 664 S.E.2d 347 (N.C. App., August 5, 2008).**

- Trial court erred by granting non-parent custody without first determining biological parent had acted inconsistent with her constitutionally protected status as a parent.
- Conduct inconsistent with constitutionally protected status is not required to involve bad acts that endanger the children.
- Biological parent may waive constitutional protection by intentionally creating a family unit and ceding parental responsibility and decision-making authority to a third party.
- North Carolina does not recognize the doctrine of parent by estoppel, and a district court judge is "without authority to confer parental status upon a person who is not the biological parent of a child" outside the context of the adoption.

Plaintiff and defendant were involved in a same-sex domestic partnership. During the relationship, defendant gave birth to twins as the result of artificial insemination using an anonymous sperm donor. The parties lived together and shared care-taking responsibility for the children for 3 ½ years. When defendant moved out of the shared home and took the children with her, plaintiff filed complaint seeking joint physical and legal custody. The trial court found that defendant had not acted inconsistent with her protected status, but held that she had "abrogated her primary paramount right as a parent." The trial court further found that plaintiff should have "legal status equal to that of [the biological mother]." The trial court then applied the best interest test and awarded joint physical custody with defendant having sole legal custody.

The court of appeals held that a trial court cannot apply the best interest of the child test in a case between a biological parent and a third party unless the trial court first concludes, based upon clear, cogent and convincing evidence, that the biological parent has waived her constitutional right to exclusive custody by conduct inconsistent with her protected status. The court of appeals rejected defendant's request to recognize the doctrine of "parent by estoppel", holding that it is a "flawed and non-existent legal theory" in North Carolina. The court of appeals stated that district court judges have "no authority to confer parental status upon a person who is not the biological parent of a child." According to the court, "the sole means of creating the legal relationship of parent and child is pursuant to the provisions of Chapter 48 of the General Statutes (Adoptions)."

The court of appeals remanded to trial court for further consideration of whether defendant had acted inconsistent with her protected status and thereby waived her exclusive right to custody of the children. The court noted that this case involves both facts that might support a conclusion that defendant had acted inconsistent with her protected status, as well as facts indicating she had not.

Facts that would support a finding of conduct inconsistent included:

- It was a joint decision for defendant to become pregnant by artificial insemination
- The sperm donor was selected based upon physical characteristics similar to those of plaintiff

- Names from plaintiff's family were used in the names of each child
- Plaintiff participated in the birthing classes and was present at the birth of the child
- Both parties signed the birth certificate application
- There was a baptism ceremony where both plaintiff and defendant were identified as parents
- Plaintiff was given authority by defendant to obtain health care treatment for the children

Facts that might support a conclusion that defendant did not act inconsistent with her protected status included:

- Defendant had been trying to become pregnant for many years before she and plaintiff began their relationship
- The timing and methodology decisions regarding defendant's pregnancy were made primarily by defendant.
- The parties were unable to work out a parenting agreement

**Velasquez v. Ralls, -- N.C. App., -- S.E.2d -- (September 2, 2008).**

- Trial court did not err by failing to make findings relating to every factor listed in GS 50A-207 before deciding that North Carolina was not an inconvenient forum for a custody determination.
- Factors listed in GS 50A-207 are necessary when the current forum is inconvenient, not when the forum is convenient.

Plaintiff and defendant signed a consent custody order in 2006 granting defendant primary physical custody of the children. The order anticipated that defendant and children would live in California. In 2007, defendant filed motion pursuant to GS 50A-207 alleging that North Carolina is now an inconvenient forum for a custody determination and requesting that jurisdiction be transferred to California. The trial court denied the motion, making findings that North Carolina remained the home state of the children and that it would be unfair to transfer jurisdiction since defendant left the state with the children. On appeal, plaintiff argued that the trial court was required to make findings about each factor listed in the statute about which evidence was presented. The court of appeals disagreed, holding that the trial court considered relevant factors and did not abuse its discretion in denying the motion. According to the court of appeals, the statute requires findings on each listed factor before determining North Carolina is an inconvenient forum but not when the determination is that the forum is convenient. Dissent on this issue.

**Jackson v. Jackson, -- N.C. App. --, -- S.E.2d -- (September 2, 2008).**

- Trial court erred by modifying custody order as punishment for criminal contempt
- Trial court erred by allowing plaintiff to amend pleading following the contempt hearing to include a motion to modify visitation.
- Trial court has authority to appoint a parenting coordinator on its own motion, as long as appropriate findings are made regarding high conflict and parties' ability to pay the coordinator.
- Rule 11 sanctions were appropriate against plaintiff for alleging that relatively minor violations of visitation order amounted to criminal contempt of court.

Plaintiff filed several motions for orders to show cause and orders of criminal contempt, each alleging defendant had violated visitation provisions of custody order. Trial court found defendant was not in contempt for conduct alleged in several of the motions but determined defendant was in criminal contempt for failing to allow plaintiff telephone access to the child as directed by the custody order. In the order of contempt, the trial court modified terms of the visitation set out in original order and appointed a parenting coordinator. Trial court also concluded plaintiff violated Rule 11 by filing the other motions for contempt because the allegations in the motions "did not rise to the level of legal sufficiency needed to allege criminal contempt of court." Defendant argued on appeal that the trial court erred in modifying the terms of the custody order when no motion requesting modification had been filed, and the court of appeals agreed. According to the court of appeals, a trial court cannot change terms of visitation in custody order on the court's own motion and without finding a substantial change of circumstances. The court of appeals stated "when the court modifies custody or visitation because of violations of a visitation order, it must be careful not to confuse the purposes of modification and contempt. The court modifies custody or visitation because substantial changes in circumstances have made a different disposition in the best interest of the child. A custodian should not violate the visitation order, but if he or she does, then ordinarily the proper response is a finding of contempt, not modification."

The court of appeals also held the trial court erred when it allowed plaintiff to amend the pleading pursuant to Rule 15(b) following trial to assert a request for modification. The court of appeals held that while Rule 15(b) allows amendment of pleadings after a hearing to reflect evidence presented during the hearing, that rule only can be used to amend pleadings to include issues raised during the hearing where the parties knew or reasonably should have known that the evidence being offered during the hearing was not related to issues in the original pleadings. Rule 15(b) cannot be used to allow a court to rule on an issue when neither party had knowledge during the hearing that the new issue was to be decided. In this case, according to the court of appeals "the record gives no indication that either party understood or reasonably should have understood the evidence presented or the arguments made to be ground for modification" rather than contempt.

However, the court of appeals held that the trial court had the authority to appoint a parenting coordinator as part of the contempt order. The trial court made appropriate findings that the case was a "high conflict" case and that the parties had the ability to pay the coordinator. According to the court of appeals, trial courts can appoint coordinators *sue sponte* under those circumstances.

The court of appeals also affirmed the trial court's imposition of Rule 11 sanctions requiring plaintiff to pay part of defendant's attorney fees. According to the court of appeals,

many of plaintiff's allegations did "not rise to the level of contemptible actions." Allegations the court found insufficient to support criminal contempt included accusations that defendant failed to inform plaintiff of child's minor illnesses, failed to notify plaintiff of child's medical appointments, and refused to answer or timely return plaintiff's calls to the minor child when the child was with defendant.

**Maxwell Schuman & Company v. Edwards, 663 S.E.2d 329 (N.C. App., July 15, 2008).**

- Contingency fee agreements between attorneys and clients in custody cases are void as against public policy.
- North Carolina court cannot enforce judgment entered by court in another country if the enforcement would violate North Carolina public policy.

Plaintiff brought action to enforce Canadian judgment entered against defendant. Canadian judgment determined defendant was liable to plaintiff for attorney fees arising out of a custody case. The fee agreement provided that defendant would owe a certain amount if his case was affirmed on appeal but would not owe the full amount if the appeal was unsuccessful. The court of appeals held that the portion of the Canadian judgment representing the amount owed pursuant to the contingency agreement was not enforceable in North Carolina because contingency agreements in custody cases as void as against public policy in this state.

# Child Support
## Cases Decided Between May 20, 2008 and September 16, 2008
## Legislation Enacted 2008

**Felts v. Felts, -- N.C. App., -- S.E.2d -- (September 2, 2008)(Unpublished)**

- Trial court properly included plaintiff's lump-sum workers' compensation settlement in the amount of $125,000 as "one-time, non-recurring" income when setting child support pursuant to the guidelines.
- Trial court did not abuse its discretion by deciding to average the lump-sum settlement over the 17 month period before plaintiff received the settlement and the 12 month period following receipt of the lump sum payment.

Plaintiff filed motion in July 2004 to modify child support after he stopped receiving monthly workers' compensation payments as of June 2004. Following a hearing held in July 2006 and in an order entered in February 2007, the trial court found that plaintiff received a lump sum settlement of the workers' compensation claim in the amount of $125,000 in January 2006 and that plaintiff had made no child support payments since September 2004. The trial court averaged part the lump sum over the 17 month period before plaintiff received the settlement (back to the date plaintiff stopped paying child support) and averaged the remaining portion of the lump sum over the 12 month period following receipt of the settlement. On appeal, plaintiff argued that trial court erred in averaging the income in this way. The court of appeals affirmed the trial court, holding that the guidelines give trial judges the discretion to order a percentage of a non-recurring lump sum to be paid as support or to average the amount over a set time period and base a child support order on that monthly amount. A trial judge will be reversed only upon a showing that the ordered allocation of the lump sum was not the result of a reasoned decision.

**Devaney v. Miller, 662 S.E.2d 672 (N.C. App., July 1, 2008).**

- Changes necessary to support motion to modify should be determined from date of last modification.
- Motion to modify must contain allegations sufficient to show that if the facts alleged are proven to be true, modification would be appropriate. Dismissal of the pleding is appropriate if the motion does not contain sufficient allegations.
- A change in income of either parent alone is not sufficient to support modification.

Original child support order was entered in 1993. The amount of support was modified in 1996 and 2000. In 2005, the court changed terms relating to payment of college expenses and allocated certain medical expenses between the parties. In 2006, defendant requested modification of the amount of support by filing a motion to modify in which he alleged that the incomes of the parties had changed and listed several other circumstances that had occurred before 2005. Trial court dismissed the motion to modify, finding that the motion contained insufficient allegations to support a modification of support.

The court of appeals affirmed, first holding that a motion to dismiss a motion to modify support should be considered pursuant to the standard as a Rule 12(b)(6) motion to dismiss a pleading. The court held that while a motion to modify does not need to contain detailed factual

allegations, the motion must "be legally sufficient to satisfy the elements of at least some legally recognizable claim."

The court of appeals held that the trial court correctly determined that the motion in this case was not legally sufficient. Changes alleged that had occurred before the last order could not be considered. The court rejected plaintiff's argument that the 2005 order was not a modification because it dealt only with college and medical expenses and did not modify the entire child support obligation. The court of appeals held that as long as the last order was not a temporary order, it should be considered the existing order. Any subsequent request for change must be based on circumstances occurring since the time of the last permanent order.

The court of appeals also held that the allegation in the motion that the income of the parties had changed was insufficient to support a modification. According to the court of appeals, a change in income must be coupled with a significant change in the needs of the children, unless an obligor's income is substantially and involuntarily decreased. As the motion contained neither an allegation that the needs of the children had changed, nor an allegation that plaintiff had experienced a substantial involuntary reduction in income, dismissal of the motion was appropriate.

## Legislation

**S.L. 2008-12 (H 724). No Social Security Numbers on Child Support Orders.**
Legislation amends GS 50-13.4 to eliminate the requirement that child support orders contain the social security numbers of the parties, but requires the clerk of court to send the social security numbers to the Child Support Enforcement Office. Change effective October 1, 2008.

# Paternity
## Cases Decided Between May 20, 2008 and September 16, 2008
## Legislation Enacted 2008

**Guilford County ex .rel. Holt v. Puckett, 644 S.E.2d 362 (N.C. App., August 5, 2008).**

- Trial court erred in awarding attorney fees pursuant to child support statute GS 50-13.6.
- While trial court can award attorney fees pursuant to GS 6-21(10) in a paternity action, it was not equitable in this case for trial court to order mother of child to pay defendant's fees after paternity action was dismissed based upon results of blood tests excluding defendant as father of child.

County initiated child support and paternity action on behalf of Holt. Paternity test excluded defendant as father of child, so plaintiff filed a voluntary dismissal. Defendant requested attorney fees and trial court ordered Holt to pay defendant $750 pursuant to GS 50-13.6, the statute that allows an award of fees in a custody and support case. The court of appeals held that attorney fees arising out of a paternity action cannot be awarded pursuant to GS 50-13.6 but can be considered under GS 6-21. However, the court of appeals held that an award of fees against Holt in this situation was not equitable because she did not initiate the action and she was forced by law to cooperate with the County to establish paternity. The majority stated that it did not disagree that defendant was entitled to reimbursement for the legal fees he incurred. Rather, according to the majority of the court of appeals, the County should be required to pay rather than the child's mother. Dissent on this issue.

# Equitable Distribution
## Cases Decided Between May 20, 2008 and September 16, 2008
## Legislation Enacted 2008

**Street v. Street, 664 S.E.2d 69 (N.C. App., August 5, 2008).**

- Trial court erred in ruling that contract between parties could not be considered because it had not been raised as an affirmative defense.

Plaintiff filed for equitable distribution and then moved for summary judgment based upon the provisions of a contract entered into between the parties during the marriage. Trial court denied the motion and ruled that the contract could not be considered because the existence of such a contract is an affirmative defense that must be specifically pled according to Rule 8(c) of the Rules of Civil Procedure. On appeal, court of appeals held that the trial court should not have refused to consider the contract on the basis of Rule 8(c). The court held that the existence of the contract could not be considered an affirmative defense because defendant filed no counterclaim. Absent a claim against plaintiff, she could not be required to file any type of defense. [Opinion does state that defendant's answer requested both visitation with the parties' child and "such orders of equitable distribution as are appropriate"] Nevertheless the court of appeals held the contract was not a defense but was rather only "a piece of evidence to be considered in settling the action for equitable distribution." Case was remanded to the trial court.

# Alimony and Postseparation Support
## Cases Decided Between May 20, 2008 and September 16, 2008
## Legislation Enacted 2008

**Helms v. Helms, 661 S.E.2d 906 (N.C. App., June 17, 2008).**

- Trial court did not err in concluding plaintiff is a dependent spouse and defendant is a supporting spouse

Opinion of court of appeals is difficult to understand. Dissent argues that opinion is confused because trial court order is difficult to understand. Final result is that majority of panel at court of appeals affirmed trial court's determination that plaintiff is a dependent spouse and that defendant is a supporting spouse. Court of appeals rejected defendant's argument that trial court should have considered income plaintiff would receive in the future as the result of an equitable distribution that had already been entered by the time of the alimony decision.

**Brown v. Brown, -- N.C. App --, -- S.E.2d – (September 16, 2008)(Unpublished)**

- Trial court was not required to impute income to dependent spouse because she allows adult son to live in basement apartment in her home without paying rent.

Opinion is a very detailed review of alimony order entered by trial court. Court of appeals affirmed the trial court order awarding permanent alimony of $1500 per month plus health insurance coverage to dependent spouse. Main point of interest in holding addresses issue of adult child of parties living in home of dependent spouse. Supporting spouse argued income should be imputed to dependent spouse for the fair rental value of the basement apartment. Trial court did not impute income and court of appeals affirmed, holding that income cannot be imputed without showing bad faith. Court of appeals also rejected argument that one-half of dependent spouse's reasonable living expenses should be attributed to adult son. Court of appeals held there was no evidence that dependent spouse was claiming additional or increased expenses due to presence of the child in the home.

# Spousal Agreements
## Cases Decided Between May 20, 2008 and September 16, 2008
## Legislation Enacted 2008

**Premarital Agreement entered in California**

**Muchmore v. Trask, -- N.C. App., -- S.E.2d -- (September 16, 2008).**

- Waiver of alimony in premarital agreement executed in California was enforceable in North Carolina even though such waivers violated public policy in North Carolina at the time this contract was executed in 1986.
- Tearing up premarital agreement was not sufficient to rescind contract under California law.
- Trial court properly refused to apply estoppel to prohibit defendant from asserting contract as defense to equitable distribution after he destroyed physical copy of agreement where plaintiff failed to show she relied on that alleged rescission to her detriment.

Parties executed a premarital agreement in California in 1986. At that time, California had adopted the Uniform Premarital Agreement Act. That act allows premarital waiver of future spousal support in a properly executed premarital agreement. North Carolina adopted the Uniform Premarital Agreement Act in 1987.

Parties moved to North Carolina in 1995 and separated in 2005. Plaintiff filed complaint for alimony, equitable distribution, child custody and child support. Defendant raised premarital agreement in defense to alimony and equitable distribution. Plaintiff countered that the waiver of spousal support in the premarital agreement cannot be enforced in North Carolina because such waivers violated the public policy of North Carolina at the time the agreement was executed. The trial court agreed and held that the alimony waiver is not enforceable. On appeal, the court of appeals reversed the trial judge on that issue. According to the court of appeals, the waiver of alimony is enforceable because the agreement was valid at the time of execution under the law of the state in which the agreement was executed, and because enforcement would not violate the present public policy in North Carolina as North Carolina adopted the Uniform Act effective July 1, 1987. The court of appeals distinguished the situation where a similar agreement was entered in North Carolina before the effective date of the Uniform Act. In that situation, according to the court of appeals, a waiver of alimony is not enforceable at the present time because it was invalid at the time of execution.

The trial court enforced the California agreement with respect to property issues despite plaintiff's allegation that the parties rescinded the agreement in 1994 when defendant tore up the contract. Court of appeals upheld the trial court's decision. According to the court of appeals, the California Uniform Premarital Agreement Act provides that such contracts can be rescinded only in writing (North Carolina's statute provides the same). The trial court also rejected plaintiff's argument that because defendant represented to plaintiff that the contract had been rescinded by his destruction of the physical copy, he should be stopped from asserting the contract as a defense to equitable distribution. The court of appeals affirmed the trial court, holding plaintiff did not prove she relied to her detriment on defendant's actions. Estoppel requires detrimental reliance on the part of the party asking that it be applied, and the court of appeals held that plaintiff produced no evidence to show she did anything as a result of the alleged rescission that she would not have done otherwise.

# Divorce and Annulment
## Cases Decided Between May 20, 2008 and September 16, 2008
## Legislation Enacted 2008

**Hawkins ex. rel. Thompson v. Hawkins, 664 S.E.2d 616 (N.C. App., August 19, 2008).**

Trial court erred in denying Rule 60(b) motion to set aside annulment judgment. Annulment judgment entered by default was void *ab initio*.

Guardian brought action to annul marriage between incompetent ward and defendant. Complaint alleged that the incompetent was incompetent at the time the marriage took place. Defendant filed answer denying allegations but thereafter failed to respond to discovery requests. As a sanction pursuant to Rule 37 of the Rules of Civil Procedure, the trial judge struck defendant's answer and entered a default judgment annulling the marriage. Defendant did not appeal the default judgment but later filed a motion pursuant to Rule 60(b) to set aside the annulment on the basis that it was void. Court of appeals agreed that annulments cannot be entered by default because GS 50-10 requires that the trial court actually find facts necessary to support an annulment judgment. That statute further provides that all allegations in a complaint for an annulment are deemed denied. According to the court of appeals, the discovery rules do not "trump" the very specific rules regarding annulment and divorce judgments.

# Miscellaneous Civil Law
## Cases Decided Between May 20, 2008 and September 16, 2008
## Legislation Enacted 2008

### Civil No-Contact Orders: Chapter 50C

**Ramsey and Knox v. Harman, 661 S.E.2d 924 (N.C. App., June 17, 2008).**

- In order to establish stalking as a basis for entry of a civil no-contact order pursuant to GS Chapter 50C, trial court must find defendant had specific intent to place plaintiff in fear for his or her physical safety or specific intent to cause plaintiff substantial emotional distress by placing plaintiff in fear of physical harm or continued harassment.
- If plaintiff alleges that defendant intended to cause substantial emotional distress, plaintiff also must show he or she actually suffered severe emotional distress.

Plaintiff filed a 50C action, alleging defendant engaged in stalking by harassing plaintiff and her minor daughter. The harassment involved posting derogatory comments about plaintiff and her daughter on defendant's website. Trial court granted the civil no-contact order and defendant appealed. The court of appeals held that 50C grants relief to persons who are the victims of stalking, as that term is defined in GS 50C. Stalking includes harassment if it is done with the specific intent to place a victim in fear of physical harm, or with the specific intent to cause a victim substantial emotional distress by placing the victim in hear of physical harm or fear of continued harassment. If the claim is based on defendant's intent to cause fear of physical harm or continued harassment, plaintiff also must prove plaintiff actually suffered substantial emotional distress. According to the court of appeals, nothing in the record of this case shows that plaintiff or the minor child actually suffered emotional distress.

### Criminal Contempt

**In re: Matter of Raymond Marshall, 662 S.E.2d 5 (N.C. App., June 17, 2008)**

- Trial court judge was required to set direct criminal contempt hearing before another judge, even though alleged contemnor made no request that the trial judge recuse himself, because alleged contemptuous acts so involved the trial judge that his objectivity could reasonable be questioned.

Trial judge held attorney in direct criminal contempt for acts occurring before a jury in a criminal case. On appeal, attorney argued judge should have set contempt hearing on before another judge because the record showed the attorney and the judge had a history of conflict both before and during the jury trial. State argued on appeal that the attorney was barred from raising the issue of recusal on appeal because he did not request that the trial judge recuse himself before the contempt hearing. The court of appeals held that GS 5A-15A requires that a judge set the criminal contempt hearing before another judge if the "criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned." The court of appeals does not address the fact that GS 5A-15A references plenary criminal contempt proceedings rather than direct criminal contempt, but seems to assume the plenary rules apply

equally to direct contempt proceedings. The court of appeals held that this statute puts the burden on the trial judge to consider recusal even when the alleged contemnor makes no recusal request. Because the history of conflict between the judge and the attorney in this situation established that the trial judge's objectivity could reasonably be questioned, the trial judge erred by not setting the hearing before another judge.

## Legislation

### Service of Process

**S.L. 2008-36 (H 2287). Allow use of electronic receipts for service of process by a designated delivery service.**

Legislation amends GS 1A-1, Rule 4 to provide that when service is made by a designated delivery service, the receipt provided by the service can be an electronic or facsimile receipt. However, amendment specifies that the Rule 4 does not allow use of electronic mailing for service of process. Amendment applies to receipts created on or after October 1, 2008.

### Family Financial Mediation

**S.L. 2008-194 (H 545). To amend sanctions provisions.**

Legislation amends GS 7A-38.4A to clarify that court can use contempt in addition to monetary sanctions in response to a party's failure to attend mediation or to pay mediator fee. Also expands monetary sanctions to cover situations where party fails to pay mediator fee. Party seeking sanctions must file a written notice and serve on all parties, but court is allowed to initiate proceedings on own motion by entry of a show cause order. Any order imposing contempt or sanctions must contain findings of fact and conclusions of law. Amendment is effective October 1, 2008.

### Crime of Violation of Civil Domestic Violence Protective Order

**S.L. 2008-93 (H 44). Increase punishment for repeat violation of protective order.**

Legislation aments GS 50B-4.1 to provide that violation of a domestic violence protective order is a Class H felony if defendant has two, rather than three, previous convictions of offenses under Chapter 50B. Applies to offenses committed on or after October 1, 2008, but offenses committed before that date count in determining number of previous offenses.

### New Judges

**S.L. 2008-107 (H 2438). Appropriations Bill**

Section 14.14 of the budget includes 3 new district court judges, 1 each in Districts 10(Wake County), 11(Harnett, Johnston and Lee), and 26(Mecklenburg). All three are effective January 15, 2009.

### Increased Filing Cost for Divorce

**S.L. 2008-107 (H 2438). Appropriations Bill**

Amends GS 7A-305(a2) to increase by $20 (from $55 to $75) the costs assessed against person filing an action for absolute divorce with increase going to the Domestic Violence Center Fund established pursuant to GS 50B-9. Increase effective July 20, 2008.