Family Law Case Update CHERYL HOWELL OCTOBER 2011	
3 rd Party Custody	
 No best interest test until you conclude parent has waived constitutional right to exclusive custody Except: you can enter temporary orders * Smith v. Barbour, 154 N.C. App. 402 (2002) 	
• Don't try the issue too early in the case • See Best v. Gallup	
	<u> </u>
Waiver	
• Jones v. Russell and Jones (unpublished)	
○ Grandparents v. unwed father and mother * Mom consented to grandparent custody	
 No waiver where father did not know he was father Cf. TPR/adoption cases ?????? 	

Waiver
<u> </u>
Powers v. Wagner
 Leaving child with grandparents for 15 months not sufficient to prove waiver without additional findings about mom's intent
o Intent is key according to NC Supreme Court
 No waiver if parent intended relinquishment to be temporary Price v. Howard Boseman v. Jarrell
Cf. Best v. Gallup
O
Mom permanently ceded exclusive decision-making
authority and created family unit
• Proved by evidence that: o They decided together to adopt child
They cared for and supported child together before and after adoption (6 years)
Adoptive parent 'publically acknowledged' other as dad
No mention of intent??
Custody Mediation
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• S.I. 2011 411
• S.L. 2011-411
 Waiver of mediation based on distance now discretionary rather than mandatory
o Effective September 15, 2011

Child Support • No 'credit' for dad's health insurance required when child already covered by mom's policy and dad does not pay extra to cover child o Clayton v. Hamilton \bullet Agreements for automatic increases in support violate public policy o Wilson v. Wilson **Setting Aside Paternity Judgment** • New Legislation: S.L. 2011-328 • Applies to motions or claims for relief filed after January 1, 2012 • Two separate sections to new law: $\circ \ Setting \ aside \ paternity \ judgments \ and \ acknowledgements \\$ $\circ \ Setting \ a side \ existing \ child \ support \ orders$ Paternity Judgments and Acknowledgements • Without regard to time limitations in Rule 60(b), judgment or affidavit can be set aside if: $\circ\,$ Fraud, duress, mutual mistake or excusable neglect, AND

 $\circ\,$ Genetic tests prove he is not the father

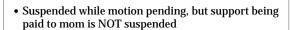
Terminating	Child	Suppor
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- Request to set aside obligation must be filed within one year of date party knew or should have known he was not the father
- Except:
 - o Time tolled during military deployment, and
 - $\circ\,$ Everyone with a claim can file before January 1, 2013

Child Support Obligation Ends if.......

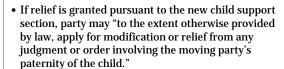
- • Paternity judgment or Acknowledgement was set aside under new law, OR
- Party shows:
 - o Genetic testing disproving paternity, AND
 - $\circ\,$ No previous public acknowledgement of paternity
 - ★ (or he only acknowledged because he believed it was true)

Support Obligation



- Arrears are not affected
 - $\circ\,$ If fraud, can order mom to repay amounts received since motion filed

Broader Opportunity for Relief??



o New GS 50-13.13(h)

Equitable Distribution



- Dismissal of claims with prejudice for failure to prosecute requires consideration of 'lesser sanctions"
 - o McKoy v. McKoy
 - o Ross v. Ross
 - o Church v. Dellinger
 - **▼** unpublished Aug. 2011
 - $\boldsymbol{\star}$ Motions in custody and support case

Romulus v. Romulus

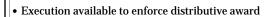


- Postseparation appreciation of dental practice
 - \circ Appreciation is divisible property unless shown to be caused by actions of spouse
 - \circ Showing spouse worked business is not enough to rebut presumption that appreciation is divisible
 - ▼ Evidence must show effort caused the increased value

Romulus v. Romulus

- Separate property titled as tenants by the entirety
 - McLean presumption: separate property was gifted to marriage and became marital property when title was transferred to spouses as tenants by the entirety
 - o Presumption can be rebutted by clear, cogent and convincing evidence that transfer was not intended to be a gift
 - $\circ\,$ Testimony of donor spouse is competent evidence of intent
 - **▼** Judge assigns weight afforded that testimony

Romulus v. Romulus



 If ED judgment is appealed, trial court loses jurisdiction to determine arrears owed on distributive award ordered to be paid in installments

Alimony

• Alimony is terminated by cohabitation

- \circ Terminates whether alimony obligation is imposed by consent judgment, incorporated agreement, or judgment entered after litigation
- \circ Parties cannot contract that alimony in a court order will not terminate on cohabitation
 - × Underwood

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Underwood v. Underwood

- If payments are really property settlement instead of support, they are not true alimony even if called alimony
- Payments are property settlement if given as reciprocal consideration for property provisions
- Presumption is that payments are *not* reciprocal consideration for property provisions
- "Integration clause" alone is not sufficient to rebut presumption

Underwood v. Underwood

- Payments in consent order clearly were alimony where order:
- \circ "Methodically enumerates" elements required for alimony pursuant to GS 50-16.3A
- o Finds defendant is dependent spouse and plaintiff is supporting
- o Refers to payments as "alimony" at least 16 times
- $\circ\;$ Designates one section of order as 'Alimony' and designates a separate section 'Property Settlement'

Role of Marital Misconduct

- PSS
- $\circ\,$ Only considered if raised first by supporting spouse
- o Weight always within discretion of judge
- Alimony
- o Generally a factor with weight within discretion of judge
- o But, illicit sexual behavior before date of separation:
 - * By dependent spouse only: no alimony
 - ▶ By supporting spouse only: must pay alimony
 ▶ By both: weight within discretion of judge
- · Definition of 'illicit sexual behavior'
 - o See Romulus v. Romulus