

Family Law Update

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Child Custody

Third Party Custody

- Court cannot order custody rights for non-parent third party over objection of parent without concluding parent has waived constitutional right to custody
- But once custody order grants custody rights to non-parent, parent has no constitutional preference at modification hearing – even if original order did not conclude parent had waived right to custody
 - *Warner v. Brickhouse*, 189 NC App 445 (2008)
 - *Brewer v. Brewer*, 139 NC App 222 (2000)
 - *Bivens v. Cottle*, 120 NC App 467 (1995)

Cf. Weideman v. Shelton

- Weideman (grandmother) and Shelton(mom) entered consent order granting custody to Weideman
- Wise filed motion to intervene and a complaint for custody
- Trial court ruled mom had not waived her constitutional rights because she did not intend for Wiedeman to have permanent custody
- Court of appeals affirmed

Parenting Coordinator

- PC may be appointed at any time during a custody proceeding by consent
- Absent consent, the court can appoint upon the entry of a temporary (not *ex parte*) or final custody order if the court finds:
 - The case is "high-conflict" as defined in GS 50-90(1);
 - The appointment of a PC is in best interest of child; and
 - Parties are able to pay the PC

"High Conflict"

*A [Chapter 50] child custody action .. where the parties demonstrate an ongoing pattern of any of the following:

- Excessive litigation
- Anger and distrust
- Verbal abuse
- Physical aggression or threats of physical aggression
- Difficulty communicating about and cooperating in the care of the minor children, or
- Conditions that in the discretion of the court warrant the appointment of a parenting coordinator.

Authority of PC

- The authority of a parenting coordinator **shall be specified in the court order appointing the parenting coordinator** and **shall be limited** to matters that will aid the parties:

- (1) Identify disputed issues
- (2) Reduce misunderstandings
- (3) Clarify priorities
- (4) Explore possibilities for compromise
- (5) Develop methods of collaboration in parenting
- (6) Comply with the court's order of custody, visitation, or guardianship.

GS 50-92

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Authority of PC

- In addition:

- the court may authorize a parenting coordinator to decide issues regarding the implementation of the parenting plan that are not specifically governed by the court order and which the parties are unable to resolve.
- The parties must comply with the parenting coordinator's decision until the court reviews the decision. The parenting coordinator, any party, or the attorney for any party may request an expedited hearing to review a parenting coordinator's decision.
- GS 90-92

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Nguyen v. Heller-Nguyen

"If a dispute arises concerning one of the following checked areas, the Parenting Coordinator has the authority to make minor changes to the custody/visitation order or to make decisions to resolve a dispute if the issue was not addressed in the custody/visitation order:

- A. Transition time/pickup/delivery
- B. Sharing of vacations and holidays
- C. Method of pick up and delivery
- D. Transportation to and from visitation"

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Nguyen v. Heller-Nguyen

- This was proper 'exercise of discretion' pursuant to GS 50-92(b)
 - *Cf. Davis v. Davis*, 229 NC App 494(2013)(trial court cannot 'tweak' custody order without motion to modify and substantial change)
- But trial court erred in offsetting dad's child support arrears by amounts he paid towards mom's share of PC fees
 - Vested child support arrears cannot be modified. GS 50-13.10

Authority of PC

(a)The parenting coordinator shall promptly provide written notification to the court, the parties, and attorneys for the parties if the parenting coordinator makes any of the following determinations:

- (1) The existing custody order is not in the best interests of the child.
- (2) The parenting coordinator is not qualified to address or resolve certain issues in the case.

(b)The court **shall schedule a hearing and review the matter** no later than two weeks following receipt of the report.

GS 90-97

Tankala v. Pithavadian

- PC filed motion pursuant to GS 90-97 asking court to order:
 - Parents to comply with therapist's recommendation that family attend 'divorce camp'
 - Parents to pay \$9,000 cost of divorce camp
 - Dad's visitation to be exercised in the homes of relatives
- Trial court granted motion
- Court of appeals affirmed, holding provisions do not "modify custody order" but rather provide specificity "within the scope of the original order."

Modification

- *Hatcher v. Matthews*
 - No modification of final custody order entered in another state without changed circumstances
 - Determine whether custody order entered in another state is temporary or final by applying N.C. law ??
 - Order is final if it:
 - Is not entered 'without prejudice' to the parties;
 - Does not set a clear reconvening date; and
 - Resolves all issues relating to physical and legal custody.

Venue for Custody

- GS 50-13.5(f)
 - Proper venue is where the child or the parents reside or where the child is physically present
- Court cannot change venue unless requested by a party
 - *Zetino-Cruz v. Benitz-Zetino*, NC App (Aug. 16, 2016)
- Request based on improper venue must be raised before or with Answer or it is waived
 - Rule 12(h), Rules of Civil Procedure
- Request based on convenience of parties cannot be made until after time for Answer
 - GS 1-83(2); *McCullough v. Branch Banking and Trust*, 136 NC App 340 (2000)

Ordering Mental Health Treatment

- Assessment and treatment probably cannot be ordered as part of a final custody order
 - *Jones v. Patience*, 121 NC App 434 (1996)
 - *Cf. Maxwell v. Maxwell*, 212 NC App 614 (2011)
- Order was not a final order where it ordered reviews 30, 60 and 90 days following entry to assess parent's progress in treatment
 - *Lueallen v. Lueallen*, NC App (Sept. 6, 2016)

Child Support

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Rackley v. Loggins
784 SE2d 620 (2016)

- Trial court has no subject matter jurisdiction to act in child support (or custody) case after final judgment unless someone files a motion to modify
- Because it is subject matter jurisdiction, it is "immaterial whether the [modification] judgment was or was not entered by consent."

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Rackley v. Loggins

- Stay issued by Supreme Court
 - 785 SE2d 90 (April 16, 2016)
- Petition for discretionary review granted
 - September 23, 2016

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Domestic Violence

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Herndon v. Herdon

- Supreme Court reversed Court of Appeals
 - COA, 777 SE2d 141 (2015)
- Witness waived 5th Amendment right by failing to invoke the right
- Witness does not waive 5th Amendment right simply by voluntarily testifying
- Witness does waive 5th Amendment right regarding matters covered by the voluntary testimony

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Personal Jurisdiction

- *In personam* proceedings need 3 things:
 - Service of process
 - Long-arm statute authorizing the exercise of jurisdiction; and
 - Due Process 'minimum contacts'
- Objection to personal jurisdiction is waived if not raised

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Mannise v. Harrell

- Chapter 50B proceedings are *in personam* proceedings
 - Too many collateral consequences to be *in rem*
- When defendant raises objection, plaintiff has burden to produce **evidence** to forecast minimum contacts

Annulment

- *In re Estate of Peacock*
 - Marriage is not void or voidable due the failure to obtain a marriage license
 - Marriage is not void or voidable because parties believed the marriage was not 'legal' when performed due to the lack of a license

Entry of Judgment

- Orally directing is not entry of judgment
- Judgment is not entered (not effective, not enforceable) until reduced to writing, signed and filed with the clerk
 - Rule 58 Rules of Civil Procedure
- Clerk had no authority to sign deed after being orally directed by judge attempting to use Rule 70 authority
 - *Dabbondanza v. Hansley*, NC App (August 16, 2016)

Nunc pro tunc

- *Nunc pro tunc* can be used to back date a judgment **only when**:
 - Judgment/order actually was entered on the date in the past;
 - Record doesn't reflect entry due to clerical error, and
 - No one will be prejudiced by back dating the judgment/order
 - *Whitworth v. Whitworth*, 222 NC App 771 (2012)
- *Nunc pro tunc* cannot be used in a civil case unless the order/judgment **actually was reduced to writing and signed by the court on the date in the past**
 - *Dabbondanza*

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Back to Custody.....

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North Carolina Custody Order

- GS 50-13.3
 - Custody orders are enforceable by:
 - Contempt (GS Chapter 5A), or
 - Injunction (GS Chapter 1 and Rule 65)
 - Neither expressly authorize orders for law enforcement involvement

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In re Bhatti, 98 NC App 493 (1990)

- “While the trial court could resort to traditional contempt proceedings, we are unaware of any statutory basis for invoking the participation of law enforcement officers in producing the children. Accordingly, this portion of the trial court’s order is vacated.”

Chick, 164 NC App 444 (2004)

- “Provisions in the UCCJEA clearly approve of the use of law enforcement officials under certain circumstances. In the absence of those circumstances, however, the trial court remains limited ... to traditional contempt proceedings.”
- “Because the circumstances allowing for the use of law enforcement officials are not present in this case and because we remain “unaware of any statutory basis for invoking the participation of law enforcement officers in producing the children[.]” we vacate the portion of the North Carolina court’s order authorizing the use of law enforcement officials.”

GS 50A-311 Warrant

- Can be issued in an expedited enforcement proceeding initiated pursuant to GS 50A-308.
- Petition for expedited enforcement of child custody determination can request Warrant to Take Physical Custody of Child
- Court can issue warrant when court concludes, based on actual testimony, child is **“immediately likely to suffer serious physical harm or be removed from the state.”**

50A-311 Warrant

- (c) A warrant to take physical custody of a child must:
 - (1) Recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based;
 - (2) Direct law enforcement officers to take physical custody of the child immediately; and
 - (3) Provide for the placement of the child pending final relief.
- (d) The respondent must be served with the petition, warrant, and order immediately after the child is taken into physical custody.

50A-311 Warrant

- (e) A warrant to take physical custody of a child is enforceable throughout this State..... it may authorize law enforcement officers to enter private property to take physical custody of the child [and]...the court may authorize law enforcement officers to make a forcible entry at any hour.

North Carolina Custody Order

- Can we use UCCJEA Part 3 ???
 - Disagreement over whether provisions are applicable to enforcement of all custody determinations or only "foreign" orders
 - Express language of statute does not limit its application to foreign orders
 - *But* context and Official Comments suggest Part 3 provisions apply only to interstate situations

Inherent Authority

- *Bhatti* and *Chick* indicate there is no inherent authority for court to order law enforcement involvement (but neither case discusses it)
- Inherent authority cannot be used in areas where legislature has acted.
 - See *State v. Gravette*, 327 NC 114 (1990); *In re Wharton*, 305 NC 565 (1982)
- Because statute specifies remedy is contempt, probably cannot use inherent authority to support order for law enforcement involvement
 - **At least absent imminent threat to safety of child**

Alimony

Dependent

- Alimony is determined by the actual income of the parties **at the time of the alimony hearing**
 - *Burger v. Burger*, NC App (August 16, 2016)
 - Income can be imputed upon showing of bad faith
 - Amount imputed must be based on evidence
- Dependency is established by showing insufficient income **at the time of the hearing** to meet reasonable needs or to meet reasonable needs into the future
 - Reasonableness of expenses is determined by accustomed standard of living at the time of separation
 - See *Kowalick*, 129 NC App 781 (1998)

Equitable Distribution

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Family Law Arbitration Act

- "It is the policy of this State to allow, by agreement of all parties, the arbitration of all issues arising from a marital separation or divorce, except for the divorce itself, while preserving a right of modification based on substantial change of circumstances related to alimony, child custody, and child support."
 - **GS 50-41**

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Family Law Arbitration

- "*During, or after marriage*, parties may agree in writing to submit to arbitration any controversy, **except for the divorce itself**, arising out of the marital relationship."
 - **gs 50-42**

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Family Law Arbitration

- *Before marriage*, parties may agree in writing to submit to arbitration any controversy, **except for child support, child custody, or the divorce itself**, arising out of the marital relationship.
 - GS 50-42

Family Law Arbitration

- The arbitration agreement is “enforceable, and irrevocable except with both parties’ consent.”
 - GS 50-42
- If one party refuses to arbitrate, the court “shall order the parties to proceed with arbitration.”
 - GS 50-43

Court’s Role

- Compel arbitration or stay arbitration
 - GS 50-43
- Order interim relief before arbitrators appointed or when arbitrators unavailable
 - GS 50-44
- Appoint arbitrators in limited circumstances
 - GS 50-45
- Help arbitrators obtain discovery or take evidence
 - GS 50-49
- Confirm final award
 - GS 50-53

Court's Role

- Vacate, modify or correct award
 - GS 50-54, GS 50-55
- Enter judgment to reflect award
 - GS 50-57
- Modify alimony, custody or child support awards based on changed circumstances
 - GS 50-56

The Agreement Controls.....

- *Eisenberg v. Hammond*, NC App (July 5, 2016)
 - Arbitrator violated terms of arbitration agreement and made decisions contrary to law by allowing witness to testify outside of presence of the parties
 - But – agreement required objection to be made in writing and filed with arbitrator
 - Party waived all objection by failing to comply with writing/filing requirement

Imposing Trusts

- Both legal and equitable ownership interests in property are subject to equitable distribution
- "In the course of an equitable distribution proceeding, equitable interests may be recognized and wrested from the hands of the legal title holder by imposition of a constructive [or resulting] trust."
 - *Upchurch v. Upchurch*, 128 NC App 461 (1998)
- Legal title holder does not have the right to jury trial
 - *Sharp v. Sharp*, 351 NC 37 (1999)

Resulting Trust

- Arises from **presumed intent of the parties at the time title is taken** by one under facts and circumstances showing the beneficial interest in the real or personal property is in another.
- Often imposed where title is taken by one but purchase price is paid by another; intent is that person who paid will have ownership interest
 - *Tuwamo v. Tuwamo*, NC App (July 19, 2016)
 - Trust only imposed only if all money paid at time title is taken
 - *Cf. Gragg v. Gragg*, 94 NC App 134 (1989)
 - Resulting trust where father held title but married couple paid mortgage

Constructive Trust

- Much broader equitable remedy
- Imposed by court to prevent unjust enrichment by legal title holder when he or she acquired title through fraud, breach of duty, or some other circumstance making it inequitable to retain it.
 - *Upchurch, Glaspy v. Glaspy*, 143 NC App 435 (2001)

Procedure

- Legal title holder must be made a party to the ED for limited purpose of deciding whether to impose a trust
- Party seeking trust files motion to join legal title holder
- Unless waived, there must be a hearing on motion to join
- If joined, legal title holder has right to participate in litigation of trust issue
- See *Tanner v. Tanner*, NC App (August 2, 2016)

Distributing Real Property

- Court has authority to transfer title to real or personal property
- ED judgment can be a conveyance of title to real property if it describes land with sufficient definiteness and certainty so that it may be located and distinguished from other land
 - *Wade v. Wade*, 72 NC App 372 (1985)
 - For example of sufficient language, see *Ellis v. Ellis*, 68 NC App 634
- Order for party to execute deed is enforceable but is **not a transfer of title**

Real Property

- "If no lis pendens is filed, any person "whose conveyance or encumbrance is recorded, or whose interest is obtained by descent, prior to the filing of the lis pendens, shall take the property free from any claim resulting from the equitable distribution proceeding."
- GS 50-20(h)

Dabbondanza v. Hansley

- ED judgment does not transfer title unless it is filed with Register of Deeds
- When party fails to comply with order to execute deed, trial court can use Rule 70 to order another person to execute deed
 - Order not entered until written, signed and filed
- Judgment lien against husband that arose **after** ED judgment **but before title was conveyed** to wife attached to the real property

Two unpublished cases...

- Nothing new but important to remember
- *Shope v. Pennington*
 - Court has discretion to distribute 99% of marital and divisible estate to one party
 - Once court concludes, based on at least one distribution factor, that an equal division is not equitable, division only reviewed for abuse of discretion
- *Uhlig v. Civitarese*
 - Conclusion that property is marital must be supported with findings of fact to show property was acquired by either or both during the marriage, before the date of separation and owned on the date of separation
 - Marital property presumption does not arise until that showing is made

“Fixing” [Q]DROs

- Court has no authority to amend an ED judgment
 - *White v. White*, 152 NC App 588 (2002).
- But court can amend a distribution order to ‘effectuate’ the original ED judgment
 - See *White v. White*, 152 NC App 588 (2002), *aff’d per curiam*, 357 NC 153 (2003); and
 - *Hillard v. Hillard*, 223 NC App 20 (2012), and
 - *Harris v. Harris*, 162 NC App 511 (2004)
