Family Law Update
Cases Decided Between
October 1, 2011 and June 5, 2012

Cheryl Howell
School of Government
UNC Chapel Hill
howell@sog.unc.edu

Court opinions can be found on the website of the N.C. Administrative Office of the Courts: www.nccourts.org

Child Support

Cases Decided Between October 1, 2011 and June 5, 2012

Imputing Income

- Trial court order erred in modifying father's child support obligation based on his substantial reduction in income when he quit his job to follow his good faith religious conviction without considering the needs of the children.
- Parent seeking reduction in support has burden of proving reduction was not the result of deliberate disregard of the support obligation.

Andrews v. Andrews, 719 S.E.2d 128 (N.C. App., November 15, 2011). Father's income at time support order was entered was $109,000. Several years after the order was entered, he accepted a new job with a salary of $172,000. One year later he quit that job, telling his employer that he was leaving "to follow Jesus Christ". He later became senior pastor for a newly organized church earning a salary of $52,800. He filed a motion to modify his child support and the trial court modified the order to reflect his current income after finding there was no evidence of bad faith to support imputing income. The court of appeals disagreed and reversed the trial court. The court of appeals held that even with a lack of bad faith, income can be imputed to a parent who "acts in deliberate disregard" of the duty to support children or who voluntarily reduces income "without giving consideration to how he would meet his child support obligation." The court of appeals noted that father admitted during the modification hearing that he gave no consideration to the child support obligation when he quit his job. The court of appeals also held that a party seeking the reduction in child support bears the burden of proving the reduction in income was not the result of bad faith. The court also cited its earlier decision in *Shipman v. Shipman*, 693 SE2d 240 (NC App 2010), where the court concluded that a voluntary reduction in income, even if based on sincerely-held religious beliefs, cannot excuse a parent from complying with a valid child support order.

Modification; imputing income

- Trial court did not err in denying father's motion to modify support based on the 3 year/15% change presumption where trial court determined that change was result of father's bad faith disregard of the welfare of the children.
- While there is a presumption of substantial change when a child support order is at least 3 years old and application of the guidelines would result in at least a 15% change in child support, this presumption does not prohibit a court from imputing income to a parent who is depressing income in bad faith.

Johnston Cty on behalf of Bugge v. Bugge, 722 S.E.2d 512 (N.C. App., February 7, 2012). Father filed motion to modify his child support obligation based on fact that existing order was more than 3 years old and his income had been reduced to the extent that application of the guidelines would result in at least a 15% change in the support amount. When the trial court denied his motion, he appealed to the court of appeals. The court of appeals affirmed the trial court, concluding that the trial court properly found there had been no substantial change in circumstances after concluding that father had deliberately depressed his income by moving to Florida to take a lower paying job "without regard to the welfare of the children." The court of

appeals rejected father's argument that the trial court was required to modify because of the 3 year/15% change presumption found in the child support guidelines. While acknowledging the presumption, the court of appeals held that this presumption does not preclude the trial court from imputing income to a parent who is acting in bad faith.

Service of Process in another state

- Rule 4 specifies that service of process in another state may be made by any person over the age of 21 who is not a party to the action, or anyone authorized to serve process under the law of the state where service is accomplished.
- While service can be made by anyone authorized under the law of the state where served, North Carolina law controlled to determine whether service was appropriate.
- Service in Virginia was appropriate when made by a private process server over the age of 18 because Virginia law allows any person over the age of 18 to act as a process server.

New Hanover County Child Support Enforcement obo Beatty v. Greenfield, 723 S.E.2d 790 (N.C. App., March 20, 2012). Plaintiff filed action for child support and paternity establishment. Defendant was served in Virginia by private process server. Defendant filed motion to dismiss alleging lack of appropriate service of process. The trial court denied the motion and the court of appeals affirmed. The court of appeals first noted that a trial court is not required to make findings of fact on a motion to dismiss unless a party specifically requests findings. If no findings are made by the trial court, the court of appeals presumes the trial court made appropriate findings to support the order entered. The court of appeals held that service was accomplished pursuant to Rule 4(a) and that proof of service was in accordance with GS 1-75.10. Rule 4 specifies that service may be made out of state either 1) by any person older than 21 and not a party to the action, or 2) by a person authorized to serve process under the laws of the state wherein service is made. In this case, the affidavit of service stated that the private server was "a person over the age of 18." Because the affidavit did not show the server was a person over the age of 21, service had to be made by someone authorized by Virginia law. The court of appeals held that Virginia allows service to be made by anyone over the age of 18 who is not a party to the action. In addition, the court of appeals held that the affidavit of service filed by the server met the requirements of GS 1-75.10 and therefore was sufficient. The court of appeals rejected defendant's argument that service was ineffective because the proof of service did not comply with the law of Virginia, holding that North Carolina rules apply to service even when service is accomplished in another state. The court of appeals stated "[t]he rules governing proof of service are distinct from the qualifications of a process server. When service is made under the law of another state, North Carolina's proof of service statute still controls."

Child Custody
Cases Decided Between October 1, 2011 and June 5, 2012

Modification; attorney fees

- When initial custody order is a consent order containing no findings of fact, trial court considering modification must take evidence and make findings of fact regarding circumstances affecting the welfare of the minor child at the time the initial order was entered.
- Once trial court concludes there has been a substantial change in circumstances, the trial court must enter a new custody order based on the best interest of the child at the time of modification. Trial court is not limited to modifying the order as requested by the party filing the motion to modify.
- Trial court did not have jurisdiction to enter award of attorney fees after father filed notice of appeal of the custody and child support judgment with the court of appeals.

Balawejder v. Balawejder, 721 S.E.2d 679 (N.C. App., October 18, 2011). Father filed a motion to modify custody order initially entered by consent of the parties. On appeal, he argued the trial court erred by considering evidence of circumstances before the entry of the initial order, contending trial courts are limited to considering only evidence of changes since the entry of the order. The court of appeals disagreed, holding that when the initial order is a consent order with no findings of fact, the trial court must "look back at the facts surrounding the best interest of the child at the time the [initial order] was entered and make appropriate findings in order to have a base line before it can determine if there had been a substantial and material change in circumstances that would warrant modification." The court of appeals also rejected father's argument that the trial court erred because "none of the trial court's modifications were contemplated by the [father] at the time he filed his motion to modify." The court of appeals held that the once the trial court finds a substantial change, the court applies the best interest to determine how to modify the order. The court is not bound by specific requests of the parties. While the issue was not raised by the parties on appeal, the court of appeals vacated the attorney fee award entered in favor of mother by the trial court. Father appealed the trial court custody order on July 13, 2010. The trial court entered the attorney fee order in October 2010. The court of appeals held that the appeal divested the trial court of jurisdiction to enter the attorney fee order, even though the appealed custody order had "reserved the issue of attorney fees for later hearing." The trial court must wait until the conclusion of the appeal to determine attorney fee issue.

Modification; time limits on presentation of evidence

- Trial court has authority pursuant to GS 8C-1, Rule 611(a) of the North Carolina Rules of Evidence to place reasonable time limits on presentation of evidence.
- Trial court had authority pursuant to GS 8C-1, Rule 403 to refuse to read all 562 email correspondences introduced by defendant.
- Trial court order clearly established how parties' inability to communicate and make joint decisions affected the welfare of the minor children and therefor appropriately supported the conclusion there had been a substantial change in circumstances.

Wolgin v. Wolgin, 719 S.E.2d 196 (N.C. App., December 6, 2011). Custody order granted parents joint legal custody with primary physical to mom and visitation to dad. At the time the order was entered, both parties lived in Durham County. Subsequently, mom remarried and moved to Wake County. She changed the children's school without consulting father. Father filed a motion to modify custody, claiming that the move and the inability of the parents to communicate and make joint decisions regarding the children constituted a change in circumstances sufficient to justify modifying custody to give him primary physical custody. The trial court modified custody and mom appealed.

Mom first argued that the trial court erred by limiting the presentation of evidence to two days. The court of appeals held there was no error where the trial court did not impose arbitrary time limits. In this case, the trial court discussed the time limit with the parties during the pretrial conference and both sides stated two days would be sufficient. In addition, the trial court made several references to the time limits during the trial and defendant made no objection. According to the court of appeals, Rule 601 of the Rules of Evidence allows a trial court to impose reasonable limitations on the presentation of evidence. Similarly, the court of appeals held that the trial court did not err in refusing to read all 562 email correspondences introduced into evidence by defendant. Instead, the trial court agreed to give the emails "due consideration" and "ascertain the tone and tenor by looking a representative portion of the emails." The court of appeals held that Rule 403 of the Rules of Evidence allows a trial judge to limit the presentation and consideration of cumulative evidence.

The court of appeals also rejected mom's claim that the trial court order failed to establish how the change in circumstances identified by father affected the welfare of the minor children. According to the court of appeals, the modification order established that the change in schools was detrimental to one child because it interrupted progress being made by the Durham teachers in addressing the child's social interaction problems. In addition, mom had stopped the child's therapy with a psychologist who had been agreed upon by the parties. Further, when mom moved the children, she changed most of their extracurricular activities, making it difficult for dad to participate in those activities. Finally, the court found that the children were affected by the fact that the inability of the parents to cooperate meant mom generally made all decisions regarding the religious activities of the children, and mom did not ensure the children regularly participated in religious activities. The court of appeals noted that while this was not a problem which had developed since the entry of the first custody order, the effect on the children had

changed as they now were older and more able to "fully participate in and understand these religious activies."

Time for filing appeal

- When party receives actual knowledge of the entry and content of an order, the service provisions of Rule 58 do not apply.
- Where defendant obtained a copy of the custody order within three days of the entry of that order, defendant had 30 days from the date the order was entered to file notice of appeal.
- Trial court did not err in dismissing appeal where defendant failed to file and serve notice of appeal within 30 days from the date the custody order was entered.

Manone v. Coffee, 720 S.E.2d 781 (N.C. App., December 20, 2011). Custody order was entered on August 16, 2010. Defendant's attorney obtained a copy of the order from the courthouse on August 19, 2010. The defendant's attorney mailed a copy of the order to plaintiff's attorney the next day, August 20. Defendant filed a notice of appeal on September 20, 2010 and the trial court dismissed the appeal as not timely filed. The court of appeals affirmed, holding that defendant had 30 days from the date the order was entered to file notice of appeal. Rule 3(c) of the Rules of Appellate Procedure provides that an appeal must be filed within 30 days from entry of judgment when a copy of the judgment is served within the three days required by Rule 58. If the judgment is not served in accordance with Rule 58, the appeal must be filed within 30 days following service of the judgment. The court rejected defendant's argument that because neither party served the judgment upon the other party within the three day period provided by Rule 58, defendant had 30 days following the date defendant mailed the judgment to plaintiff, as shown by the certificate of service to be August 20. The court of appeals held that the party filing notice of appeal in this case had actual knowledge of the entry of the judgment within that three day period and therefore the time for appeal began on the date of entry rather than on the date when plaintiff was served with a copy of the judgment.

Jurisdiction; simultaneous proceeding in another state

- Where adoption and custody actions were pending in New Jersey at the time a custody action was filed in NC, the NC action was appropriately dismissed after the NC judge determined that New Jersey was the home state of the child at the time the New Jersey actions were initiated.
- When the NC judge determined that New Jersey was exercising jurisdiction substantially in conformity with the UCCJEA, the NC trial judge had the discretion to contact the New Jersey judge but was not required to do so.

Jones v. Whimper, _S.E.2d_ (N.C. App., February 7, 2012). Plaintiff filed a custody action in NC while an adoption and a child custody proceeding were pending in New Jersey. Shortly after the NC proceeding was filed, the judge in New Jersey sent a letter to the NC judge to notify the NC judge of the New Jersey proceedings and to inform the NC judge that the New Jersey judge had denied plaintiff's motion asking that the New Jersey court to relinquish jurisdiction as an inconvenient forum. The NC judge dismissed the NC proceeding after concluding that New Jersey was exercising jurisdiction appropriately. On appeal, father argued that the NC judge was required to communicate with the New Jersey judge and to give the parties an opportunity to be

heard on the issue of jurisdiction before making a decision. The court of appeals held that GS 50A-206 sets out the procedure when there are simultaneous proceedings in different states. That statute does require a judge to contact the judge in the other state to determine whether that state is acting in conformity with the UCCJEA. In this case, however, the letter from the New Jersey judge was sufficient to fulfill the contact requirement in GS 50A-206. And, according to the court of appeals, because the court was acting pursuant to the simultaneous proceeding statute rather than pursuant to GS 50A-110, the NC judge was not required to follow the procedures set out in GS 50A-110. Therefore, the trial judge did not err by making the jurisdiction decision without first allowing the parties to argue the matter.

Modification Jurisdiction

- Trial court erred in terminating the parental rights of respondent father where termination order did not establish that NC had subject matter jurisdiction pursuant to Chapter 50A, the UCCJEA.
- Because a custody order regarding the child at issue in the TPR proceeding had been entered in New Jersey in 2001, the termination petition filed in 2009 could not be adjudicated in NC unless NC had modification jurisdiction pursuant to GS 50A-203.
- In order to modify a custody determination made by another state, the NC court must first determine either that 1) no party continues to reside in that state, or 2) the other state has determined it no longer has continuing exclusive jurisdiction. If the NC court determines either is true, then the NC court can make a custody determination if NC has jurisdiction pursuant to GS 50A-201 (home state or substantial connection jurisdiction).

In the Matter of J.A.P., 721 S.E.2d 253 (N.C. App., January 17, 2011). Child was born in New Jersey in 2001 and a custody order was entered in New Jersey after the parties participated in mediation. In 2007, the mother and child moved to NC and father remained in New Jersey. A TPR petition was filed by mother in North Carolina in 2009 and the trial court terminated the parental rights of respondent father. On appeal, father argued that the trial court had no jurisdiction to modify the New Jersey order because he was still a resident of New Jersey and that state court had not made a determination that it no longer had exclusive continuing jurisdiction. The court of appeals agreed, rejecting mother's argument that the fact that the record contained no copy of the New Jersey order prohibited the father from raising the jurisdiction issue. The court of appeals held that the pleadings established that the New Jersey custody order had been entered and therefore, the termination order needed to show that the NC court had modification jurisdiction pursuant to GS 50A-203. Since the TPR order did not find either that 1) no party continued to reside in New Jersey – and in fact father did continue to reside in New Jersey, or 2) the New Jersey court had determined it no longer had exclusive continuing jurisdiction, the court of appeals concluded that NC did not have subject matter jurisdiction to adjudicate the TPR.

Equitable Distribution
Cases Decided Between October 1, 2011 and June 5, 2012

Personal Jurisdiction; minimum contacts

- Trial court erred in concluding defendant had sufficient contacts with North Carolina to allow court to exercise jurisdiction over him for purposes of wife's alimony and ED claims.
- Sufficiency of contacts is a factual determination made on a case-by-case basis.
- In determining whether a defendant has sufficient contacts with NC, the trial court must consider the quantity of a defendant's contacts with the state, the nature and quality of those contacts, the source and connection of the cause of action to the contacts, the interest of NC in litigating the matter, the convenience of the parties, and the interest of and fairness to the parties.

Shaner v. Shaner, 717 S.E.2d 66 (N.C. App., October 18, 2011). Parties were married 41 years and lived all of that time in the state of New York. The parties moved together to North Carolina to live close to their children. Husband resided here for 4 months and then returned to New York. Parties separated several years later. Wife filed action in NC seeking postseparation support, alimony, equitable distribution and absolute divorce. Husband made motion to dismiss based on lack of personal jurisdiction but trial court concluded he has sufficient contacts with NC to justify jurisdiction. The court of appeals disagreed, holding that the only contact was the 4 month period of time he lived here approximately three years before separation of the parties. Considering the factors listed above, the court of appeals held that the short period of residence was not sufficient to support personal jurisdiction. The court of appeals did not separately address the divorce action. Absolute divorce does not need minimum contacts.
For another recent case on the determination of minimum contacts, *see Bell v. Mozley*,_S.E.2d_ (N.C. App., November 1, 2011). In that case, the court of appeals also concluded there was no minimum contacts where all parties lived in SC but husband filed alienation of affection and criminal conversation claim in NC because SC does not recognize either tort. The court of appeals held that the defendant's business related contacts with NC were insufficient to support jurisdiction for the claims related to marriage.

Valuation; 'credit' for postseparation payments

- Equitable distribution order had to be remanded to trial court where court of appeals could not tell how trial court arrived at value of business.
- Business valuation must be based on a sound methodology.
- Equitable distribution order had to be remanded to trial court where trial court found value of marital home but did not specify that it was the date of separation value of the house.
- Trial court can give 'credit' only for postseparation payments that benefit the marital estate.

Williamson v. Williamson, 719 S.E.2d 625 (N.C. App., December 6, 2011). On the date of separation, the parties owned all of the stock of a corporation created by them during the marriage. The trial court valued the corporation based on the testimony of plaintiff husband and the trial court stated that value assigned was based on the "liquidated value" of the corporation. The court of appeals held that a business valuation must be based on a 'sound valuation

methodology.' Because the court of appeals could not tell how the trial court arrived at the value in this case and could not tell what the court meant by 'liquidated value', the issue was remanded to the trial court. Similarly, the trial court relied on plaintiff's testimony to establish the value of the marital residence. However, nothing in the judgment or record indicated that plaintiff testified as to the value on the date of separation. Finally, the court of appeals also instructed the trial court to make more findings of fact to support the decision to give plaintiff "credit" for paying expenses for defendant after the date of separation. The plaintiff paid for defendant's health insurance following separation, and paid bills such as defendant's phone bill, utility bill and water bill. The trial court gave plaintiff credit after finding that plaintiff paid the bills with the expectation that he would receive credit in the equitable distribution proceeding. The court of appeals held that, while it may be appropriate for a court to give a party "credit" for postseparation payments that benefit the marital estate, the trial court in this case did not indicate how these payments were a benefit to the marital estate.

Separation and Property Settlement Agreement barred ED

- Trial court erred in entering an ED judgment where parties executed a separation and property settlement agreement wherein each waived all rights to ED.
- Reconciliation of parties did not terminate the provisions of the agreement where agreement specifically provided that it would survive reconciliation and where agreement had been incorporated into the divorce judgment.

Porter v. Porter, 720 S.E.2d 778 (N.C. App., December 20, 2011). Parties separated in 1988 and executed a separation and property settlement agreement wherein each waived the right to ED. The agreement also provided that reconciliation would not void the property settlement terms of the agreement. The parties subsequently reconciled until separating again in 2005. Husband filed for divorce and wife filed for ED. Husband replied claiming that the agreement was a bar to ED. Thereafter, a divorce judgment was entered which incorporated the agreement. The trial court determined that the agreement did not bar ED and entered an ED judgment. Husband appealed. The court of appeals held that the agreement was a bar to ED, both because it provided that the property settlement terms of the agreement would survive reconciliation and because it was incorporated into the divorce judgment. The case was remanded to the trial court with instruction that the property of the parties be distributed in accordance with the terms of the agreement.

Business valuation methodology

- Trial court did not err in accepting valuation expert's discount for lack of marketability as part of the expert's valuation of marital business based on a capitalization of earnings methodology.

Taylor v. Taylor, unpublished opinion, 722 S.E.2d 211 (N.C. App., March 6, 2012). Parties offered competing valuation experts to provide evidence of value of marital business. Both experts used a capitalization of earnings approach but wife's expert included a discount for lack of marketability. The trial court accepted wife's expert's opinion and the court of appeals affirmed. The appellate court rejected husband's argument that prior case law prohibits a

discount for lack of marketability. Citing the published opinion in *Crowder v. Crowder*, 147 NC App 677 (2001), the court held that the use of the discount has been specifically approved.

Classification of 401K

- Trial court erred in classifying 401K retirement plan by determining amount contributed to the account during the marriage. All retirement accounts, including defined contribution plans, must be classified using the coverture fraction set out in GS 50-20.1.

Curtis v. Curtis, unpublished, _S.E.2d_ (N.C. App., May 1, 2012). Trial court classified husband's 401K as separate property to the extent of the plan's value on the date of marriage and marital to the extent that the account increased in value during the marriage. The court of appeals held this to be error. GS 50-20.1 requires that all plans, whether defined benefit or defined contribution (such as a 401K account), be classified using the coverture fraction: marital component equal to total number of years earning retirement account while married divided by total number of years earning retirement account up to the date of separation.

Classification of divisible debt

- Trial court erred in failing to classify, value and distribute postseparation payments of marital debt
- To decide whether a party should receive any 'credit' for making postseparation payments on marital debt, the trial court must identify the source of the funds used to pay the marital debt.
- Trial court erred in failing to classify, value and distribute postseparation passive increase in the value of marital 401K account and in failing to classify, value and distribute the expenditures plaintiff made of the funds in that account after the date of separation and before the date of trial.
- Trial court did not err in failing to identify the specific percentage of the marital estate distributed to each spouse where that figure could "readily be calculated using information" in the order.

Bodie v. Bodie, _S.E.2d_ (N.C. App., June 5, 2012). Trial court made finding in equitable distribution judgment that husband paid $216,000 towards the mortgage, insurance, upkeep and taxes on the marital residence after the date of separation and before the date of the equitable distribution trial. However, the judgment did not classify or distribute the payments as divisible property. The court of appeals held that upon finding husband paid marital debt after the date of separation, the trial court was obligated to classify, value and distribute any decrease in marital debt as divisible debt. In addition, the court of appeals held that in considering the distribution of the divisible debt, the trial court must make findings as to the source of the funds used to make the postseparation payments. If the payments were made with marital funds, husband would not be entitled to any sort of 'credit' in distribution based on the fact that payments were made. The court of appeals also held that the trial court on remand should consider evidence indicating that husband's 401K increased in value after the date of separation and before the date of trial. The court of appeals held that any passive increase in that account should be classified as divisible and that the trial court should make findings accounting for any amounts withdrawn from that account during the period of separation.

Postseparation Support and Alimony
Cases Decided Between October 1, 2011 and June 5, 2012

Personal Jurisdiction; minimum contacts

- Trial court erred in concluding defendant had sufficient contacts with North Carolina to allow court to exercise jurisdiction over him for purposes of wife's alimony and ED claims.
- Sufficiency of contacts is a factual determination made on a case-by-case basis.
- In determining whether a defendant has sufficient contacts with NC, the trial court must consider the quantity of a defendant's contacts with the state, the nature and quality of those contacts, the source and connection of the cause of action to the contacts, the interest of NC in litigating the matter, the convenience of the parties, and the interest of and fairness to the parties.

Shaner v. Shaner, 717 S.E.2d 66 (N.C. App., October 18, 2011). Parties were married 41 years and lived all of that time in the state of New York. The parties moved together to North Carolina to live close to their children. Husband resided here for 4 months and then returned to New York. Parties separated several years later. Wife filed action in NC seeking postseparation support, alimony, equitable distribution and absolute divorce. Husband made motion to dismiss based on lack of personal jurisdiction but trial court concluded he has sufficient contacts with NC to justify jurisdiction. The court of appeals disagreed, holding that the only contact was the 4 month period of time he lived here approximately three years before separation of the parties. Considering the factors listed above, the court of appeals held that the short period of residence was not sufficient to support personal jurisdiction. The court of appeals did not separately address the divorce action. Absolute divorce does not need minimum contacts.
For another recent case on the determination of minimum contacts, *see Bell v. Mozley*,_S.E.2d_ (N.C. App., November 1, 2011). In that case, the court of appeals also concluded there was no minimum contacts where all parties lived in SC but husband filed alienation of affection and criminal conversation claim in NC because SC does not recognize either tort. The court of appeals held that the defendant's business related contacts with NC were insufficient to support jurisdiction for the claims related to marriage.

Income; using findings of fact from other proceedings within same case

- Trial court erred by not considering tax withholdings when determining defendant's actual income where trial court determined that gross income should be used because in previous years defendant had received a full refund of all taxes she had paid.
- Trial court did not err in refusing to consider defendant's evidence that her income would decrease in the future.
- Trial court can take judicial notice of matters contained in previous orders entered in the same cause.

Williamson v. Williamson, 719 S.E.2d 625 (N.C. App., December 6, 2011). Wife appealed alimony order entered requiring husband to pay alimony to her. She claimed trial court made errors in determining the income of the parties. First she argued that the trial court failed to

consider amounts withheld from her gross income for the payment of taxes after finding that defendant always received everything she paid in taxes back as a tax refund. The court of appeals agreed that this was error, holding that both bonuses and tax refunds may not be included as income because of their speculative nature. However, the court rejected defendant's argument that the trial court should have considered her evidence that her income would decrease in the future. The court of appeals held that alimony awards must be based on actual present income rather than on potential future income. Finally, the court of appeals held that the trial court did not err when it determined defendant's income by adopting a finding on that issue made by the trial court in an earlier equitable distribution proceeding between the parties. The equitable distribution was filed in the same complaint as the alimony, and the court of appeals held that judges can take 'judicial notice' of facts found in other matters in the same case.

Imputing minimum wage; findings to support duration

- Trial court erred when it imputed minimum wage to wife who had not worked during the marriage. Trial court cannot impute income without first determining that wife depressed her income in bad faith.
- Trial court alimony order had to be remanded to trial court where order did not explain why the trial court ordered that alimony be paid for a period of seven years. Trial court has discretion to set term of award but alimony order must explain reasons for the duration chosen by the court.

Works v. Works, 719 S.E.2d 218 (N.C. App., December 6, 2011). Trial court ordered husband to pay wife $1000 per month in alimony for a period of seven years. The trial court attributed minimum wage to wife even though wife did not work at the time of the alimony trial and had not worked during the marriage. In addition, the trial court reduced wife's expenses by the amount of her child support obligation, which the trial court determined by applying the child support guidelines assuming wife earned minimum wage. The court of appeals held that it was error for the trial court to assume minimum wage in determining wife's income for the purpose of determining alimony as well as her obligation for child support absent a finding that wife was deliberating depressing her income in bad faith disregard of her obligation to support her children. In addition, the alimony order did not contain an explanation of why the trial court limited the alimony award to a term of seven years. The case was remanded to the trial court for the reconsideration of both issues. On this issue of bad faith, the court of appeals held that the trial court could support a finding of bad faith if on remand it is able to find the wife refused to seek or accept gainful employment, willfully refused to secure or take a job, deliberately not applied herself to a business of employment, or intentionally depressed her income to an artificial low.

Dependency

- Trial court is not required to resolve equitable distribution before alimony.
- Trial court erred in failing to consider spouse's ability to meet his own needs in the future when determining dependency.

Taylor v. Taylor, unpublished opinion, 722 S.E.2d 211 (N.C. App., March 6, 2012). Disabled husband sought alimony. Trial court concluded that he was not a dependent spouse because at the time of alimony hearing, he was able to maintain on his own income the same standard of

living the parties had enjoyed before separation. The court of appeals remanded after concluding the trial court should have considered evidence offered by husband concerning his ability to continue to maintain this standard of living into the future. While present ability to provide for reasonable needs is relevant to the first prong of the test for dependency – actually substantially dependent – the trial court also is required to consider the second prong – substantially in need of maintenance and support. The court of appeals held that husband's evidence that his income would decrease as a result of the marital business being distributed to wife as well as evidence that husband's income might actually increase in the future required trial court to make findings of fact regarding his prospective ability to meet his own needs in order to determine dependency.

Court of appeals rejected husband's argument that the trial court was required to resolve equitable distribution before determining alimony. The court of appeals held that before the alimony statutes were amended in 1995, case law required trial courts to resolve ED first. However, GS 50-16.3A now allows the court to enter an alimony order either before or after ED. In addition, GS 50-20(f) provides that, to the extent an equitable distribution judgment affects an alimony award, "the court, upon request of either party, shall consider whether an award of alimony or child support should be modified or vacated…".

Cohabitation

- Trial court order sufficiently supported conclusion that wife had not engaged in cohabitation.
- To establish cohabitation, supporting spouse must establish that dependent spouse and third party 1) dwelled together in a private heterosexual relationship continuously and habitually and 2) that dependent spouse and third party voluntarily assumed those rights, duties, and obligations usually manifested by married persons.
- As trial court concluded that no cohabitation had occurred based on objective evidence of actions of the parties, there was no need for trial court also to consider subjective intent of the two parties.

Russo v. Russo, unpublished opinion, 720 S.E.2d 28 (N.C. App., December 6, 2011). This is an unpublished opinion that does not create new law. However, it contains a clear and comprehensive review of the analysis to be applied to determine whether a dependent spouse has cohabitated. Cohabitation will terminate any court-ordered alimony or postseparation support.

The trial court denied husband's motion to terminate his alimony obligation based on wife's cohabitation with Mr. Fisher and court of appeals affirmed. According to the court of appeals, the following evidence supported trial court's conclusion that parties did not meet the first prong of the test for cohabitation – dwelling together continuously and habitually: wife and Mr. Fisher had an exclusive sexual relationship for 15 months. Mr. Fisher never moved into wife's house but maintained active residence at his parents' home. Mr. Fisher stayed overnight on an infrequent basis, except for a 2-month period of time where he stayed with wife two or three nights each week. He always called before coming to wife's residence, he did not have a key to her house and his mail was not delivered to wife's residence. In addition, the following findings supported the conclusion that the two did not voluntarily assume those marital rights, duties, and

obligations usually manifested by married people – a determination to be made "based on the totality of the circumstances": Mr. Fisher did mow the lawn at wife's house, trimmed hedges, worked on her car, and did some grocery shopping. He also used her car on a couple of occasions while wife was out of town and she purchased clothing for him at a yard sale. Their kids and parents had visited the homes of each. On the other hand, Mr. Fisher maintained an "active" residence at his parents' home, the two did not share financial obligations, and they did not purchase gifts for each other or other items without being reimbursed by the other. While Mr. Fisher used wife's car on a couple of occasions, wife also allowed other people to use her car because her license had been suspended. The trial court concluded that while wife and Mr. Fisher had engaged in some domestic activities, there was no "assumption of marital rights and obligations extending beyond an intimate friendship and rising to the level of a married couple – such as, for example, joint financial obligations, open displays of affection, sharing of a home, blending of finances, or consistent merging of families."

Dependency; maintaining accustomed standard of living

- Trial court did not err in concluding wife was not a dependent spouse where she was able to meet her reasonable needs at the time of the alimony hearing with a small surplus.
- While a trial court is required to consider accustomed standard of living during the marriage when determining dependency, the trial court is not obligated to order alimony sufficient to support that same standard of living, especially if the standard during the marriage was supported by unsustainable debt.
- Trial court cannot order alimony even if the spouse seeking support is dependent if the other spouse does not have the ability to pay.

Bodie v. Bodie, _S.E.2d_ (N.C. App., June 5, 2012). After finding wife had sufficient assets to meet her reasonable needs at the time of the alimony trial, the trial court concluded wife was not a dependent spouse and denied her claim for alimony. On appeal, wife argued that even though she was able to meet her needs at the time of trial, she was dependent because she could not afford to maintain the standard of living enjoyed by the parties during the marriage. According to wife, the separation had forced her to change her lifestyle to a much lower standard of living. The court of appeals held that plaintiff was correct in her argument that the fact that she was able to meet her present expenses at the time of the alimony trial is not sufficient alone to establish she is not dependent. However, to establish dependency when that is the case, the spouse seeking support must prove 1) that she is unable to maintain the standard of living to which she was accustomed during the marriage and 2) the other spouse has the means to pay her a sufficient amount to enable her to maintain that previous standard of living. In this case, the court of appeals held that evidence showed the parties had maintained the lifestyle during the marriage only through the "massive infusion of debt," and the court held that there is no legal basis "for maintaining a lifestyle that rests upon such a shaky foundation." In addition, all evidence indicated husband was in bankruptcy and had no ability to pay any amount of alimony.

Divorce and Annulment

Cases Decided October 1, 2011 and June 5, 2012

Void and voidable marriages

- Trial court erred in dismissing plaintiff's claim for annulment based on bigamy.
- Marriage ceremony conducted in front of a friend who was not authorized to perform marriages was voidable rather than void.
- Because defendant had not annulled the voidable marriage or obtained a divorce pursuant to state law before she married plaintiff, her second marriage was void.
- A bigamous marriage is the only marriage that is void ab initio.
- NOTE: This case currently is on appeal to NC Supreme Court.

Mussa v. Palmer-Mussa, 719 S.E.2d 192 (N.C. App., December 6, 2011). Parties were married for 12 years and had two children together. Upon separation, defendant wife filed for alimony, custody and child support. Plaintiff husband filed a separate action for annulment, claiming the marriage was void ab initio because defendant wife had married another man several years before she married plaintiff. Evidence showed that wife had engaged in an Islamic "wedding ceremony" several years before she married plaintiff. During that ceremony, defendant and another man exchanged vows in front of a friend who was not authorized to perform marriage ceremonies. The couple lived together for several years but the marriage was never consummated. The couple then divorced in accordance with Islamic law, which did not require a state court proceeding. Thereafter, defendant married plaintiff. The trial court concluded that plaintiff failed to prove defendant was validly married at the time she married him and dismissed his annulment claim. The court of appeals reversed. According to the court of appeals, the fact that the first marriage ceremony was not performed by an appropriate person meant that the first marriage was voidable as opposed to void. The only void marriage pursuant to North Carolina law is a bigamous one. All other marriages are valid until annulled or until one party obtains a divorce. Because defendant wife did not obtain a divorce through a court of competent jurisdiction or an annulment, her marriage was still valid at the time she married plaintiff. Dissent argued that the majority failed to apply the long-established common law presumption in favor of the validity of the second marriage. That presumption would have placed the burden on plaintiff to prove the first marriage was valid, which it clearly was not, instead of focusing on whether the first marriage was void or voidable.

Domestic Violence
Cases Decided October 1, 2011 and June 5, 2012

50C No-Contact Order; harassment

- Trial court did not err in entering a civil no-contact order against defendants after finding that defendants' behavior constituted the unlawful conduct of intimidating a witness in a pending criminal case.
- No showing of emotional harm is required when defendants intended to cause fear of physical harm rather than to cause severe emotional distress.
- The term 'unlawful conduct' does not mean the conduct complained of must be a crime. Rather, the term means nonconsensual sexual conduct or stalking, as those terms are defined in Chapter 50C.

St. John v. Tammy and Vicky Brantley, 720 S.E.2d 754 (N.C. App., December 20, 2011). Plaintiff filed an action for a civil no-contact order pursuant to Chapter 50C alleging that defendants engaged in stalking, as that term is defined in the statute to include harassment that causes fear of physical injury. The trial court entered a no-contact order after finding that both defendants committed the crime of intimidating a witness in a pending criminal case. Plaintiff had reported fighting between the two defendants to the police and was named as the prosecuting witness in a criminal complaint against one of the defendants. Defendants thereafter proceeded to harass plaintiff and made plaintiff fear for her personal safety by threatening to damage her personal property and by following her and banging on her front door. The court of appeals upheld the no-contact order, concluding that the findings were sufficient to support the conclusion that defendants had harassed plaintiff and caused her to fear physical harm.

50B Consent Orders

- Trial court erred in renewing a DVPO entered pursuant to Chapter 50B where original DVPO was entered by consent and contained no finding of fact or conclusion of law that defendant committed an act of domestic violence.
- Consent orders entered in 50B action without finding of fact/conclusion of law that defendant committed an act of domestic violence are void ab initio.

Kenton v. Kenton, _S.E.2d_ (N.C. App., February 7, 2012). A DVPO was entered Jan. 8, 2010 by consent of the parties, ordering that defendant "shall not commit any acts of abuse or make any threats of abuse." The order contained no finding of fact or conclusion of law that defendant committed an act of domestic violence. Instead, the order stated that "the parties agree to entry of this order without express findings of fact regarding the behavior of either party." In addition, the consent order stated that the "parties waive conclusions of law." On January 6, 2011, plaintiff filed a motion to renew the DVPO. In response, defendant filed a motion to dismiss the motion to renew on the basis that the original consent DVPO was void due to a lack of a finding of fact or conclusion of law that an act of domestic violence had been committed. The trial court denied defendant's motion and renewed the DVPO for an additional period of one year. On appeal, defendant argued that the trial court erred when it denied his motion to dismiss

the request to renew the consent DVPO and the court of appeals agreed. According to the court of appeals, a consent order entered pursuant to Chapter 50B must contain a finding of fact or conclusion of law that defendant committed an act of domestic violence (court of appeals does not state whether this actually is a finding of fact, a conclusion of law, or both), and without such a finding or conclusion, the order is void *ab initio*. The court of appeals cited *Bryant v. Williams*, 161 NC App 444 (2003), wherein the court stated "the court's authority to enter a protective order or approve a consent agreement is dependent upon finding that an act of domestic violence occurred …".

50C Orders; verification of complaint

- GS 50C-2 requires that complaints filed pursuant to Chapter 50C be verified.
- Where complaints seeking no-contact orders were not properly verified, no-contact orders entered by the trial court had to be vacated and plaintiffs' complaints dismissed.

Honeycutt v. Honeycutt, _S.E.2d_ (N.C. App., June 5, 2012). Two plaintiffs filed complaints against same defendant seeking no-contact orders pursuant to Chapter 50C. Upon finding that defendant stalked and harassed both plaintiffs, the trial court entered no-contact orders. On appeal, defendant argued the complaints in both cases were not properly verified and the court of appeals agreed. According to the court of appeals, because GS 50C-2 requires that all complaints filed pursuant to Chapter 50C be verified, a lack of an appropriate verification defeats the subject matter jurisdiction of the court. In this case, both plaintiffs used AOC form complaint CV-520. In one case, plaintiff signed the verification section of the complaint and there was another signature on the line intended for the signature of the person authorized to administer oaths before whom plaintiff signed. However, there was no check beside any box indicating the title of the person before whom plaintiff signed the complaint. Therefore, there was no indication on the form that the verification was executed in front of a person authorized to administer the oath. (the form has boxes to indicate if sworn before a "Deputy CSC", an "Assistant CSC", "Clerk of Superior Court", "District Court Judge", "Magistrate", or "Notary" but none of those boxes were checked). On the other complaint, plaintiff signed the verification section but no other line was signed to show that plaintiff swore to the complaint in front of a person authorized to take oaths. As neither complaint was properly verified, the court of appeals vacated the no-contact orders and dismissed plaintiffs' actions.

DVPO; act of domestic violence

- Trial court must conclude that defendant committed an act of domestic violence before entering a Chapter 50B DVPO. This is a conclusion of law rather than a finding of fact.
- Defendant's act of hiring a private investigator to watch plaintiff's house at night to determine whether she was engaging in cohabitation was not sufficient to support trial court's finding of fact that defendant harassed plaintiff.

Kennedy v. Morgan, _S.E.2d_ (N.C. App., June 5, 2012). Trial court found that defendant hired a private investigator to conduct surveillance of plaintiff to determine whether plaintiff was engaging in cohabitation sufficient to terminate defendant's alimony obligation. In addition, the trial court found that because of the "long history of abuse" of plaintiff by defendant, this

surveillance placed plaintiff in fear of continued harassment that rose to a level sufficient to inflict substantial emotional distress to plaintiff. The trial court concluded based on these findings that defendant had committed an act of domestic violence and issued a DVPO. Court of appeals held that the facts found by the trial court did not support the conclusion that defendant committed an act of domestic violence. The trial court erred in basing a conclusion on a finding as vague as the finding that the parties had a 'long history of abuse, " and held that defendant's act of hiring a private investigator was not sufficient to support ultimate finding that defendant 'harassed' plaintiff.

Spousal Agreements
Cases Decided October 1, 2011 and June 5, 2012

Separation and Property Settlement Agreement barred ED

- Trial court erred in entering an ED judgment where parties executed a separation and property settlement agreement wherein each waived all rights to ED.
- Reconciliation of parties did not terminate the provisions of the agreement where agreement specifically provided that it would survive reconciliation and where agreement had been incorporated into the divorce judgment.

Porter v. Porter, 720 S.E.2d 778 (N.C. App., December 20, 2011). Parties separated in 1988 and executed a separation and property settlement agreement wherein each waived the right to ED. The agreement also provided that reconciliation would not void the property settlement terms of the agreement. The parties subsequently reconciled until separating again in 2005. Husband filed for divorce and wife filed for ED. Husband replied claiming that the agreement was a bar to ED. Thereafter, a divorce judgment was entered which incorporated the agreement. The trial court determined that the agreement did not bar ED and entered an ED judgment. Husband appealed. The court of appeals held that the agreement was a bar to ED, both because it provided that the property settlement terms of the agreement would survive reconciliation and because it was incorporated into the divorce judgment. The case was remanded to the trial court with instruction that the property of the parties be distributed in accordance with the terms of the agreement.

Specific Performance

- Trial court does not need to find defendant has present ability to comply with terms of contract before ordering specific performance when trial court concludes defendant is deliberately depressing income or has dissipated assets.
- Trial court does not need to make findings that no adequate remedy is available at law before ordering specific performance of prospective support payments contained in an unincorporated separation agreement. However, trial court must make such findings before ordering specific performance of arrears already due and owing pursuant to the agreement.

Praver v. Raus, _S.E.2d_ (N.C. App. 17, 2012). Parties entered into a separation agreement wherein defendant agreed to pay plaintiff child support in the amount of $1500 per month and alimony in the amount of $4500 per month as well as 30% of defendant's income over $240,000 each year. Plaintiff filed action alleging breach of the agreement and alleging defendant owed child support arrearages in the amount of $130,470 and alimony arrears in excess of $300,000. In addition, plaintiff alleged that defendant had breached the agreement by failing to pay orthodontic expenses for the children and by failing to maintain life insurance policies as provided by the agreement. Plaintiff requested an order of specific performance for both past due arrears as well as future payments required by the terms of the agreement. After finding defendant had breached the terms of the agreement by failing to pay all amounts owed, the trial

court entered an order requiring specific performance of past due amounts of child support and alimony, and specific performance of defendant's future obligations pursuant to the contract. On appeal, defendant argued that the trial court erred in ordering specific performance of the agreement because evidence established he did not have the ability to pay in accordance with the terms of the agreement. The court of appeals rejected this argument, holding that because the trial court concluded defendant deliberately depressed his income, the trial court was not required to find defendant actually had the ability to pay. According to the court of appeals, trial court may rely on a party's earning capacity rather than actual income when there is evidence that the spouse has deliberately suppressed income or dissipated resources.

Defendant also argued that the trial court was required to make specific findings to support the conclusion that plaintiff's remedy at law for breach of contract was inadequate before ordering specific performance. The court of appeals held that case law clearly establishes that the remedy at law is inadequate for prospective payments of support required by a contract because the recovery of money damages would require successive lawsuits each time defendant fails to make a monthly payment. However, there is no similar recognition that the legal remedies for accrued arrears are inadequate because the legal remedy for amounts already accrued is execution. Whether a defendant has assets subject to execution sufficient to satisfy a judgment is a determination to be made on a case by case basis.

Introduction of evidence from website

- Trial court did not abuse discretion by admitting into evidence computer printouts of information concerning the Consumer Price Index located on the website of the United States Department of Labor Bureau of Labor Statistics.
- Information regarding the Consumer Price Index is subject to judicial notice.

Blackburn v. Bugg, unpublished, 723 S.E.2d 585 (N.C. App., 2012). In a premarital agreement, defendant agreed to make monthly alimony payments in the amount of $1000 with that amount to be adjusted annually based on the Consumer Price Index. Plaintiff brought action to enforce alimony provision in the agreement. To establish amount owed, plaintiff offered into evidence computer printouts from the website of the Department of Labor. The trial court admitted the printouts and used the information to determine the amount owed by defendant. On appeal, defendant argued that plaintiff failed to properly authenticate the printouts. The court of appeals disagreed, holding that plaintiff's testimony about finding the website and printing the pages, along with the fact that the pages had the "United Stated Department of Labor Bureau of Labor Statistics" heading displayed at the top of each page was sufficient to "prove that the computer printouts were what plaintiff purported them to be." [defendant also argued the printouts were inadmissible hearsay but the court of appeals held defendant abandoned this issue on appeal]. In addition, the court of appeals held that information regarding the Consumer Price Index "is public information readily available" and therefore is subject to judicial notice.

Paternity

Cases Decided October 1, 2011 and June 5, 2012

Presumption when father's name is on birth certificate

- In TPR proceeding, fact that respondent's name appeared on birth certificate when he was not married to the mother at the time of child's birth raised presumption that he had taken steps necessary to judicially establish paternity of the child.
- Because statutes require the establishment of paternity either judicially or by affidavit before a name can be added as father on a birth certificate when the mother is unmarried at time of child's birth, the existence of respondent's name on the birth certificate raised the presumption that paternity has been established.

In the Matter of J.K.C. and J.D.K. 721 S.E.2d 264 (N.C. App., January 17, 2011). One of grounds alleged as basis for terminating parental rights of respondent father was that he never established paternity in one of the ways listed in GS 7B-1111(a)(5). [other issues in this opinion are addressed by Janet Mason in the Juvenile Law update]. However, the trial court concluded that the GAL had not proved respondent failed establish paternity. Upon denial of the TPR by the trial court, the GAL appealed. The court of appeals affirmed the trial court. On the issue of paternity, the court of appeals held that because the name of respondent appeared on the child's birth certificate, there was a rebuttable presumption that the respondent had established paternity either judicially or by affidavit as required by GS 7B-1111(a)(5). According to the court of appeals, when a child is born to an unmarried mother, NC statutes allow a father's name to be placed on the birth certificate if paternity is judicially determined and a copy of the judgment is sent to Vital Statistics (GS 130-118), or when the alleged father and mother execute an affidavit pursuant to GS 130A-101(f) in the hospital at the time of the child's birth. As such, the court of appeals concluded that there should be a presumption that respondent had done one of these things when his name actually appears on the birth certificate.