Family Law Case Update
Cases Decided Between October 1, 2006 and June 5, 2007

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Child Support

- Trial court must determine income at time of hearing and support order must be based on actual income at time of hearing. Trial court can base award on earning capacity only upon finding obligor is depressing actual income in bad faith.
- Income must include gifts or maintenance received from third parties.

State ex. rel. Williams v. Williams, N.C. App., 635 S.E.2d 495 (October 17, 2006).
In action for child support, trial court concluded that defendant father's monthly income was $3,200. The order contained a finding that this amount was based upon defendant's statement under oath in a previous bankruptcy case. The trial court found this statement to be "the most believable statement of income for the defendant." The court of appeals reversed because the statement in the bankruptcy case was made 18 months before the child support hearing. The appellate court held that an award for child support must be based on actual income of the parties at the time of hearing. Earning capacity at the time of hearing may be used if the trial court concludes that obligor is deliberately depressing his or her income at the time of trial to avoid family responsibilities.

The court of appeals also held the trial court erred in failing to include in the calculation of plaintiff mother's income amounts paid by her father to cover her rent and vehicle expenses. The child support guidelines specify that income must include income received from third parties in the form of a gift or maintenance.

- Trial court cannot modify a child support order after concluding there has been no substantial change of circumstances since the entry of the order.
- A presumption that a substantial change of circumstances has occurred arises when an order is at least three years-old and evidence shows that application of the guidelines will result in at least a 15% change in the amount of child support required by the guidelines. Fact that existing order was not based on the guidelines does not change this rule.

Lewis v. Lewis, N.C. App., 638 S.E.2d 628 (January 2, 2007).
Child support order entered by consent required father to pay $200 support, an amount not based upon application of the child support guidelines. Mother later requested modification to bring the order into compliance with the guidelines. The trial court concluded there had been no substantial change in the needs of the children and that because there had been no change in their needs, the court was not required to consider the financial circumstances of the parents at the time of the consent order or at the time of the modification hearing. Despite concluding there had been no change in circumstances, the trial court nevertheless reduced husband's monthly obligation to $100.

Court of appeals vacated order, holding that no modification can be made to a support order if the trial court concludes there has been no substantial change in circumstances. The appellate court also held that the trial court erred in concluding there was no need to consider the income of the parents because there had been no change in the needs of the children. The court of appeals that the child support guidelines impose a presumption of a substantial change when a support order is at least three years old and

evidence shows application of the guidelines would result in at least a 15% change in the amount of child support required under the guidelines. According to the court of appeals, the fact that the original order was not based on the guidelines does not change this presumption. Therefore the trial court erred in not considering evidence of change in the financial circumstance of the parents.

- In a high-income child support case, trial court is not required to give paying parent an "off-set" based on child care expenses paid by that parent while the child is in his custody.
- There is no formula for determining the amount of support when parents earn above $20,000 per month.

Pasco v. Pasco, N.C. App., S.E.2d (June 5, 2007).
Both parents have estates in excess of $1 million, and their combined monthly income exceeds $20,000. A separation agreement between the parties provided that defendant father would pay child support in the amount of $500 per month plus half of all non-reimbursed medical expenses and extraordinary expenses related to the child. Following divorce, plaintiff mother filed for increased child support. The trial court found that mother rebutted the presumption that the amount provided in the unincorporated agreement was reasonable by showing father's income had increased substantially while hers had increased only nominally, and that the amount in the agreement was not sufficient to cover the present reasonable needs of the child. The trial court found that the child's total reasonable needs were $3,206.85 per month, that mother's pro rata share based on the total income of both parents was 45.6% or $1,462 per month, and that father should pay the remaining share of the expenses. On appeal father argued that the trial court should have given him an "offset" for the amount he spends for the child while she is in his care. The court of appeals held that, in high-income child support cases, the amount of support is based upon consideration of the reasonable needs of the child and the relative ability of each parent to provide support. The court rejected father's request for an offset, holding that the trial court properly considered the child's total reasonable needs of the child, an amount that included expenses paid by both parents. The court of appeals also rejected father's contention that the trial court should have used a "modified version of Schedule B" to determine the amount of support. According to the court of appeals, there is no formula for high-income support cases. Rather the court must determine support on a case-by-case basis considering the needs of the child and the relative ability of the parents to pay.

Custody

- Trial court cannot modify custody order in any way without first concluding there has been a substantial change of circumstances since the entry of the existing order.

Lewis v. Lewis, N.C. App., 638 S.E.2d 628 (January 2, 2007).
Parties entered into consent custody order. Mom filed motion to modify visitation provisions of the order. Trial court concluded that mother had failed to establish there had been a substantial change of circumstances. However, the judge modified the visitation provisions of the order to provide mother with one additional week of visitation each summer. The court of appeals vacated the order, holding that a trial court cannot modify any part of an existing custody order without first concluding there has been a substantial change in circumstances affecting the welfare of the children since the entry of the existing order. The appellate court stated "the trial court cannot, on the one hand, conclude there was not a substantial change of circumstances and, at the same time, change the existing order."

- GS 7A-911 allows a juvenile judge to resolve a juvenile proceeding by creating a Chapter 50 custody order and terminating the jurisdiction of the juvenile court.
- Only one order is necessary for a juvenile court to create a Chapter 50 custody order as a final disposition of the juvenile case pursuant to GS 7A-911. As long as one order makes all findings necessary for the juvenile file and all findings necessary for the Chapter 50 file, the same order can be included in both files.
- If an order exists in a Chapter 50 case at the time the juvenile judge decides to resolve the juvenile case by entering a civil custody order pursuant to GS 7A-911, the order of the juvenile judge must contain findings to show a substantial change of circumstances affecting the welfare of the child since the entry of the original civil order.

In re: A.S. and S.S., N.C. App. 641 S.E.2d 400 (March 6, 2007).
DSS filed petition alleging children were neglected due to improper discipline by step-father. Immediately before the petition was filed, mother allowed children to live with their father. DSS continued placement with the father. As a final disposition, the trial court granted custody to the father and gave mother visitation. The trial court concluded there was no further need for DSS involvement and therefore entered an order terminating juvenile jurisdiction pursuant to GS 7A-911 and creating a child custody order pursuant to that same statute. Because there had been an earlier Chapter 50 custody order between mother and father, the juvenile court found there had been a substantial change of circumstances justifying modification of that existing order. The trial court drafted only one order and instructed that a copy be placed in both the juvenile and the custody files.

On appeal, mother argued that GS 7A-911 requires two separate orders, one terminating the juvenile case and another creating the Chapter 50 custody order. The court of appeals disagreed, holding that as long as one order makes the findings required

by the statute for both parts of the disposition, the same order can be used for each file. The court also rejected mother's argument that the order failed to make findings sufficient to support the conclusion there had been a substantial change of circumstances affecting the welfare of the children. The court of appeals held that the findings of neglect as well as other findings regarding behavioral problems experienced by the children were sufficient to support the modification order.

Alimony and Postseparation Support

- Trial court can consider relative estates of both parties in determining the appropriate amount of alimony, and court can order an amount that might deplete the estate of an obligor if the amount ordered is "fair to all parties" under the circumstances.
- In considering a motion to modify, trial court must consider only those factors listed in GS 50-16.3A that have changed since the entry of the original order. Because "the standard of living established by the parties during the marriage" cannot change after the original order, the trial court does not need to consider that factor when modifying an order.
- Alimony order is not required to contain finding that supporting spouse has the actual ability to pay the amount ordered as long as findings show trial court considered supporting spouse's ability to pay in determining the amount.
- Trial court is not required to find supporting spouse in contempt before ordering the payment of alimony arrears.
- Trial court cannot order attorney fees in modification case without finding that the spouse requesting fees 1) is entitled to the relief demanded, 2) is a dependent spouse, and 3) "has not sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof."

Swain v. Swain, N.C. App., 635 S.E.2d 504 (October 17, 2006).
Trial court allowed plaintiff's motion to reduce his alimony obligation based upon changed circumstances. The court reduced the amount from $4,300 per month to $3,600 based upon his substantial reduction in income. Plaintiff argued on appeal that the trial court erred because his total monthly income at the time of the modification hearing was $3,791.95, his reasonable needs were $3,193, and the amount ordered by the trial court order therefore requires that he deplete his estate in order to pay alimony. The court of appeals held that generally parties should not be required to deplete their estates to pay alimony or meet personal expenses. However, the trial court must consider the relative estates and earning capacity of both parties when setting the amount of alimony and an award that might result in depletion of an estate is allowed if the award is "fair to both parties." The court of appeals concluded that the award was fair in this case because plaintiff has an estate that is significantly larger than that of defendant. The court also found it significant that the amount awarded "would not deplete plaintiff's estate for almost 12 years based on his current financial situation, and could last significantly longer if plaintiff's income increases in accordance with the earning capacity he has demonstrated." In addition, the court held that both parties will be required to deplete estates in order to meet their reasonable needs. According to the court, it would be unfair to require dependent spouse to deplete her estate more quickly in order to save supporting spouse from depleting his.

Court of appeals also rejected plaintiff's argument that the trial court was required to find he had the actual ability to pay the amount ordered. The court of appeals held that while GS 50-16.3A requires that the court consider a supporting spouse's ability to pay, there is no requirement that the court find an actual ability to pay. In this case, the order showed that the trial court considered plaintiff's income, expenses and estate, and was therefore sufficient to show consideration of his ability to pay.

The trial court ordered plaintiff to pay $11,000 for alimony payments that accrued under the original order before he filed the motion to modify. Plaintiff argued on appeal that the trial court could not order arrears paid without first holding him in contempt for failure to pay. The court of appeals rejected this argument and stated that a supporting spouse "becomes indebted to the [dependent spouse] for alimony as it becomes due, and when [supporting spouse] is in arrears in the payment of alimony the court may, upon application of [dependent spouse], judicially determine the amount then due and enter its decree accordingly."

Finally, the court of appeals vacated the trial court's award of attorney fees to defendant because the order did not contain findings about defendant's ability to defray the expenses of litigation as required by GS 50-16.4.

- Trial court cannot award attorney fees to dependent spouse represented on a pro bono basis.

Patronelli v. Patronelli, 360 N.C. 628, 636 S.E.2d 559 (2006), affirming 175 N.C. App. 320, 623 S.E.2d 322 (2006).

Defendant filed claims for child custody and support, postseparation support and alimony. She was represented on a pro bono basis through the Volunteer Lawyers Program. The trial court awarded defendant primary physical custody of the children, and ordered plaintiff to pay child support and alimony. The trial court denied defendant's request for attorney fees after concluding that GS 50-16.4 requires a dependent spouse to show she actually incurred attorney fees and expenses. The court of appeals affirmed, and the supreme court agreed. The supreme court held that the "plain language" of GS 50-16.4 allows a trial court to award attorney fees only "for the benefit of" a dependent spouse. The court reasoned that if a dependent spouse incurs no liability for attorney fees, an award of fees would not be for the benefit of that spouse.

- A pleading or motion for alimony must contain allegations relating to dependency, the supporting spouse, and some of the economic and other factors that make an award of alimony equitable under the circumstances. Simply requesting "alimony" is not sufficient to state a claim.

Coleman v. Coleman, N.C. App., 641 S.E.2d 332 (March 6, 2007).

Pro se defendant filed an answer to plaintiff's complaint for divorce. Answer stated that pursuant to an oral agreement between the parties, plaintiff had been paying numerous household and marital expenses since the date of separation. The Answer requested that "Plaintiff be ordered to pay Defendant alimony payments in the amount of $1500 per month." The trial court dismissed the alimony claim for failure to state a claim and the court of appeals affirmed. According to the court of appeals, Rule 8 of the Rules of Civil Procedure requires that a pleading contain "a short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences showing that the pleader is entitled to relief." The court cited Lee's *North Carolina Family Law* as requiring "facts addressed

to dependency, supporting spouse, and some of the economic and other facts that make an award of alimony equitable under the circumstances."

- Postseparation support is a temporary order. Findings in the PSS order are not binding on the judge at the alimony hearing, and there is no requirement that the court find a substantial change of circumstances before awarding alimony in an amount different than the PSS order.
- Trial judge is required to make findings in an alimony order only with regard to those factors listed in GS 50-16.3A about which evidence is presented.

Langdon v. Langdon, N.C. App., S.E.2d (June 5, 2007).
Plaintiff's complaint requested PSS and alimony. A PSS order was entered by consent of the parties in September 2000, requiring defendant to pay PSS in the amount of $1356 per month. In February 2004, defendant filed a motion seeking reduction in the amount of PSS. The trial court denied the motion but set the alimony claim for hearing. Following the alimony trial, the trial court entered an order requiring defendant to pay $1356 in alimony for approximately one year, then pay $600 per month for about 6 months, then pay $250 per month for an additional 6 months, with all support ending after that time. The trial court supported the order with findings that plaintiff had the ability to return to work as a nurse practitioner and earn a salary sufficient to meet her reasonable needs. On appeal, plaintiff argued that the trial court erred in ordering support different from that provided in the PSS order without finding a substantial change in circumstances. The court of appeals rejected this argument, explaining that PSS is a temporary order that terminates automatically when a request for permanent alimony is granted or denied. Because it is a temporary order, findings and conclusions in the PSS order are not binding on the trial court considering alimony. In addition, plaintiff argued that the trial court failed to make findings of fact in the alimony order regarding all factors listed in GS 50-16.3A. The court of appeals held that findings must be made only as to each factor about which a party offers evidence, assuming the evidence is sufficient to support a finding.

Separation Agreements and Property Settlements

OPINION REVERSING COURT OF APPEALS DECISION SUMMARIZED IN LAST CASE SUMMARY.

- Prenuptial agreement may be set aside if party shows agreement was not entered voluntarily, or that agreement is unconscionable and the other party failed to disclose all assets and liabilities at the time the agreement was signed. GS 52B-7.
- Where spouse admits that agreement was signed voluntarily and not as the result of duress or undue influence, and that the agreement is fair and equitable, summary judgment is appropriate even though spouse alleges a failure to disclose assets at time agreement was entered.

Kornegay v. Robinson, 360 N.C. 640, 637 S.E.2d 516 (2006), reversing 176 NC App. --, 625 SE2d 805 (2006).
Plaintiff requested that prenuptial agreement wherein she waived all rights to her husband's estate be set aside. Trial court granted summary judgment for defendant heirs after concluding that the agreement was not unconscionable, and that it was entered into voluntarily by plaintiff without duress or undue influence. The court of appeals held that while plaintiff admitted she entered into the agreement voluntarily, her allegations that she did not read the agreement when it was presented to her on the day before the wedding and that she did not have sufficient information to know the financial circumstances of her husband at the time she signed the agreement, were sufficient to raise a genuine issue of fact regarding whether she voluntarily entered into the agreement. According to the court of appeals, both parties must make full disclosure of their financial circumstances to the other in order for an agreement to be voluntary. The supreme court reversed the court of appeals, holding there was no genuine issue of material fact where plaintiff admitted that she voluntarily signed the agreement, that the agreement was fair and reasonable, and that it was not the result of duress or undue influence.

- Enforcement of antenuptial agreement was not precluded by federal law specifying that wife was entitled to receive proceeds from federal tobacco allotment buy-out program.

Brown and Estate of Ginn v. Ginn, N.C. App., 640 S.E.2d 787 (February 6, 2007).
Decedent and wife entered into an agreement after marriage wherein wife waived and released all rights she had in the estate of husband. Upon his death, husband devised 10 acres of his tobacco farm to the wife and left the remaining acres to his children. Following his death, Congress enacted the Fair and Equitable Tobacco Reform Act of 2004 which provided that tobacco farmers would be compensated for tobacco allotments being terminated by the act. The federal act specified that if the owner of an allotment died before payment was made, the pay-out would be paid to the surviving spouse. Pursuant to the federal law, defendant wife received payment for all allotments that had

been attached to husband's property. Husband's children sued wife for breach of the antenuptial agreement when she refused to turn the allotment money over to them. The trial court entered summary judgment against defendant wife, deciding that because wife had waived all right and interest in husband's estate, the heirs were entitled to the tobacco funds. On appeal, wife argued that she was entitled to keep the proceeds based upon the federal law. The court of appeals disagreed, holding that the federal law did not interfere with the rights of lien holders or other creditors to reach the proceeds once the proceeds were paid to the surviving spouse. According to the court of appeals, the antenuptial agreement gave husband's heirs the right to receive all property of husband not passed to wife by his will.

- Waiver of inheritance rights in a separation agreement is an executory provision. Therefore, such provisions are rescinded upon reconciliation of the parties.

In Re Estate of Josephine Archibald (Edwards), N.C. App., S.E.2d (May 15, 2007). Husband and wife executed a separation agreement wherein both waived all inheritance rights in each other's estate. They filed the agreement with the Register of Deeds, but they reconciled the following day. They lived together as husband and wife until wife's death two years later. Husband requested the spouse's one-year allowance and was granted the allowance by the Clerk of Court. A beneficiary under wife's will appealed, arguing that the separation agreement provision was not rescinded by the reconciliation of the parties. The court of appeals disagreed and held that reconciliation waives all executory provisions in the agreement. According to the court of appeals, a waiver of estate rights always is an executory provision because it requires one party to the agreement to "do or not do a particular thing in the future."

Equitable Distribution

- QDRO cannot be modified unless court sets it aside pursuant to Rule 59 or 60, or if judge makes findings to support conclusion that there has been a material change in circumstances warranting modification.

Morris v. Gray, N.C. App., 640 S.E.2d 737 (February 6, 2007).
Trial court entered a QDRO dividing defendant's US Airways retirement plan. Following entry of the QDRO, US Airways filed for bankruptcy and administration of the pension plan was taken over by the Pension Guaranty Corporation. Subsequently a judge different from the one who signed the original QDRO entered a new QDRO naming the Pension Guaranty Corporation as the plan administrator and changing other terms of the original order. On appeal defendant argued the trial court had no authority to modify the original QDRO and the court of appeals agreed. The appellate court held that one judge may not overrule or modify an order entered by another judge "unless a material change of circumstances in the situations of the parties so warrants." The trial court in this case erred in modifying the order without making findings about why it was modifying the order and about the circumstances that justified modification. The court of appeals held that Rules 59 and 60 are available to set aside orders, but both rules require that a party file a motion and that the court make findings of fact and conclusions of law to support setting aside the original order pursuant to the terms of one of those rules.

- Party is not entitled to be reimbursed for separate contributions to real property held as tenants by the entirety unless the spouse seeking partial separate classification is successful in rebutting the presumption that the separate contribution was a gift to the marital estate. However, trial court may consider separate contribution to marital property as a distribution factor.
- Trial court cannot order an unequal distribution without considering distribution factors.

Stone v. Stone. N.C. App., 640 S.E.2d 826 (February 20, 2007).
Trial court equitable distribution order concluded that an equal distribution was equitable. However, the trial court distributed a piece of marital property to wife in order to "compensate her" for contributions she and her mother made to the equity in the marital residence held by the parties as tenants by the entirety. Distributing that property to wife actually created an unequal distribution of the marital property. The court of appeals held that because the marital residence was held by the parties as tenants by the entirety, the entire value of the home on the date of separation was presumed marital. Therefore, wife was not entitled to compensation for her separate contribution, and awarding her additional marital property amounted to an unequal division. The court held that an unequal distribution is inappropriate where the trial court has not considered and made findings about distribution factors, and is inappropriate where the order concludes that an equal distribution is equitable. The appellate court remanded the case to the trial court, and reminded the trial court that a spouse's contribution of separate property to the

acquisition of property held as tenants by the entirety can be considered by the trial court as a distribution factor if the court considers an unequal distribution.

- Presumption of gift arises when a transfer is made from a parent to a child.
- A statement in a conveyance that payment was made for the conveyance is *prima facie* evidence that the transfer was for consideration rather than a gift.

Joyce v. Joyce, N.C. App., 637 S.E.2d 908 (Dec. 19, 2006).
During the marriage, husband's father transferred title to one-half of his interest in a mobile home park to husband. The trial court concluded that the transfer was made as consideration for work performed by the son for the father. The trial court rejected father's testimony that he intended the transfer to be part of husband's inheritance, finding that the father's testimony was not credible. On appeal, husband argued that the interest in the mobile home park was his separate property because it had been acquired by him by gift. The court of appeals held that when a transfer is made to one party during the marriage by that party's parent, a rebuttable presumption arises that the transfer was a gift. However, the court of appeals held that the trial court had sufficient evidence to support the conclusion that wife had rebutted the presumption by 1) evidence of the significant amount of work husband performed for the father, and 2) the statement in the deed that the transfer was being made "for valuable consideration." The court of appeals held that such language in a deed is *prima facie* evidence that consideration was in fact paid. The court of appeals also held that while the best evidence of donative intent is testimony by the alleged donor, the trial court is the final judge of the credibility of the donor. In this case, the court of appeals held there was good reason for the trial court to be suspicious of father's statements during the trial.

- Statement in Answer that defendant "requests the right to an equitable distribution" was sufficient to state a claim for equitable distribution.

Coleman v. Coleman, N.C. App., 641 S.E.2d 332 (March 6, 2007).
Pro se defendant filed an answer to plaintiff's complaint for divorce. Answer stated defendant "requests the right to an equitable distribution" and prayed the court that "defendant be granted the request to reserve the right for equitable distribution." The Answer contained no other allegations relevant to the claim for equitable distribution. The trial court dismissed the equitable distribution claim on the ground that defendant had failed to state a claim for relief. The court of appeals reversed, holding that the statement in the Answer was sufficient to give Plaintiff notice of the nature and basis of the claim for relief.

Divorce and Annulment

- Doctrine of unclean hands bars a defendant from asserting plaintiff should be estopped from denying validity of marriage found to be void *ab initio* due to defendant's failure to obtain a legal divorce from her first husband.

Hurston v. Hurston, N.C. App., 635 S.E.2d 451 (October 17, 2006).
Plaintiff brought annulment action to declare marriage void *ab initio*. Plaintiff and defendant agreed that defendant failed to obtain a proper divorce from her first husband, making the marriage between plaintiff and defendant void from the start. Defendant and her first husband obtained a decree of divorce from the Dominican Republic, but defendant conceded that neither she nor her first husband had ever lived in or visited the Dominican Republic. In addition to annulling the marriage, the trial court held that plaintiff was barred by the doctrine of equitable estoppel from asserting the invalidity of the marriage as a defense to defendant's claims for alimony and equitable distribution in another case pending between the parties. The court of appeals acknowledged that estoppel may bar a party from asserting the invalidity of a marriage as a defense to claims arising out of the marital relationship, but held that the doctrine of unclean hands prohibited defendant from asserting estoppel in this case. The court of appeals held that even if plaintiff "acted negligently" in that he knew about the Dominican Republic proceeding, the doctrine of unclean hands barred defendant from asserting estoppel because she was "culpably negligent" in marrying plaintiff when she knew she had not obtained a legal divorce from her first husband.

Domestic Violence

Court of Appeals' decision interpreting "harassment" has no precedential value. Wornstaff v. Wornstaff, N.C., 641 S.E.2d 301 (March 9, 2007), appeal of N.C. App., 634 S.E.2d 567 (2006).
Court of Appeals' opinion was summarized in last update. Court of Appeals upheld trial court's determination in a Chapter 50B case that defendant had "placed plaintiff in fear of continued harassment." On review, the supreme court was equally divided on the issue of whether to affirm or reverse the Court of Appeals' decision. Therefore "the decision of the Court of Appeals is left undisturbed and stands without precedential value."

S.L. 2007-14 (H 42). "AN ACT TO AMEND CRIMINAL PROCEDURE LAWS AFFECTING DOMESTIC VIOLENCE VICTIMS AND TO REQUIRE DOMESTIC VIOLENCE HOMICIDE REPORTING AS RECOMMENDED BY THE JOINT LEGISLATIVE COMMITTEE ON DOMESTIC VIOLENCE."
Section relevant to district court amends G.S. 15A-534.1 to add the charge of stalking to the list of charges which require that a judge determine conditions of pretrial release when the alleged victim is a spouse or former spouse or a person with whom the defendant lives or has lived as if married. Applies to offenses committed on or after December 1, 2007.

S.L. 2007-15 (H 46). "AN ACT TO DETERMINE WHETHER SECURITY GUIDELINES ARE NEEDED FOR DOMESTIC VIOLENCE SHELTERS OPERATED BY STATE-FUNDED AGENCIES AND TO PROVIDE, WHERE FEASIBLE, SECURE AREAS FOR DOMESTIC VIOLENCE VICTIMS TO AWAIT HEARING OF THEIR COURT CASE AS RECOMMENDED BY THE JOINT LEGISLATIVE COMMITTEE ON DOMESTIC VIOLENCE."
Section relevant to district court provides that, when practical, upon request of the victim of domestic violence, the clerk of court must coordinate with the sheriff of a county to make available to the victim a secure area away from the general population of the courtroom, to await hearing of his or her case. The clerk must notify the presiding judge that the victim is present in the segregated area. The AOC must report to the Joint Legislative Committee by May 1, 2008 on the progress of providing space in every courthouse. Effective April 12, 2007.

Paternity

- G.S. 110-32 does not create an unlimited right in the putative father to seek rescission of an affidavit of paternity. Rather, the statute incorporates Rule 60(b) grounds and limitations for setting aside a judgment.

County of Durham DSS, ex.rel. Leslie Stevons v. Charles, N.C. App., 642 S.E.2d 482 (April 3, 2007).

In 1997, defendant executed a "Father's Acknowledgment of Paternity" and a Voluntary Support Agreement. The acknowledgment and agreement were incorporated into a court order. In 2005, defendant filed motions pursuant to Rule 60(b) and GS 110-132 seeking to set aside both the Acknowledgment and the Voluntary Support Agreement, claiming plaintiff mother committed fraud in1997 when she told him he is the child's father. Defendant claimed, and plaintiff did not dispute, that while plaintiff mother told defendant in 1997 he is the father of the child, in 2005 she admitted he is not the child's father. The trial court denied the Rule 60 motion after concluding it was not filed before the expiration of the one-year limitation imposed by Rules 60(b)(1), (2) and (3). However, the trial court granted defendant's motion pursuant to GS 110-132. That statute allows a putative father to rescind an acknowledgment within 90 days after signing. Following that 90 day period, the statute allows the affidavit to be challenged on the "basis of fraud, duress, mistake, or excusable neglect." The trial court concluded plaintiff committed fraud when she told defendant he is the child's father. The court of appeals reversed, holding that the one-year limitation contained in Rule 60(b) also applies to motions brought pursuant to GS 110-132. According to the majority of the court of appeals, the General Assembly did not intend to create an unlimited right to seek rescission of an acknowledgment. Instead, the court held that the legislation was intended to incorporate Rule 60 provisions into GS 110-132.

Miscellaneous Family Law Cases

- Subject to the 10-year statute of repose contained in GS 1-52(16), the three-year statute of limitation for criminal conversation begins to run when the extramarital affair is discovered or should have been discovered and not at the time of the last act giving rise to the tort.

Misenheimer v. Burris, 360 N.C. 620, 637 S.E.2d 173 (2006), reversing 169 N.C. App. 539, 610 S.E.2d 271 (2005).
Plaintiff brought action against defendant after discovering defendant engaged in an extramarital affair with plaintiff's wife. The affair ended in 1995 but plaintiff did not discover the affair until July 1997. He filed the criminal conversation claim in April 2000. The trial court denied defendant's motion to dismiss the claim based upon the three year statute of limitation. The trial court held that the discovery rule contained in GS 1-52(16) applies to criminal conversation and therefore the three-year statute of limitations is tolled until the conduct constituting the tort is discovered by plaintiff. The court of appeals disagreed, holding that GS 1-52(16) does not apply to criminal conversation. The supreme court reversed the court of appeals, concluding that criminal conversation is a personal injury claim to which the discovery rule applies. The court noted while GS 1-52(16) generally tolls the statute of limitation indefinitely until discovery, no action may be commenced more than 10 years after the last act giving rise to the cause of action.

- A verified pleading or motion is evidence that may be used to support findings of fact.
- Court of appeals is sympathetic to difficulties faced by pro se litigants, but fairness requires that pro se litigants be held to "minimum standards of compliance with the Rules of Civil Procedure."
- Trial court has discretion to strike an answer or a counterclaim as sanction for discovery violations but order must reflect that trial court considered lesser sanctions.

Harrison v. Harrison, N.C. App., 637 S.E.2d 284 (Dec. 5, 2006).
Plaintiff filed action for divorce from bed and board and equitable distribution. Defendant filed answer and counterclaims. Plaintiff served Interrogatories and Request for Production of Documents on defendant soon after the complaint was filed but defendant failed to respond. A year after the discovery request was served on defendant, the trial court entered an order compelling discovery. Defendant still did not respond, and two years after the discovery was served, the trial court entered an order imposing sanctions on defendant, including striking her answer and counterclaims and ordering her to pay attorney fees.

The court of appeals rejected defendant's contention on appeal that various findings of fact in the order of sanctions were not supported by evidence introduced during the sanction hearing. The court held that sufficient evidence was introduced for most findings and others were supported by statements contained in the verified motion filed by plaintiff requesting sanctions. The court of appeals held that verified pleadings and motions are considered evidence upon which findings of fact may be based.

The court also rejected defendant's argument that sanctions were inappropriate because this case involves complicated business records and she was unrepresented by counsel during most of the proceedings. The court of appeals stated that the trial court had given defendant much more time than required by the Rules of Civil Procedure to comply with the discovery request and held that fairness requires that pro se litigants be held to "minimal standards of compliance with the Rules of Civil Procedure."

However, the court of appeals remanded the case to the trial court for specific findings to show that the trial judge considered less drastic sanctions before striking defendant's answer and counterclaims. The court held that it was bound by previous decisions of the court of appeals holding that such findings must be in any sanction order striking an answer or counterclaim. The court rejected the argument by plaintiff that the court of appeals should assume trial judges consider all legal options before deciding on a sanction.

- An appeal of a 50C order is moot and must be dismissed if the order has expired before the court of appeals reviews the case.

Williams v. Vonderau, N.C. App., 638 S.E.2d 644 (January 2, 2006).
Trial court entered a 50C no-contact order against defendant, effective April 7, 2005 until April 7, 2006. Defendant appealed but the case was not calendared to be heard by the court of appeals until September 12, 2006. The majority of the court of appeals concluded that the appeal was moot because the order had expired. Dissent argues that 50C orders should be treated same as 50B orders (court of appeals has held that appeals of 50B orders are not moot due to the collateral consequences of domestic violence orders). Dissent also argues that the 50C order was legally incorrect in this case because plaintiff proved only one incident of harassment by defendant. Dissent contends that 50C requires a finding that harassment occurred on more than one occasion, but the majority opinion does not address this issue.

- Attorney working pursuant to a contingency fee agreement who withdraws from representation before final judgment in a case is not allowed to file a charging lien. Doing so will subject the attorney to sanctions pursuant to Rule 11.

Wilson v. Wilson, N.C. App., S.E.2d (May 15, 2007).
Plaintiff's attorney in an equitable distribution case filed an attorney charging lien in the amount of $81,000 against plaintiff's final equitable distribution judgment. However, the lien was filed before the final judgment was entered. The trial court granted plaintiff's request for Rule 11 sanctions against the attorney, and entered a sanction order striking the lien and requiring the attorney to pay the attorney fees plaintiff incurred to bring the Rule 11 motion. The court of appeals upheld the trial court after concluding that a charging fee can be imposed in a contingency fee case only following entry of final judgment. If an attorney withdraws prior to final judgment, the attorney must seek collection of a fee through an action seeking *quantum meriut* recovery.

- Clergy-communicant privilege is absolute unless waived in open court by the communicant. The statute granting the privilege does not allow a trial court to compel testimony "in the interest of justice."

Misenheimer v. Burris, N.C. App., S.E.2d (June 5, 2007).
Defendant argued that plaintiff's criminal conversation claim was barred by the statute of limitations (see discussion above summarizing decision of supreme court regarding the applicable statute of limitations). Plaintiff claimed he found out about his wife's affair with defendant during a counseling session with a minister in July 1997. Defendant called the minister to testify in an effort to show plaintiff actually found out about the affair during an earlier session with the minister. Plaintiff asserted the clergy-communicant privilege provided by GS 8-53.2 but waived the privilege with regard to the July 1997 counseling session. The minister testified that his notes did not show that plaintiff's wife revealed the affair during that session, and defendant requested the trial court to order the minister to testify about other sessions. The trial court denied the request and the court of appeals affirmed. According to the court of appeals, the clergy-communicant privilege statute was amended in 1967 to remove the provision which allowed a trial court to compel testimony of a minister "when necessary to the proper administration of justice." According to the court of appeals, this amendment was intended to make the privilege absolute unless waived in open court by the communicant. In this case, plaintiff waived the privilege only with regard to one counseling session. Therefore the trial court was correct in denying defendant's request to require the minister to testify about other sessions.

Contempt

- Trial court does not have authority to enforce a non-domestic settlement agreement by contempt. However, court has authority to order specific performance of settlement agreement and then enforce order of specific performance by contempt.
- Rule 60(b) cannot be used to set aside order based upon an error of law.
- Attorney fees cannot be ordered as part of contempt judgment unless specifically authorized by statute.

Baxley v. Jackson, N.C. App., 634 S.E.2d 905 (October 3, 2006).
Plaintiffs brought action for breach of contract and other claims arising out of a sale of a residential home. Parties resolved the case by settlement agreement requiring defendants to pay plaintiffs $87,500.00. The settlement agreement was approved by the court. When defendants failed to pay, the trial court entered an order of specific performance. Plaintiff thereafter filed a motion pursuant to Rule 60(b) requesting that the order of specific performance be set aside, arguing that the order violated the constitutional rights of the plaintiffs. The trial court denied the motion. When defendants failed to comply with the order of specific performance, the trial court found them in civil contempt and ordered they pay plaintiffs' attorney fees as "sanction" for delaying the case. The court of appeals held that the denial of the Rule 60 motion was appropriate because Rule 60 cannot be used to set aside orders based upon errors of law. Because defendants' motion was based on their contention that the order of specific performance was legally incorrect, the trial court was correct in denying relief. The court of appeals also upheld the order of civil contempt. While a non-domestic consent order is not enforceable directly by contempt, a trial court can enforce an order of specific performance by contempt.

However, the court of appeals vacated the award of attorney fees. According to the court, there is no authority to order compensation for damages of any type in a contempt proceeding. And attorney fees in particular cannot be awarded without specific statutory authority. The court noted that attorney fees are permitted for contempt in cases relating to child support and equitable distribution.

- Trial court did not err in holding an attorney in criminal contempt for refusing to represent a client during a probation hearing because the client had not paid him.
- Attorney's conduct amounted to "willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court."

State v. Key, N.C. App., 643 S.E.2d 444 (April 17, 2007).
Defendant attorney represented a defendant with numerous criminal charges. During one court hearing, the attorney resolved all pending cases against the client except one charge of probation violation. On the court date set for the probation hearing, attorney appeared but left the courthouse after learning that his client did not have money to pay the remainder of his fee. On instruction from the trial judge, the clerk of court called attorney to return to court to represent the client but the attorney refused. In addition, the attorney

made several inappropriate comments about the judge to the clerk during that telephone conversation. The trial judge entered a show cause order directing attorney to appear and show cause why he should not be held in criminal contempt. Following a hearing on a later date, a different trial judge held the attorney in contempt after concluding that the attorney had made a general appearance on behalf of the client and was the attorney of record for all the client's criminal charges. According to GS 15A-143, an attorney who enters a case without limiting his or her representation undertakes representation until final judgment. An attorney must seek court permission to withdraw. The trial court found that the attorney had committed criminal contempt by refusing to proceed with the probation violation hearing on the scheduled date. On appeal, attorney argued that the evidence did not support a finding of criminal contempt because his conduct did not result in "substantial interference with the business of the court" as required by GS 5A-11(a)(7). The court of appeals disagreed, holding that evidence showed that a hearing which should have taken 5 minutes to resolve had to be delayed for several days due to the attorney's failure to appear, and that the court room clerk and trial judge spent much time "tracking down" the attorney and dealing with the case. According to the court of appeals, this evidence was sufficient to support the conclusion that the conduct resulted in substantial interference with court business.

- Order of direct criminal contempt must show trial court applied the beyond a reasonable doubt standard in making findings to support the contempt order.

Re: Contempt proceedings against Cogdell, attorney for defendant Buoniconti, N.C. App., S.E.2d (May 15, 2007).

Trial court held defense counsel in direct criminal contempt for twice asking a witness questions concerning whether a police informant had been given a polygraph test. The trial court determined that the attorney "appeared to be" deliberately trying to introduce inadmissible evidence in front of the jury. The court of appeals reversed the contempt order, finding it to be "fatally deficient" because the order failed to indicate the judge applied the beyond a reasonable doubt standard during the summary proceeding.