

# Family Law Update



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# Absolute Divorce



- Void Divorces

- *Caldon v. Caldon*, COA Nov. 18, 2008

- ✦ *Case filed before one year*

- *Broyhill v. Broyhill*, COA Feb. 17, 2008

- ✦ *No summons in file*

- ✦ *But see In matter of K.J.L.*, NC June 18, 2008

- *Summons is matter of personal jurisdiction, not subject matter jurisdiction*

# Other Divorce Issues



- Lack of verification
  - *Boyd v. Boyd*, 61 NC App 334 (1983)
- Lack of signature
  - Rule 11
- Lack of SS# in complaint
  - *See Cobb v. Cobb*, 42 NC App 373 (1979)(names of children)
- Summary Judgment Procedure
  - Rule 56 procedure
  - Order needs findings of fact. GS 50-10(d)

# Domestic Violence



- **Firearm surrender: 50B-3.1(a)**
  - Use or threatened use of firearm, or pattern of prior conduct involving use of threatened use
  - Threats to seriously injure or kill
  - Suicide threat
  - Serious injuries
  
- **Firearm retrieval: 50B-3.1(f)**
  - Sheriff needs court order
  - Court shall deny return if defendant is precluded by state or federal law from owning or possessing firearms, or if there are pending criminal charges regarding plaintiff
  - *Gainey v. Gainey*, COA Dec. 08

# *Burris v. Burris*



- Evidence insufficient to support finding of domestic violence
  - DSS investigation
  - Hearsay evidence accepted for limited purpose
  - “Previous domestic violence”
- Standard for issuance of DVPO
  - 50B-3: “If court finds act of domestic violence has occurred, the court shall grant a protective order restraining defendant from further acts”
  - **Burris**: trial court authorized “to issue a DVPO only upon showing of acts of domestic violence of which the court may ‘bring about a cessation’.”

# *State v. Byrd*



- Reversed the Court of Appeals
- Rule 65 TRO  $\neq$  50B DVPO
- Ex parte order  $\neq$  “order entered upon hearing”

# Child Custody Jurisdiction



- **Emergency Jurisdiction**
  - G.S. 50A-204 (no longer listed as separate ground for jurisdiction)
- **NC may exercise *TEMPORARY* jurisdiction if child is present in NC and:**
  - Child has been abandoned, or
  - It is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse

# Emergency *Temporary* Jurisdiction



- If state with jurisdiction has **not** acted and does **not** act, NC order may become permanent.
  - ✦ *In re M.B.*, 635 NC App 8 (2006)
  - ✦ *In re EXJ*, 662 SE2d 24 (COA 2008), *aff'd* NC Feb. 09
- If state with jurisdiction **has acted or is acting**, NC order must be of limited duration
  - ✦ *In the Matter of JWS*, COA Dec. 08
- If state with jurisdiction **has acted or is acting**, NC court must communicate “immediately” with that court to resolve the emergency
  - ✦ Failure to do so will result in a void judgment
  - ✦ *In the Matter of JWS*, COA Dec. 08



# Grandparents



- Visitation
  - Grandparents can intervene in on-going custody dispute between parents; visitation as meets best interest of the child
  - *Smith v. Barbour*, COA Feb. 09
  - *Quesinberry v. Parrish*, COA April 09
- “Custody”
  - Grandparents can intervene in on-going dispute between parents only if allege facts sufficient to prove parents have waived constitutional right to custody
  - *Perdue v. Fuqua*, COA March 09
  - Held allegations insufficient as a matter of law

# Custody and Domestic Violence



- Collateral estoppel: If 50B order finds party did or did not commit act of domestic violence, custody order cannot find otherwise
  - *Doyle v. Doyle*, 176 NC App 547 (2006)
  - *Simms v. Simms*, COA March 2009
- But, custody judge must consider domestic violence
  - GS 50-13.2(a) – “and shall make findings accordingly”
  - If find domestic violence has occurred, must protect victims “in accordance with the provisions of GS 50B-3(a1)(1), (2) and (3).”
    - ✦ GS 50-13.2(b)

# Equitable Distribution



- **Divisible property**
  - GS 50-20(b)(4)
  
- **Postseparation**
  - Appreciation/depreciation of marital/divisible property not caused by “effort” of a spouse
  - Passive income from marital property
  - Property earned as the result of marital efforts (commissions, bonuses, contract rights)
  - Increases [and decreases] in marital debt; financing charges and interest on marital debt
    - ✦ Decreases added October 11, 2002

# Divisible Property



- “Under the plain language of the statute, all appreciation and diminution in value of marital and divisible property is presumed to be divisible property unless the trial court finds that the change in value is attributable to the postseparation actions of one spouse.”
- “When the court is unable to determine whether the change in value of marital property is attributable to the actions of one spouse, this presumption is rebutted and must control.”
  - *Wirth v. Wirth*, COA Nov. 2008

# Postseparation Mortgage Payments



- Probably should not consider nor classify if payments made pursuant to PSS order.
  - *See Wilkins v. Wilkins*, 111 NC App 541 (1993)(GS 50-20(f) prohibits consideration of alimony or child support in ED)
  - *See also Wirth v. Wirth*, COA Nov. 2008 (no error to refuse “credit” in ED if party received “credit” in PSS)

# Postseparation Mortgage Payments



- *Hay v. Hay*, 148 NC App 649 (2002)
  - Value homes using “net value” – ties mortgage debt with house
  - Payments of mortgage result in postseparation appreciation, caused by a spouse. Reduction was distribution factor
- *Warren v. Warren*, 175 NC App 509 (2006)
  - Payments made after Oct. 11, 2002 are divisible debt if they reduce marital debt
  - *McNeely v. McNeely*, COA March 2009: Mortgage on tenancy by entirety property presumed marital debt??

# Postseparation Mortgage Payments



- *McNeely v. McNeely*, COA March 09
  - Trial court classified payments as divisible and awarded to payor – no further “credit” required.
  - *Jones v. Jones*, COA Nov 08 (*unpublished*): Equal division of divisible debt is not required

**KEY:** If treat as divisible debt, don't also count as appreciation

# Division of Marital Property



- “There appears to be no other guide than the discretion and good conscience of the judge in determining which party gets which specific property”
  - **Khajanchi v. Khajanchi**, 140 NC App 552 (2000)
    - Can order that property be sold and proceeds distributed.  
See *Wall v. Wall*, 72 NC App 303 (2000)
- *Troutman v. Troutman*, COA Oct. 08
  - Okay to divide 58 acre tract into three separate parcels
  - See also ***Edwards v. Edwards***, 152 NC App 185 (2002)(split up hunting lodge)
- *Wirth v. Wirth*, COA Nov. 08
  - Okay to award business to spouse with no business experience