Family Law Update
Cases Decided and Legislation Enacted Between June 18, 2024, and September 17, 2024

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Custody
June 18, 2024, and September 17, 2024

Temporary custody order or permanent order

- Citing what it referred to as the "*Senner* test", [*Senner v. Senner*, 161 NC App 78, 587 SE2d 675 (2003)], the court of appeals held that an order is temporary rather than permanent if it (1) is entered without prejudice to either party, (2) states a clear and specific reconvening time in the order and the time interval between the two hearings is reasonable brief, or (3) does not determine all issues.
- A consent custody order was a temporary order even though it did not specifically state that it was entered "without prejudice" where it was clear from the plain language of the order that it was entered "without the loss of rights" to either party.
- The temporary order did not become a permanent order through operation of time where less than 9 months elapsed between the entry of the consent order and plaintiff's filing of a calendar request and notice of hearing on the issue of custody.

Lawrence v Lawrence, 903 S.E.2d 374 (N.C. App., June 18, 2024). Plaintiff father filed for custody and an ex parte order was entered granting joint physical custody with the parties sharing custody on a week on/week off basis. A temporary custody hearing was held, and the parties entered a consent order on January 13, 2019, granting defendant mother primary physical custody with father having custody every other weekend and one day each week. The consent order was later modified on April 17, 2019, to lengthen father's weekend time and eliminate his weeknight visits. Both orders were referred to as temporary orders and neither order provided for holiday or summer vacation visitation.

A hearing was held on February 18, 2022, to determine whether the last consent order was a temporary order and if so, whether it converted to a permanent order due to the passage of time. The trial court determined that both consent orders were permanent orders because they were not entered without prejudice to either party, there was no reconvening time set in the orders, and the orders resolved all issues. In addition, the trial court held that, even if temporary when entered, the last consent order converted to a permanent order because neither party filed a motion for a hearing on permanent custody "for a period of no less than 18 months."

Plaintiff father appealed and the court of appeals reversed. The appellate court held that both consent orders were temporary orders because they were entered "without the loss of rights" to either party. Even though neither order contained the language that they were entered "without prejudice", they contained several references to the fact the orders were temporary. In addition, the court of appeals held that the record did not support the trial court's finding that neither party requested a hearing on permanent custody for more than 18 months. Rather, according to the appellate court, the record showed plaintiff filed a calendar request and notice of hearing less than 9 months following the entry of the last consent order. Hearings were rescheduled and continued for a variety of reasons, including the COVID-19 pandemic, withdrawal of plaintiff's attorney, the retirement of plaintiff's subsequent attorney, and not being reached by the court. To determine whether a temporary order has become permanent due to the passage of time, a trial

court should consider the amount of time between the entry of the temporary order and the time a party requests a hearing rather than when the court actually conducts the hearing.

Madison v. Gonzalez-Madison, _ N.C. App. _, _ S.E.2d _ (August 2024)

On The Civil Side, August 2024

The NC Court of Appeals addresses "self-executing" modification provisions in custody orders

The North Carolina Supreme Court has stated that "[a] judgment awarding custody is based upon conditions found to exist at the time it is entered …." *Stanback v. Stanback*, 266 N.C. 72, 76 (1965). *See also* *Kellanos v. Kellanos,* 251 N.C. App. 149 (2016)(a district court must consider the pros and cons of ordering primary custody with each parent, contemplating the two options as *they exist [at the time of the hearing]*, and then choose which one is in the child's best interest.").

A custody order can be modified only upon a showing of a substantial change in circumstances affecting the welfare of the child that occurred after the entry of the custody order. G.S 50-13.7; *Shipman v. Shipman*, 357 N.C. 471 (2003). "Evidence of speculation or conjecture that a … change may take place sometime in the future will not support a change in custody." *Benedict v. Coe*, 117 N.C. App, 369, 378 (1994), quoting *Ramirez-Barker v. Barker,* 107 N.C. App. 71, 78 (1992).

But what if it seems very likely, at the time the custody order is entered, that circumstances will change? Can the court anticipate the change in the custody order and provide for a change in the custodial arrangement upon the occurrence of the change?

The court of appeals addressed this issue yesterday in Madison v. Gonzalez-Madison, (N.C. App, August 6, 2024). That opinion, as well as earlier decisions of the appellate court, indicate that a trial court's authority to include "self-executing" modification provisions is extremely limited.

Madison v. Gonzalez-Madison

Both parents are active-duty members of the U.S. Army. While both were stationed in North Carolina when the custody action was initiated, both had been re-stationed in Hawaii by the time of the permanent custody trial. The trial court granted mother primary physical custody of the child and joint legal custody to both parents. However, the court also included provisions in the order that would take effect if either or both parents are relocated by the Army from Hawaii. The trial court found that each parent was expected to have a permanent change of station in 2025, and that mother planned to relocate to Texas at that time. The court created an alternative visitation schedule for the father that would commence if the parents left Hawaii and that included alternative visitation provisions that would apply depending on whether the parties lived further than 100 miles from each other.

On appeal, the father argued that the trial court abused its discretion by including this "self-executing modification provision" in the custody order, and the court of appeals agreed.

The appellate court first noted that several other states have held that self-executing modification orders are generally illegal, and that their legality is unclear in other states, citing Helen R. Davis, *Self-Executing Modification of Custody Orders: Are They Legal?* 24 Am. Acad. Matrim. Laws 53 (2021).

The appellate court then held that the change anticipated by the court was much too speculative to allow the trial court to determine the appropriate visitation schedule before the change occurs. The court of appeals stated:

"Here, the trial court made a call regarding visitation in the future without knowing when either parent may be transferred from Hawaii or where either may be transferred or how far apart Mother and Father would be living from each other. A [station change] could create either a slight change or a drastic change which could uproot [the child] to any United States Army base. We therefore conclude the trial court abused its discretion by incorporating the "self-executing" provisions in the order, provisions which do not take effect until after either parent [transfers] from Hawaii, where the time and place of such transfer is unknown."

Burger v. Smith

The court in *Madison* acknowledged the contrary result in *Burger v. Smith,* 243 N.C. App. 233 (2015). In that case, the court of appeals affirmed an order providing for visitation of an 18-month-old child with mother for two months, then with father for one month, until the child started kindergarten, at which time father's visitation would change and thereafter take place over spring, summer, and Christmas breaks. The court of appeals held that this order was within the trial court's discretion, was supported by a finding that both parents were excellent parents who had provided exceptional care and had strong support systems and was an "appropriate response to the parties' unusual living situation." The mother lived in North Carolina and was a U.S. citizen, but father was not a U.S. citizen and lived sometimes in Canada and sometimes in Africa. Rather than an abuse of discretion, the court in *Burger* held that "[t]he trial court's findings of fact and conclusions of law demonstrate an intention to fashion a custody plan that would foster the development of a close and meaningful relationship between the minor child and both of his parents."

The court in *Madison* distinguished *Burger* by stating that "the changes in circumstances which may occur based on a [military station change for either or both parents] are much more speculative than that in *Burger*," pointing to the fact that there was no way to know whether a station change would result in a "slight or drastic" change for the child.

Cox v. Cox

Although not mentioned by the court in *Madison*, the court of appeals also rejected a "self-executing modification" in the case of *Cox v. Cox*, 238 N.C. App. 22 (2014). In that case, due to concerns regarding the father's mental health, the trial court's custody order required that father reside with his mother when exercising visitation with the child. However, the order also provided that this restriction on father's visitation would be lifted upon a showing that his therapist no longer had concerns about father's mental health or his ability to care for the

children on his own. The order specifically provided that this showing would constitute a substantial change in circumstances that would result in the modification of the custody order to lift the restriction on father's visitation.

The court in Cox held that the provision violated the requirements of G.S. 50-13.7, stating "[t]o predetermine that a future event will amount to a substantial change in circumstances warranting a modification of child custody is to predetermine a legal conclusion absent any finding of fact."

The court reached similar conclusions in *Hibshman v. Hibshman*, 212 N.C. App. 113 (2011)(agreement by parties in initial custody order that order was subject to modification without a showing of changed circumstances was ineffective); *Thomas v. Thomas*, 233 N.C. App. 736 (2014)(stipulation by parties at the beginning of modification hearing that there had been a substantial change in circumstances was ineffective; changed circumstances is a legal conclusion of law that must be made by the trial judge); and *Spoon v. Spoon*, 233 N.C. App. 38 (2014)(noting that the trial court would have erred had it relied on a stipulation that the parties made before the entry of the original custody order that a move by mother in the future would constitute a substantial change in circumstances).

UCCJEA, modification jurisdiction, waiver of parental right to custody

- The court of appeals has the duty to address subject matter jurisdiction even if neither party raises the issue.
- North Carolina had subject matter jurisdiction to modify a New York consent custody order where North Carolina was the home state of the child at the time the modification proceeding was initiated in North Carolina and the New York court had ruled that North Carolina was the more convenient forum.
- The temporary order did not become a permanent order through operation of time where less than 9 months elapsed between the entry of the consent order and plaintiff's filing of a calendar request and notice of hearing on the issue of custody.
- Extensive findings of fact, supported by clear, cogent and convincing evidence, were sufficient to support the trial court's conclusion that mother waived her constitutional right to exclusive custody of her child.

Harney v. Harney, _N.C. App._, _S.E.2d_ (September 3, 2024). In June 2019, the child was born in New York where mother resides. Maternal grandfather lives in North Carolina and traveled to be with mother when the child was born. Shortly after the child's birth, grandfather sought and obtained temporary custody of the child in New York due to concerns with mother's home and mental health. A few days later, the New York court entered a stipulation agreement with consent of mother and grandfather that granted both parties joint custody; noted grandfather lived in North Carolina and named grandfather as the child's physical custodian. The stipulation gave mother supervised visitation rights and included provisions mother had to address. The child lived in North Carolina with grandfather since entry of the stipulation order. In June 2020, grandfather filed for custody of the child in North Carolina. In July 2020, mother filed petitions in New York to modify and enforce the New York custody order and motioned to dismiss grandfather's complaint in North Carolina for lack of subject matter jurisdiction, though

admitting the child lived with grandfather in North Carolina since June 2019. In October 2020, following a hearing conducted by the presiding New York judge and the North Carolina judge, at which both parties appeared in North Carolina, the New York court declined exclusive, continuing jurisdiction, naming North Carolina as the more appropriate forum, and directing the parties to appear and cooperate in further proceedings in North Carolina. In July 2021, the North Carolina court entered a temporary custody order and held custody hearings over several months. In 2022, the North Carolina court entered a permanent custody order granting grandfather legal and physical custody, after concluding mother waived her constitutional right to custody. Mother appealed.

Subject Matter Jurisdiction to modify the New York Order

The NC Court of Appeals held that:

- An appellate court has a duty to address subject matter jurisdiction even if not raised by any party. The standard of review of whether a court possesses subject matter jurisdiction under the UCCJEA is de novo. Mother's only argument relating to the North Carolina trial court's subject matter jurisdiction is that the North Carolina court failed to rule on her motion to dismiss. Mother cited no supporting authorities and made no argument on the issue. The court of appeals noted its duty to address jurisdiction and addressed the issue despite mother's failure to raise the issue.

- Under the UCCJEA, "[e]xcept as otherwise provided in G.S. 50A-204 [temporary emergency jurisdiction], a court of this State may not modify a child-custody determination made by a court of another state unless a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) [home state jurisdiction] or G.S. 50A-201(a)(2) [significant connection jurisdiction] **and**: (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207," *quoting* G.S. 50A-203.

- North Carolina had subject matter jurisdiction to enter the custody order under the UCCJEA. The New York and North Carolina trial courts held a hearing on mother's motions filed in New York. The New York court entered an order declining to exercise exclusive continuing jurisdiction in favor of the more appropriate forum of North Carolina in compliance with G.S. 50A-207. Mother did not appeal the New York order, and the order is binding upon North Carolina courts. North Carolina was the child's home state under G.S. 50A-201(a)(1) and the court had modification jurisdiction pursuant to G.S. 50A-203.

Waiver of Parental Rights

The court of appeals held that the extensive findings of fact, made by clear, cogent, and convincing evidence, supported the trial court's conclusion that mom acted inconsistently with her protected status as a parent, thereby waiving her constitutional right to exclusive care, custody and control of her child. Among other things, the trial court found that mother:

- Failed to provide financial support for her child despite her ability to do so,
- Took no action to recover custody of the child after the temporary order was entered in New York,
- Failed to act in a timely manner to address the concerns about the condition of her home and to seek treatment for her mental health issues as ordered by the New York court,
- Failed to make efforts to establish a relationship with the child despite grandfather's efforts to provide her the opportunity to be with the child,
- Screamed profanities at the grandfather in the presence of the child,
- Failed to consult with the child's medical providers or to acknowledge and address the child's medical and emotional issues, and
- Failed to disclose the identity of the child's father after initially alleging that she did not know the identity of the father.

Divorce
June 18, 2024, and September 17, 2024

Service of process, attacking judgment based on false swearing

- Plaintiff failed to rebut presumption that service of process in earlier divorce action was proper.
- A party seeking to invalidate a divorce judgment on the basis that the judgment was obtained by making a false allegation as to the date of separation must file a motion in the divorce action; the divorce judgment cannot be attacked in a separate civil proceeding.

Tuminski v. Norlin, _ N.C. App. _, _S.E.2d _(September 3, 2024). Plaintiff husband filed this action seeking to invalidate a divorce judgment entered in a separate proceeding initiated by defendant wife. In the earlier proceeding, the wife filed for divorce, served husband by certified mail, and claimed the parties had been separated for a year before she filed the complaint. After the divorce judgment was entered, the husband filed this action, seeking to set aside the divorce pursuant to Rule 60(b). The trial court denied his request and dismissed his complaint. The court of appeals affirmed.

Service of process in the first proceeding was by certified mail, addressed to husband's personal mailbox located in a UPS store. The return receipt was labeled as having been received by "BP/FP" [not the husband's initials] and had "COVID-19" instead of a signature. The wife filed an affidavit of service stating that a copy of the complaint had been deposited in the mail for mailing by certified mail and she attached the return receipt. The court of appeals held that pursuant to Rule 4 and GS 1-75.10(a)(4), this affidavit and the attached receipt raised the presumption of valid service. The court of appeals identified the divorce judgment as a "default judgment." The husband admitted he signed a contract with UPS to receive all his mail and that he did receive all his mail at this mailbox at that time. Because he failed to rebut the presumption of valid service, the divorce judgment was valid.

The court of appeals also agreed with the trial court that husband could not attack the divorce judgment based on his allegation that the parties had not been separated for a year at the time the case was filed. An attack on the judgment based on a claim that wife made a false allegation in the divorce complaint must be made in the original divorce proceeding and cannot be made by collateral attack.

Equitable Distribution
June 18, 2024, and O September 17, 2024

Marital debt, student loans, delay in entry of judgment, distributive award

- Marital debt is debt incurred after the date of marriage and before the date of separation by either or both spouses for the joint benefit of the parties. The party seeking the marital classification of a debt has the burden of proving each element, including that the debt was incurred for the joint benefit of the parties.
- The trial court finding of fact that the mortgage on the marital home was in the joint names of the parties was a simple clerical error where the mortgage was in the name of the wife alone. The error was not significant because the name on a debt is not relevant to the classification or distribution of the debt.
- The trial court did not err in classifying wife's student loan debt as partially marital and partially separate after concluding that only that portion of the loan used to pay for the living expenses of the parties during the marriage was incurred for the joint benefit of the parties.
- The delay of nine months between the equitable distribution trial and the entry of the judgment was not sufficient to entitle the wife to a new distribution order where she failed to show any prejudice to her caused by the delay.
- The trial court erred in ordering a distributive award without explicitly finding that an in-kind distribution was not equitable in this case and without finding that wife had sufficient assets from which to pay the distributive award.

Sapia v. Sapia, 903 S.E.2d 444 (N.C. App., June 18, 2024). The trial court entered an equitable distribution judgment, concluding that an equal division was equitable, distributing the marital residence and the debts encumbering the residence to the wife, and ordering wife to pay husband a distributive award. The marital home was the most significant asset in the marital estate. In a very fact specific opinion, the court of appeals affirmed the trial court's classification of the home and the marital debts, as well as the determination that an equal division was equitable. The court of appeals vacated the distributive award and remanded the case to the trial court for specific findings regarding whether the presumption in favor of an in-kind division had been rebutted by the evidence in this case and whether wife had sufficient assets from which to pay the distributive award. The court noted that, if the trial court could not make those findings and conclusions on remand, the trial court "in its discretion ... may also consider ordering sale of the marital home."

Marital debt, property gifted to children, credit for postseparation payments, distributive award

- Debt incurred by husband after the date of separation to repair the marital residence was divisible debt.
- Debt incurred during the marriage to purchase property out of foreclosure that had been owned by husband before marriage was marital debt.
- The trial court did not err in concluding vehicles purchased by the parties during the marriage had been gifted to the children of the parties and therefore were not marital property.

- The trial court erred in classifying scaffolding as marital property where the scaffolding was owned by husband before the date of marriage.
- A business debt incurred by the business on the date of separation was not marital debt because it was not incurred before the date of separation and was not related to any existing marital debt.
- The husband was entitled to credit in distribution for wife's postseparation occupation of the marital residence because he made mortgage payments on the residence following separation using his separate funds.
- The wife is entitled to credit in distribution for any postseparation payments she made on the marital residence with separate funds because the residence was distributed to husband in the final judgment.
- The trial court's extensive findings of fact regarding distribution factors were sufficient to support the distributive award ordered by the court, despite the lack of a finding by the trial court that the presumption in favor of an in-kind distribution had been rebutted.

Kerslake v. Kerslake, _ N.C. App. _, _ S.E.2d _(Sept. 3, 2024). The trial court entered an equitable distribution judgment, concluding that an unequal division was equitable, awarding husband 80% of the marital estate and ordering wife to pay husband a distribution award, The court of appeals affirmed in part, reversed in part, vacated in part and remanded the case to the trial court.

No subject matter jurisdiction to consider ED claim requested by motion in the cause

- The trial court was without jurisdiction to consider defendant's motion in the cause requesting equitable distribution filed by defendant after final judgment was entered resolving the only remaining pending claim in the case.

Phillips v. Phillips, unpublished opinion, 292 N.C. App. 549, 897 S.E.2d 181 (2024). Plaintiff filed a complaint seeking child custody. The defendant responded with counterclaims for custody, child support, equitable distribution, PSS, alimony and attorney fees. Plaintiff replied seeking affirmative relief in the claims raised by defendant's counterclaims.

The parties resolved permanent custody by a consent order. Subsequently, the defendant filed a voluntary dismissal of all her counterclaims. Approximately nine months later, the defendant filed a motion in the cause requesting equitable distribution. The trial court dismissed the claim, concluding it did not have subject matter jurisdiction to litigate a claim for equitable distribution filed by motion in a case where all pending issues had been resolved. After finding that plaintiff consented to defendant's voluntary dismissal of her original counterclaims, the court of appeals agreed the trial court had no jurisdiction to consider equitable distribution requested by a motion in the cause.

Spousal Agreements
June 18, 2024, and September 17, 2024

Duress, ratification, summary judgment

- A separation agreement is invalid and unenforceable if it is unconscionable or procured by duress, coercion, or fraud.
- An agreement procured by duress, coercion, or fraud is enforceable if the contract was ratified following execution unless the ratification occurred while the duress, coercion, or fraud was still in effect.
- Summary judgment is not appropriate when there is a genuine issue of fact regarding whether the agreement was procured by duress, coercion, or fraud, or regarding whether the agreement was ratified. "When examining whether both parties freely entered into a separation agreement, trial court should use considerable care because contracts between husbands and wives are special agreements."
- The trial court erred in granting summary judgment concluding as a matter of law that husband was not coerced into executing the separation agreement and that he had ratified the agreement, and in ruling as a matter of law that he had breached the agreement. Husband's forecast of evidence, viewed in light most favorable to him, raised an issue of fact as to whether he was under extreme stress caused by wife's threat of pursuing an ex parte Domestic Violence Protective Order against him during the time the agreement was executed and at the time he partially complied with the agreement.

Baer v. Baer, 904 S.E.2d 815 (N.C. App., July 2, 2024). The husband filed a declaratory judgment action seeking to set aside a separation agreement between him and his wife, alleging the agreement was entered into as the result of her duress, coercion, and fraud. The wife filed an answer denying his allegations and arguing that he had ratified the agreement by complying with significant portions of the agreement before filing the action seeking to invalidate the agreement. She also counterclaimed for breach of contract. The trial court entered summary judgment, ruling as a matter of law that the husband ratified the contract and ruling as a matter of law that he breached the contract.

The court of appeals reversed, holding that husband's forecast of evidence was sufficient to show a genuine issue of material fact about whether he was under significant duress from wife's threat to seek an ex parte Domestic Violence Protective Order against him if he did not agree to the terms of the contract. Husband produced an affidavit from a psychologist who stated that husband's concern over the impact of a DVPO on his career caused the husband significant anxiety and stress that interfered with his ability to negotiate the agreement and that the duress and anxiety continued during the time husband complied with some terms of the agreement. The court of appeals noted: "[u]nsupported or falsely verified ex parte DVPOs are perjurious, unlawful, sanctionable, and cannot be misused to obtain unfair advantages in settlement negotiations."

Civil No-Contact Orders
June 18, 2024, and September 17, 2024

Workplace Violence Prevention Act; harassment; authority over non-parties

- The Workplace Violence Prevention Act, GS 95-260, et seq., allows an employer to seek a civil no-contact order when an employee has been the victim of unlawful conduct that can be carried out or was carried out at the employee's workplace.
- A protection order entered pursuant to this act can order the defendant to not assault, harass or otherwise interfere with the employee at the employer's workplace, along with other similar prohibitions as set forth in GS 95-264.
- Social media posts and text messages met the definition of harassment contained in the statute.
- The trial court did not make sufficient findings of fact to support the order where there were no findings as to the specific content of the posted messages or findings regarding who sent the messages. While statements made in the complaint that were incorporated into the order were sufficient to establish unlawful conduct, the trial court must make the findings to support the no-contact order.
- The order entered by the trial court restricting respondent's area to gather and protest did not violate the respondent's constitutional right of free speech under the State constitution.
- The order prohibiting conduct of respondent's unnamed "followers" was vacated as the court lacks authority to enter orders affecting persons not a party to the proceeding.

Durham County DSS v. Wallace, _ N.C. App., _, _ S.E.2d _ (September 3, 2024). Former DSS employee (Respondent) appeals from a civil no-contact order entered pursuant to the Workplace Violence Prevention Act (WVPA). Respondent founded Operation Stop Child Protective Services (Operation Stop CPS) and led rallies and protests against DSS policies, especially focused on abuse and neglect practices. DSS (Petitioner) filed a complaint for a civil no-contact order on behalf of DSS and its employees to enjoin Respondent and her "followers." The complaint's allegations included Respondent's protests near the DSS office and at the Director's residence, and social media posts and hundreds of text messages sent to an employee by Operation Stop CPS advocates which caused employees of DSS to feel fearful.

The trial court granted a temporary ex-parte no-contact order and following a hearing, the court found that Respondent's actions constituted harassment and issued a permanent no-contact order. [GS 95-267 provides that a permanent no-contact order can stay in effect no longer than one year, and permanent orders can be renewed for good cause]. The trial court concluded Respondent committed unlawful conduct but would still be allowed to peacefully protest and directed Respondent, among other things, to not visit or interfere with DSS, its employees, or its operations. The order further decreed that the Respondent and her "followers" were allowed to peacefully protest so long as they are at least 25 feet from the

DSS entrances while protesting, do not use amplification devices, and do not yell or chant when minor children are leaving the building when they appear to be exercising DSS supervised visitation.

Respondent appealed, arguing (1) the social media posts and text messages do not constitute harassment under the WVPA; (2) the no-contact order did not include a finding that Respondent acted with the intent to place an employee in reasonable fear of their safety as required by the WVPA; (3) the order's restrictions violate Respondent's freedom of speech under the federal and state constitutions; and (4) the WVPA does not grant the court authority to enjoin non-parties in the order.

The court of appeals held that:

- The WVPA authorizes a trial court to issue a civil no-contact order "upon finding that an 'employee has suffered unlawful conduct committed by' a respondent[,]" which includes "otherwise harassing [conduct], as defined in [N.C. Gen. Stat. §] 14-277.3A. . ., *quoting* G.S. 95-264(a), 95-260(3)(b).

- Civil harassment has five statutory elements under G.S. 14-277.3A: (1) knowing conduct (2) directed at (3) a specific person (4) that torments, terrorizes, or terrifies, and (5) serves no legitimate purpose. "

- 'Direct at' element included Respondent's direction of third parties to act towards a targeted employee.'".

- The court of appeals relied on Ramsey v. Harman, 191 N.C. 146 (2008), to apply the appellate courts' interpretation of the identical statutory language of G.S. Chapter 50C applicable to civil no-contact orders, to no-contact orders entered pursuant to the WVPA. The trial court must make findings of harassment "without legal purpose and with the *intent* to place the employee in reasonable fear for the employee's safety" to determine the Respondent committed unlawful conduct, *quoting* G.S. 95-260.

- Respondent's social media posts and text messages met the statutory definition of harassment. Respondent knowingly intended to advocate for certain causes and deliberately took actions in furtherance of that objective. Respondent influenced and directed Operation Stop CPS advocates to target their efforts at specific DSS employees. The record shows the posts and texts were directed at two specific employees, the Director and a specific social worker, both named in the petition. The acts did not serve a legitimate purpose based on the court's finding that Respondent intimidated the Director and the finding that numerous texts were sent in a short time.

- However, the findings in the order were insufficient to support the court's conclusion that DSS and its employees suffered unlawful conduct committed by Respondent. The court incorporated the facts alleged in the petition in its findings of fact, including findings about the protests at the main office and personal residence of an employee, the intimidation of the director, and the receipt of numerous texts in a single evening by a social worker that made the social worker and their employees fearful. However, the court did not make any findings concerning the allegations in the complaint. Without specific findings by the trial court, the appellate court cannot review whether the conduct served a "legitimate purpose" or whether there was specific intent to "torment, terrorize, or terrify" DSS employees to constitute harassment under G.S. 14-277.3A(b)(2) and thereby conclude that Respondent engaged in unlawful conduct under the WVPA, G.S. 95-260(3)(b).

- Respondent argued on appeal that the no-contact order violated her right to freedom of speech under the NC Constitution because the streets and sidewalks outside DSS office and its employees' homes are "traditional public forums." The appellate court explained that, to determine whether Respondent's constitutional right to free speech afforded by Article I of the N.C. Constitution were unconstitutionally restricted by the no-contact order, the appellate court relied on preexisting federal Free Speech Clause jurisprudence, citing State v. Petersilie, 334 N.C. 169 (1993) (expressly adopting federal free speech jurisprudence to interpret N.C. Const., Art. I, through its disposition). An analysis of "First Amendment free-speech rights and government fora requires four inquiries . . .: (1) whether the restriction affected protected speech or expressive conduct; (2) if so, whether the restriction is either content-based or content-neutral; (3) if content-neutral, which tier of judicial review below strict scrutiny applies to the restriction; and (4) which category of forum the restriction concerns." "Content-neutral restrictions of traditional and designated (collectively, 'unlimited') fora are subject to intermediate scrutiny[.]" Unlimited fora are "quintessential community venue[s], such as a public street, sidewalk, or park." To satisfy intermediate scrutiny, "the restriction must be narrowly tailored to achieve an important or substantial government interest in a manner that allows for ample alternative channels of communication" but "need to be the least restrictive or least intrusive means [in achieving said interest]."

- The court held that the no-contact order in this case satisfies intermediate scrutiny and does not violate Respondent's free speech rights. The effect of the WVPA through the no-contact order implicates Respondent's expressive conduct of protesting DSS's practices. Respondent challenges the WVPA and the order's restrictions as applied to her and therefore the restrictions are content-neutral. Due to the lack of precise findings in the no-contact order, the appellate court deferred determining the exact forum classification at issue here, presumed the forum to be a "quintessential community venue," and applied the most stringent applicable test – intermediate scrutiny. The content-neutral restrictions were aimed at achieving the significant public interests of protecting employee safety and preventing psychological harm to minor children visiting

the DSS building. The restrictions were narrowly tailored because they promote this significant interest and would be achieved less effectively otherwise. Finally, the order left open ample alternative channels of communication by specifically allowing Respondent to protest subject to the order's narrow restrictions.

- Appellate courts void "injunctions 'affecting [the] vested rights' of non-parties who lack any identifiable relationship to the parties or any notice of the proceedings.". Here, the trial court did not identify any "followers" of Respondent to enjoin in the order. The portion of the order enjoining the undetermined and unnamed followers is vacated.

Contempt
June 18, 2024, and September 17, 2024

Direct criminal contempt; refusal of juror to wear face mask, invalid administrative order

- Defendant's refusal to wear a face mask in the jury assembly room of the courthouse or in the court room was not an act of direct criminal contempt under the facts of this case.
- The local emergency administrative order regarding the wearing of face masks in the courthouse was invalid because it contained no expiration date.
- Evidence did not support the finding of fact that defendant acted willfully.

State of N.C. v. Hahn, _ N.C. App. _, _ S.E.2d _ (September 3, 2024). On October 10, 2022, defendant reported to the Harnett County Courthouse for jury duty. At that time, an emergency administrative order was in effect for that courthouse which provided that masks were encouraged for persons unvaccinated against the COVID-19 virus, but they were optional for hallways, foyers, meeting rooms and similar areas. The order further provided that the presiding judge in each courtroom could decide, in their discretion, whether masks were required in their individual courtrooms.

While defendant was in the jury assembly room, he was ordered to wear a mask, but he respectfully refused. He was taken before a superior court judge in a courtroom. The judge told the defendant to wear a mask, and he again respectfully refused. The judge told the defendant that a mask was required in the jury room and in the courtroom and that he would be held in contempt if he failed to comply. The judge asked defendant if he had anything to say and the defendant said "no, sir". The judge then held the defendant in direct criminal contempt and sentenced him to 24 hours in jail. Defendant appealed.

The court of appeals held that acts of criminal contempt are those acts set out in GS 5A-11. To support a judgment of direct criminal contempt, one of the listed acts in GS 5A-11 must be committed within the sight or hearing of a judicial official and in proximity to the room where the proceedings are being held and the act must be likely to interrupt or interfere with matters then before the court. In response to direct criminal contempt, the court may summarily impose punishment when necessary to restore order or maintain dignity and authority of the court.

The contempt order in this case found defendant had committed GS 5A-11(1) and (2); willful behavior committed during the sitting of the court and directly tending to interrupt its proceedings, and willful behavior committed during the sitting of the court in its immediate view and directly tending to impair the respect due its authority. The court of appeals held that the evidence did not support these findings in that the defendant was not in the courtroom when he first refused to wear the mask, he was brought to the courtroom by court personnel, he did not interrupt the court proceedings, and he acted in a respectful manner to the judge.

The court of appeals also held that the emergency administrative order regarding masks in the courthouse was invalid. The order stated that it relied on the authority granted by the Chief Justice of the N.C. Supreme Court and by the N.C. General Assembly, but the emergency orders

issued by the Chief Justice pursuant to the authority granted by the General Assembly had expired before this administrative order was entered. In addition, the administrative order contained no termination date, unlike the orders adopted by the Chief Justice and unlike the authority granted to the courts by the General Assembly. The court of appeals held that the authority of individual judicial districts "cannot exceed the same temporal restrictions provided by the General Assembly."

Finally, the court held that the evidence in the record did not support the trial court's finding that defendant acted willfully. As there was no evidence that defendant had knowledge that the court was in session or that his conduct was interfering with the business of the court, there was no support for the conclusion that his conduct was a willful interference with the functioning of the court. According to the court of appeals. "a misapplication of the local emergency order served as the impetus of the conflict." The order clearly stated that masks were not required in meeting rooms and other similar areas, so masks were not required in the jury assembly room. And, while the order allowed a judge to order masks in their courtroom, the juror had not been assigned to a courtroom at the time he was punished for refusing to wear the mask.

Direct criminal contempt; summary opportunity to respond

- The trial court gave the defendant an appropriate summary opportunity to respond before holding him in direct criminal contempt.

State of N.C. v. Davis, unpublished opinion_ N.C. App. _, _ S.E.2d _ (September 17, 2024). During defendant's jury trial on criminal drug charges, the trial court held him in direct criminal contempt following a summary proceeding. The contempt order was in response to the defendant using foul language and calling a witness a liar in the presence of the jury. Before holding him in contempt, the trial court asked the defendant if he remembered the court telling him not to use foul language and to act professionally. The defendant responded that he did remember but that he used the foul language because the witness lied and because he had "bad mental health issues." The judge sentenced him to 30 days in jail for criminal contempt and the defendant appealed.

The only argument on appeal was that the trial court did not give the defendant a summary opportunity to respond as required in a summary proceeding for direct criminal contempt. The court of appeals disagreed, holding that the trial court allowed defendant to respond when the court allowed him to explain why he used foul language.