Family Law Update
Cases Decided
October 2009 through June 1, 2010

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

The full text of all court opinions can be found on the website of the N.C. Administrative Office of the Courts: www.nccourts.org.

Domestic Violence

Cases Decided Between October 2009 and June 1, 2010

Domestic violence as ground for setting aside civil judgment under Rule 60(b)

- No abuse of discretion for trial judge to set aside summary judgment entered against defendant when she failed to respond to request for admissions.
- Trial court did not err in concluding defendant had shown excusable neglect by showing she did not receive request for admissions. She did not receive the document because she relocated without informing plaintiff and court of her new address. However, she withheld information about her new address due to her fear of continued acts of domestic violence against her by plaintiff.

Elliott v. Elliott, et. al, 683 S.E.2d 405 (N.C. App., October 6, 2009).
Plaintiff former husband had "documented history of domestic violence" against defendant ex-wife. Plaintiff brought this civil action based on claims arising out of business relationship between the parties. Defendant filed pro se answer, indicating her address was the former marital residence. Plaintiff subsequently served request for admissions by mailing the document to defendant at address indicated in her answer. Defendant failed to answer the request and the trial court granted summary judgment in favor of plaintiff. Defendant filed a Rule 60(b) motion seeking to set aside the judgment, arguing excusable neglect. The trial court granted the motion, finding that defendant did not receive the request for admissions because she had relocated to Virginia after filing her answer. She did not inform the court or plaintiff of her move due to her fear of continued harassment and abuse by plaintiff. On appeal, court of appeals held that while generally a party's failure to inform the court of a change of address will not support a finding of excusable neglect, the 'extenuating circumstances' regarding domestic violence in this case were sufficient to support the trial court's decision to set aside the summary judgment.

Ex parte order; procedure and required findings; evidence required for final DVPO

- Trial court cannot issue ex parte domestic violence protective order based only on allegations in complaint; trial court must conduct a 'hearing'.
- Due to the "potentially serious consequences of the ex parte DVPO, GS 50B-3 requires that an ex parte be issued only when it clearly appears based on specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party."
- While it is preferable for a trial court to comply with Rule 52 of the Rules of Civil Procedure and separately state the "specific facts shown" by plaintiff to support the issuance of the ex parte DVPO, it was not error in this case for trial court simply to reference the complaint in the form order for the ex parte DVPO.
- To support an ex parte DVPO, the trial court must determine there is a "substantial risk of future harm"; a decision that is "of necessity predictive in nature."
- The 50B statute provides for three separate actions; one for ex parte relief, one for emergency relief, and one for the final DVPO. Each type of proceeding is independent from the other. Therefore, denial of ex parte does not preclude a plaintiff from seeking one of the other two types of orders under the statute.

- It was error for trial court to enter 'final' DVPO without hearing evidence to support entry of the order, even though defendant did not file an answer and did not appear for the trial.

Hensey v. Hennessy, 685 S.E.2d 541(N.C. App., November 17, 2009).
Plaintiff alleged in 50B complaint that defendant broke plaintiff's cell phone, "heckled her", put her in a headlock, dragged her and banged her head against the wall. This all occurred at a time plaintiff was 29 weeks pregnant with defendant's child.

Ex Parte Order: The trial court entered an ex parte protective order on the AOC form, finding plaintiff had "appeared" and established "by specific facts shown" that defendant committed an act of domestic violence against plaintiff and that there was a danger of acts of domestic violence against plaintiff. The trial court checked the boxes beside pre-printed findings on the AOC form order and referenced the complaint on that part of the form order leaving space for judge to write specific facts. Upon return of the ex parte order, the trial court entered a DVPO and defendant appealed both the ex parte order and the final DVPO.

The court of appeals first held that while the ex parte could not have been appealed upon its entry due to the fact that it is an interlocutory order, ex parte orders can be appealed after entry of the final DVPO. The court of appeals then held that because GS 50B-2(c) allows the court to enter an ex parte only if the trial court finds "from specific facts shown" there is a danger of acts of domestic violence against the aggrieved party or minor child, a trial judge must conduct a 'hearing' and take evidence from plaintiff upon which to make the required findings. The court of appeals interprets the requirement that the court find "specific facts shown" to mean that 50B does not allow a trial court to issue an ex parte order based only on a review of the complaint, regardless of whether the complaint is verified. Since there was no record in this case to show whether the court actually heard evidence or not, the court of appeals held that it presumed the trial court did hear evidence because the form order states that the "matter came on for hearing on" a specific date and that the plaintiff appeared pro se. Based on these pre-printed findings on the form, the court of appeals presumed the trial court took evidence before issuing the ex parte order.

The court of appeals then rejected defendant's argument that the trial court findings on the ex parte order were insufficient to support the entry of the order. First, the court of appeals held that in this case, it was sufficient for the trial court to reference the complaint rather than separately state the findings of fact in support of the order. In reaching this conclusion, the court of appeals held that Chapter 50B actions are civil actions and the Rules of Civil Procedure generally apply unless the statute specifically states otherwise. The court of appeals held that Rule 52 which requires specific findings of fact, applies to 50B actions and that it is "preferable" for a trial court to make specific findings rather than incorporate allegations in a complaint. However, the court held that given the expedited nature of the ex parte proceeding, it was not error in this case for the trial court to check particular finding boxes on the AOC form and reference the complaint. Second, the court of appeals found that the specific facts alleged and found by the trial court in this case were sufficient to show there was a danger of acts of future violence against plaintiff. The court of appeals held that "considering the recency and severity of defendant's acts," the trial court has sufficient basis to find there was danger to plaintiff.

Final DVPO: When matter came on for entry of the final DVPO, defendant did not appear and the trial judge stated on the record that he remembered the evidence presented in an earlier criminal case. Because he had heard the evidence in the earlier proceeding, the trial judge did not require plaintiff to present evidence during the civil trial. The court of appeals reversed the entry of the order, holding that evidence must be taken orally in open court in the case

presently before the court. It is error for a trial judge to rely on personal memory of earlier proceedings.

The court also rejected plaintiff's argument that because defendant did not file an answer, he was in default and the trial court could enter the order based on the allegations in the complaint. The court of appeals acknowledged that Rule 8 provides that allegations in a complaint are deemed admitted when a defendant fails to answer. However, the court of appeals held that a default must be entered by the clerk pursuant to Rule 55 before a defendant can be precluded from presenting evidence on plaintiff's allegations. In this case, no default had been entered.

Res judicata barred entry of DVPO

- Prior action in New Jersey based on same allegations of abuse barred the North Carolina 50B action.
- The law of the state where the adjudication was entered applies to determine whether the adjudication was an adjudication on the merits.

Lindsey v. Lindsey, unpublished opinion, 688 S.E.2d 118 (N.C. App., November 17, 2009). Plaintiff filed action against defendant in New Jersey seeking protection from domestic violence. The parties entered into "a compromise settlement" regarding the New Jersey claim and, as part of the settlement, plaintiff dismissed her action against defendant. Plaintiff subsequently filed a 50B proceeding in NC, alleging the same incidents that formed the basis of the New Jersey suit. Defendant made a motion to dismiss based on the principle of res judicata but the trial court denied the motion. The court of appeals reversed, holding that because both parties agreed that the claim involved the same parties and the same incidents, res judicata barred the North Carolina action because compromise settlements are adjudications on the merits pursuant to the law of New Jersey.

Divorce

Cases Decided Between October 2009 and June 1, 2010

Divorce from Bed and Board

- As adultery is generally proved by circumstantial evidence, trial court did not err when it based finding that adultery occurred on the text of email messages between wife and her alleged paramour.
- Trial court did not err in ordering wife out of husband's house as part of the divorce from bed and board.

Slight v. Slight, unpublished, 683 S.E.2d 467 (N.C. App., October 6, 2009).

Trial court granted plaintiff's husband request for divorce from bed and board after finding defendant wife committed adultery. As part of that order, the trial court ordered defendant wife to vacate the marital home. On appeal, defendant argued that there was insufficient evidence to support the finding of adultery. The trial court based the finding on the text of emails introduced by husband. The emails were "sexually explicit messages indicating that [wife] and the recipient were currently engaged in an affair." There was further evidence that defendant had created a profile on a dating website called "Date a Millionaire." The court of appeals rejected defendant's argument, holding that adultery "is usually proved by circumstances – rarely by positive and direct evidence of adulterous acts." In addition, the court of appeals rejected defendant's argument that the trial court erred in ordering her out of the marital residence. The court of appeals stated "a divorce from bed and board is merely a judicial decision ordering a spouse out of a house…".

Divorce action pending in another state; request to stay proceeding in NC

- Fact that divorce action was pending between the parties in Ohio did not prohibit North Carolina court from entering judgment in divorce case filed in North Carolina after case was filed in Ohio.
- Trial judge did not abuse discretion in denying defendant's motion pursuant to GS 1-75.12 to stay the North Carolina proceeding.

Muter v. Muter, 689 S.E.2d 924 (N.C. App., March 16, 2010).

Wife filed action for divorce and other relief in Ohio. Subsequently, husband filed for divorce and other relief in North Carolina. Husband then filed a motion to sever the claim for absolute divorce and for entry of absolute divorce. Wife requested a stay of the divorce proceeding due to the action pending in Ohio, pursuant to GS 1-75.12. The trial court denied the stay and entered the divorce. On appeal, wife argued the trial court abused its discretion in refusing to stay the divorce. Court of appeals held that GA 1-75.12 allows a judge to stay a proceeding based on a claim pending in another state if the trial court finds that proceeding with the North Carolina case would "work a substantial injustice". In making the decision, the trial court is required to consider factors identified by the court in *Lawyers Mut. Lia. Ins. Co. v. Nexen Pruet Jacobs & Pollard*, 112 NC App 353 (1993). The court of appeals concluded that the trial court in this case made sufficient findings of fact to show it considered all required factors.

Child Support
Cases Decided Between October 2009 and June 1, 2010

Imputing income; findings required for attorney fees

- Trial court did not err in imputing income to custodial father where his failure to seek additional work in order to increase his income amounted to naïve indifference to his ability to support his children.
- Trial court did not err in basing amount of imputed income on amount defendant's monthly expenses rather than his work history.
- Trial court erred in awarding attorney fees without making required findings of fact.

Thomas v. Thomas, unpublished opinion, 683 S.E.2d 791 (N.C. App., October 20, 2009). In case where parties share joint physical and legal custody, plaintiff mother was originally ordered to pay child support to defendant father. Father filed motion to modify support, arguing that mother's income had significantly increased while his had significantly decreased. Trial court concluded father's income decreased because his investment earnings decreased but father continued to work only part-time as a coach and personal trainer. Trial court determined father acted in bad faith by refusing to seek more gainful employment even though his investment income fell and his investments were being depleted by his monthly expenditures. Trial court imputed income of $4000 per month to father and entered child support order requiring him to pay monthly child support to mother. On appeal, court of appeals upheld the trial court order imputing income to father. According to the court of appeals, father's failure to seek additional income when his investments declined to the point he was unable to pay his monthly expenses demonstrated defendant's "naïve indifference to his ability to support his children" and supported the trial court's conclusion that income should be imputed. Court of appeals also rejected father's argument that trial court erred by imputing income in the amount of his monthly expenditures rather than on his recent work history. Court of appeals held it was appropriate for trial court to impute amount that supported father's standard of living when he was working part-time and receiving investment income. The appellate court stated "[i]t was not error for the trial court to conclude defendant's probable earning level would equal the amount on which he was actually living." Finally, the court of appeals remanded the award of attorney fees to the trial court for findings required to support the amount of the award. Required findings include the "lawyer's skill, his hourly rate, its reasonableness in comparison with that of other lawyers, what he did, and the hours he spent."

Extraordinary expenses; private school tuition

- Trial court does not need to make findings that private school tuition is reasonable, necessary or in the child's best interest before including the tuition as an extraordinary expense under the child support guidelines.
- Fact that obligor's income is in the shaded area does not preclude including extraordinary expenses in child support calculation.

- Fact that grandparents paid private school tuition in past did not relieve obligor of responsibility for a share of the expenses

Allen v. Allen, unpublished opinion, 688 S.E.2d 118 (N.C. App., November 17, 2009). Trial court ordered defendant mother to pay child support to custodial father. Trial court included private school tuition in calculation of guideline support as an extraordinary expense. On appeal, defendant argued that trial court erred by failing to find private school was reasonable, necessary and in the best interest of the children before ordering her to pay a portion of the expense. The court of appeals disagreed, citing Biggs v. Geer, 136 NC App 294 (2000). According to the court of appeals, extraordinary expenses are a part of guideline support rather than a form of deviation. Trial courts are not required to make findings other than a finding of present income when entering guideline support. The court of appeals also rejected defendant's argument that the trial court erred in awarding extraordinary expenses when her income falls within the shaded area in the guidelines. The court of appeals held that while the guidelines do exclude childcare and health insurance premiums when the income of the obligor is in the shaded area, the guidelines do not exclude extraordinary expenses. Finally, the court of appeals rejected defendant's argument that she should not be required to pay a portion of the tuition because the grandparents of the children had been paying it. The court of appeals held that the fact that the grandparents had helped with payments did not mean defendant "escaped her obligation to pay her share."

Imputing income

- Trial court did not err in imputing income to father where findings of fact supported conclusion that father suppressed income in deliberate disregard of his child support obligation.
- Trial court did not err in imputing income in an amount equal to amount father made in his last job, based on trial court's "judicial notice of the wide range of employment opportunities in the defendant's experience level" in the Charlotte area.

Tardani v. Tardani, unpublished opinion, 689 S.E.2d 601 (N.C. App., January 5, 2010). Father was employed by Walgreen in Michigan until he left that job and moved the family to Wilmington NC. Father left wife and kids with wife's parents in Wilmington when he took a job in Concord as a management trainee for Dollar Store. Wife filed action in Wilmington requesting various forms of relief including child support. The trial court imputed income to father in amount he earned while employed with Walgreen after concluding that father acted in bad faith disregard of his child support obligation by taking a job as a trainee when he had significant management experience that would have allowed him to obtain employment with a higher salary. The trial court also found that his actions in not providing any support to mother after he moved to Concord and in not appearing for court hearings supported a finding of bad faith. To support imputing an amount similar to father's pay when he was employed by Walgreen's, the court took 'judicial notice' of employment opportunities available in the Charlotte area. The court of appeals upheld the trial court, concluding that the findings of fact were sufficient to support the imputed income.

UIFSA; modification jurisdiction

- Fact that child support order from New York was registered in North Carolina for enforcement did not give North Carolina jurisdiction to modify the order.

- Where request to modify New York support order was made in North Carolina by North Carolina resident, North Carolina court did not have jurisdiction to modify the New York order when other parent now lives in Florida.

Lacarrubba v. Lacarrubba, 688 S.E.2d 769 (N.C. App., February 16, 2010).
Child support order was entered in New York when all parties lived in New York. Mother and children subsequently moved to Florida and registered support order in that state for enforcement. Dad and one child thereafter moved to North Carolina while mom and other child remained in Florida. Mom filed request to register New York order in North Carolina for enforcement and alleged dad owed substantial arrears. Dad consented to registration for enforcement and requested that the North Carolina court modify the arrears that had accumulated and lower the amount of support required by the order based on fact that one child now lives with him. Trial court modified the order and mom appealed.

Court of appeals agreed with mom's argument that trial court did not have jurisdiction to modify the support order. Pursuant to UIFSA, New York lost continuing exclusive jurisdiction to modify the order when all parties left that state. GS 52C-6-611 provides an order registered in another state can be modified by that state if the issuing state no longer has continuing exclusive jurisdiction only if the petitioner is not a resident of the state wherein modification is sought and the state has personal jurisdiction over the respondent (this rule is often referred to as the 'play-away rule' – once the issuing state has lost continuing exclusive jurisdiction, another state can modify but the person seeking modification must go to the state where the other party resides to seek modification). Because the father was a resident of North Carolina and he was the party requesting modification, North Carolina did not have modification jurisdiction. Dad needs to go to Florida where mom resides. [There probably also is a problem in this case with fact that trial court modified arrears – something that is prohibited even if North Carolina has modification jurisdiction – but appellate court did not need to address that issue].

Consent judgment

- Judgment was not a consent judgment where it was entered based on a statement signed by defendant one year before entry of the judgment.
- "Nunc pro tunc" does not operate to "accomplish something that ought to have been done but was not done."
- Consent judgment is not valid unless both parties consent to terms of judgment at time it is entered.

Rockingham County DSS o/b/o Walker v. Tate, 689 S.E.2d 913 (N.C. App., March 2, 2010).
Trial court entered a 'consent judgment' setting child support on October 23, 2008 in a matter that had come on for hearing on December 7, 2007. At that hearing, attorney represented to the court that the matter had been resolved by consent. The consent was evidenced by a statement signed by defendant obligor on November 14, 2007 indicating that he agreed to his child support obligation being 'reinstated'. The judgment was presented to the judge more than 10 months following the date of the hearing and the judgment stated that it was being entered by consent and "nunc pro tunc" to December 7, 2007. Defendant obligor appealed and the court of appeals vacated the judgment, holding that there was nothing in the record to indicate obligor consented to the judgment either at the time of the December 7 hearing or at the time the judgment actually was entered on October 23, 2008. The court of appeals held the 'statement' signed by obligor was not sufficient consent to the entry of a judgment – the party must consent to the actual terms of the judgment at the time the judgment is entered. The court of appeals seems to indicate that

the parties actually must sign the judgment before it is signed by the judge. The court of appeals also held that adding the term 'nunc pro tunc' to the judgment did not cure the lack of consent, noting that adding the term does not operate to "accomplish something that ought to have been done but was not done."

Contempt; willfulness; attorney fees

- Finding of fact supported contempt order against defendant for willful failure to pay child support where after support order was entered, defendant joined a religious organization that prohibits members from holding jobs and earning income.
- Noncompliance with a child support order can be willful in the context of contempt, even if there is no evidence that a party is acting in bad faith.
- An order of civil contempt must contain finding that contemnor has the actual present ability to pay any amount ordered as a purge.
- Finding by trial court that "defendant has the ability to comply or to take reasonable steps to comply" was "minimally sufficient" to support purge amount.
- Trial court order did not contain sufficient findings of fact to support order for attorney fees.

Shippen v. Shippen, _S.E.2d_ (N.C. App., May 18, 2010).

Shortly after trial court entered order requiring defendant to pay child support, defendant joined a religious community which prohibits its members from earning outside income. Instead, the members farm and provide services to each other in exchange for food and a place to live. So defendant quit his job and stopped paying child support. The trial court held him in contempt after finding he willfully failed to comply with the child support order and ordered him incarcerated until he paid a purge amount of $6,290 and attorney fees. Defendant appealed, arguing the trial court erred in finding he willfully failed to comply with the child support order and that he had the present ability to pay the purge imposed.

The court of appeals upheld the trial court order of civil contempt but remanded the case for more findings of fact to support the attorney fee order. According to the court of appeals, a finding of willfulness can be supported by evidence that the party has "voluntarily taken on additional financial obligations or divested himself of assets or income after the entry of a support order", even if there is no evidence of bad faith on the part of that party. The court of appeals cited cases holding that obligors must continue to pay pursuant to existing child support orders even when those obligors take on additional financial obligations by remarriage or by having additional children, things presumably done by an obligor in good faith. Therefore, the court of appeals held that in this case the trial court was correct in concluding defendant acted willfully, even though there was no evidence that he acted for any reason other than his sincere religious convictions.

Defendant also argued that the trial court erred in finding he had the present ability to pay the purge amount ordered. While the court of appeals acknowledged that there must be evidence that a party has the present ability to pay the purge ordered, the court held that the finding by the trial court in this case that defendant had the present ability to pay or to take reasonable steps to enable him to pay was "minimal" but sufficient. The court also noted findings that defendant recently had voluntarily quit his job and refused to take another job. [It is not clear whether defendant agued on appeal about the sufficiency of the evidence to support the finding. The opinion states only that defendant argued on appeal that the trial court "made no findings that he had the present ability to pay the arrearage and purge himself of contempt."]

Finally, court of appeals agreed with defendant that trial court order contained insufficient findings to support the award of attorney fees. The court held that orders must contain findings concerning the ability of the party requesting fees to defray the cost of the litigation, the good faith of the party requesting fees, the skill of the lawyer, the lawyer's hourly rate and the nature and scope of legal services rendered. As the contempt order in this case contained none of those findings, the case was remanded to the trial court for correction.

Modification; extracurricular activities and private school expense

- Trial court did not have authority to modify amounts obligor was required to pay for extracurricular activities and private school expenses when motion filed by obligor requested only modification of child support.
- This analysis probably is contrary to other case law holding that amounts paid for extraordinary expenses such as private school and extracurricular activity expenses are considered a part of guideline child support. See e.g. Biggs v. Geer, 136 N.C. App. 294 (2000); Doan v. Doan, 156 N.C. App. 570 (2003).

Parrott v. Kriss, unpublished opinion, _ S.E.2d _ (N.C. App., May 18, 2010).
Consent child support order required obligor father to pay $1,400 per month as "child support" and also required that he pay one-half of all expenses incurred for the extracurricular activities of the children and one-half of the cost of private school tuition. Father filed motion to modify, requesting that his "child support obligation" be modified based on the substantial change in his ability to pay in accordance with the terms of the consent judgment. Following an extensive trial, the trial court modified obligor's monthly support payments and further modified the original order by specifying that obligor was no longer responsible for paying expenses related to extracurricular activities and private school. Mother appealed, arguing that the trial court erred in finding a substantial change of circumstances because father's reduction in income was voluntary. The court of appeals rejected mother's argument and upheld trial court's decision to modify the monthly child support payment. However, the court of appeals held that the trial court erred in modifying the provisions regarding the extracurricular expenses and private school tuition because obligor's motion to modify did not specify that he wanted the court to modify those provisions of the consent order. According to the court of appeals, when obligor requested modification of "child support", the part of the order requiring payment for extracurricular activity expense and private school tuition "was not properly before the court."

Child Custody
Cases Decided Between October 2009 and June 1, 2010

Modification; order must contain conclusion that there has been a substantial change in circumstances

- While there was evidence in the record to support the conclusion that there had been a substantial change in circumstances since the entry of the last custody order, trial court erred in modifying the existing order without concluding in the order that there was a change in circumstances.

Allen v. Allen, unpublished opinion, 688 S.E.2d 118 (N.C. App., November 17, 2009).
Custody order granted defendant mother primary physical custody of the children. Plaintiff father had filed motion to modify, alleging that defendant mother was unable to maintain a stable residence, had violated the existing order by moving out of county with the children, had interfered with plaintiff's visitation, and that she was financially and socially unstable. The trial court concluded it was in the best interest of the children to be in custody of plaintiff and modified the custody order. The court of appeals remanded, holding that the trial court must conclude there has been a substantial change in circumstances before reaching the best interest issue in a custody modification action. The court of appeals acknowledged that 1) the evidence was sufficient to support the conclusion that circumstances affecting the welfare of the children had changed, and 2) recent case law has held that a trial court will not be reversed on appeal for failing to include 'buzz words' in custody modification orders. Nevertheless, the court held that the court of appeals cannot make the determination of changed circumstances, even if the record contains sufficient evidence upon which to base that conclusion. In addition, while recent case law does indicate a trial judge may not be reversed for failing to include a statement that the substantial change actually affects the child, no case law indicates that a trial court order can be upheld if it does not include a conclusion that there has been a substantial change in circumstances.

Paternity

- Trial court did not err when it denied defendant mother's request for blood test where mom requested blood test in a "motion for proof of paternity" filed two years after court entered custody order awarding plaintiff primary custody of child.
- Finding in custody order that defendant is the biological mother of the child and that plaintiff is the biological father of the child barred mom from raising issue of paternity in this post-judgment motion.

Helms v. Landry, 363 N.C. 738, 686 S.E.2d 674, reversing 194 N.C. App. 787, 671 S.E.2d 347 (2009).
Both parties filed separate actions seeking custody of the minor child. Trial court consolidated both actions and entered a custody order, awarding defendant primary custody and plaintiff visitation. The trial court order contained findings that defendant is the biological mother of the child and plaintiff is the biological father, even though the issue of paternity had not been raised nor previously litigated. Approximately four years later, trial court entered an order finding a substantial change in circumstances and awarding primary custody to plaintiff and visitation to defendant. Two years later, defendant filed a motion "for proof of paternity" and requested that

plaintiff be ordered to submit to blood tests. The trial court denied the motion, ruling that there was no basis for the trial court to order the tests. The court of appeals reversed, holding that because plaintiff had not formally acknowledged paternity and paternity had not been determined pursuant to Chapter 49, the trial court was required to order blood tests upon request of defendant. The supreme court reversed the court of appeals, adopting the dissent filed by Judge Jackson in the court of appeals. According to Judge Jackson, paternity was judicially established in the custody order when the court found plaintiff and defendant to be the biological parents of the child. The court would need to set the custody order aside pursuant to Rule 60(b) in order to revisit the issue of paternity. In this case, mother waited too long to seek relief under that rule.

UCCJEA; record of communication with another state court

- When trial judge engages in a discretionary ex parte communication with a judge in another state concerning jurisdiction, a record must be made of the communication and the parties must be given an opportunity to be heard on the issue of jurisdiction before the trial court enters a ruling.
- When a custody action is filed in North Carolina and trial court determines that a custody action already has been commenced in another state, communication with the judge in the other state is not required until after the North Carolina judge determines the other state is exercising jurisdiction in conformity with the UCCJEA.

Harris v. Harris, unpublished opinion, 691 S.E.2d 133 (N.C. App., February 16, 2010). Custody action was filed in North Carolina after custody action dealing with same child was filed in Indiana. North Carolina trial judge communicated with judge in Indiana and determined that Indiana was home state of the child and dismissed the North Carolina action. Plaintiff appealed, arguing trial judge erred by not making a record of the communication with the Indiana judge and by not allowing the parties an opportunity to be heard on the issue of jurisdiction before dismissing the custody action. The court of appeals reversed and remanded after concluding that the UCCJEA requires that trial judges make a record of any discretionary conversation with judges in other states. The record must be provided to the parties and the parties must be given the opportunity to be heard on the jurisdictional issue before the court makes a jurisdictional ruling. The court of appeals interpreted the trial court's communication in this situation as discretionary rather than mandatory, meaning the record was required. According to GS 50A-206, a trial court is required to communicate with a court in another state if there is a proceeding pending in that other state and that state is acting in substantial conformity with the UCCJEA. However, according to the court of appeals, the communication is not required until the North Carolina judge determines the other state is acting in conformity with the UCCJEA. The judge may communicate with the judge in the other state to make this determination, but if the North Carolina judge does have that communication, a record must be made and the parties must be given the opportunity to review the record and to be heard on the issue of jurisdiction. The case was remanded with instruction to the trial judge that the record be made. The court of appeals noted that if the trial judge did not make a record at the time of the conversation with the other judge and could not make one from memory on remand, a record made by the Indiana judge can be used instead.

Relationship between guardianship and custody of adult child

- Clerk of court has exclusive jurisdiction over matters of guardianship of incompetents.

- Once Clerk makes determination of incompetency and appoints a guardian for the incompetent, the clerk retains exclusive jurisdiction to determine disputes between guardians, including disputes about the physical custody of the incompetent.
- District court judge cannot enter custody order pursuant to GS 50-13.8 after clerk had adjudicated an adult child of the parties incompetent and appointed guardians.

McKoy v. McKoy, 689 S.E.2d 590 (N.C. App., February 16, 2010).
Parties are parents of disabled child. When child turned 18, the parties petitioned the clerk to declare the child incompetent and appoint them as his guardians pursuant to Chapter 35A. The clerk appointed both parents as joint guardians. Eight years later the parties separated and filed an action for custody pursuant to GS 50-13.8. The trial judge awarded joint custody with one party having physical custody 60% of the time and the other having physical custody 40% of the time. On appeal, the court of appeals accepted plaintiff's argument that the trial court lacked subject matter jurisdiction to enter a custody order pursuant to Chapter 50 after the clerk had made an incompetency determination and appointment of guardians pursuant to Chapter 35A. GS 35A-1203 provides that once the clerk makes an appointment of a guardian, the clerk retains jurisdiction to deal with all issues relating to guardians and to hear and determine all disputes between guardians. The court held that while GS 50-13.8 allows trial judges to determine custody of an adult child if the child is "mentally or physically incapable of self-support", the court does not have authority pursuant to that statute if the clerk already is exercising jurisdiction under Chapter 35A. The court noted that when two courts have concurrent jurisdiction over an issue, the court to first exercise jurisdiction has priority. The court of appeals also noted that GS 50-13.8 is broad enough to cover situations where an adult child is not incompetent or when parents decide not to ask that the child be declared incompetent.

Modification; findings of fact; delay in entry of order

- Trial court does not need to make findings of fact in order denying motion to modify an existing custody order when denial is based on court's determination that moving party did not meet the required burden of proof.
- When trial court concluded moving party did not prove that the substantial change in circumstances required modification, trial court was not required to make findings of fact concerning best interest of the child.
- It is duty of the trial court to enter its rulings in an expeditious manner, especially when the well-being of children is at issue. However, writ of mandamus rather than request for new trial is the appropriate remedy when a judge delays entering an order.

McKyer v. McKyer, unpublished opinion, 691 S.E.2d 767 (N.C. App., March 2, 2010).
Both parties filed motions to modify custody. Trial court concluded plaintiff established a substantial change in circumstances regarding one of the two children but denied the request to modify the order. In response to various arguments by plaintiff on appeal concerning the insufficiency of the evidence to support the findings of fact made by the trial judge, the court of appeals held that findings of fact were not necessary at all in this order because the trial court had concluded that father failed to meet his burden of proving that the custody order needed to be modified. The court of appeals held that the denial of a motion on this basis requires no findings of fact. In addition, although the trial court concluded there had been a substantial change regarding one child, the court of appeals held that the trial court was not required to make findings of fact as to the best interest of the child because the trial court decided not to modify the existing order. The court of appeals seems to be saying that findings regarding best interest

are not required unless the court first determines that the substantial change requires that the custody arrangements be changed. (although it is a best interest analysis that determines whether the order needs to be modified). According to the court of appeals, if the trial court determines no change is necessary, the original order remains in effect and no new order is entered. Plaintiff also argued he is entitled to a new hearing because there was a delay of almost one full year between the modification hearing and the entry of the order. The court of appeals held that it is the court's duty to make sure orders are entered in a timely fashion. However, the court cited the decision of the North Carolina Supreme Court, *In re T.H.T.*, 363 NC 446 (2008), and held that a new hearing is not an appropriate remedy for this issue. Instead, a litigant should request a writ of mandamus from the appellate court when there is an unreasonable delay by the trial court in entering a judgment or order.

Modification; effects of change on child

- In case where parents entered consent judgment giving third parties custody of child, mother had burden of showing substantial change of circumstances and that modification was in best interest of child before court could modify consent order. Mother had no constitutional preference in the modification case.
- Substantial changes in mother's lifestyle had a "self-evident" effect on minor child.

Clark and Clark v. Sutton and Bare, unpublished opinion, S.E.2d (N.C. App., May 18, 2010).

Plaintiffs are unrelated to defendant parents and the minor child. Parties entered a consent order in 2006 granting custody to plaintiffs and visitation to defendant mother. In 2007, defendant mother filed a motion to modify, seeking primary custody of the minor child. The trial court concluded there had been a substantial change in circumstances and that primary custody with defendant mom is in the best interest of the child. On appeal, the plaintiffs argued that the evidence did not support the trial court's conclusion that there had been a substantial change affecting the welfare of the child. The findings in the trial court order concerned improvements in lifestyle of the mother. The court of appeals, without discussion of this issue, held that plaintiff had the same burden as any other party seeking to modify a custody order. Her status as biological parent in a case against a nonrelated third party did not entitle her to special deference or constitutional protection, as it would in an initial determination of custody. The court of appeals held that the changes detailed in the trial court's findings of fact established changes that had a "self-evident effect" on the child. Those changes include: mother's continuing to live drug-free, continuing her education, obtaining stable housing and employment, and bonding with her child through visitation."

Adoption

Cases Decided Between October 2009 and June 1, 2010

District court jurisdiction

- Only those adoption decrees "finally disposed of" by the Clerk of Superior Court can be appealed to the district court.
- The Clerk must transfer adoption proceedings to district court when an issue of fact, an equitable defense, or a request for equitable relief arises within the adoption action.
- Trial court had no jurisdiction to consolidate adoption case with custody case pending in district court when adoption still was pending with the clerk of court.

Norris v. Midkiff, 692 S.E.2d 190(N.C. App., April, 2010).

Paternal grandparents filed for custody after mother of children died and father was charged with her murder. After court granted custody to paternal grandparents, those grandparents filed an adoption petition with the Clerk of Superior Court. Thereafter, maternal grandparents filed a motion to intervene in the custody case. The clerk then entered the order of adoption but later set aside that adoption after finding out that the maternal grandparents had requested custody. The district court judge then issued an order, consolidating the adoption and the custody case in district court, ruling that the Clerk did not have jurisdiction to set aside the order of adoption, and ruling that the adoption was complete and all custody orders regarding the children were void. Paternal grandparents appealed, and the court of appeals agreed that the district court had no jurisdiction to set aside the clerk's decision to set aside the first order of adoption. According to the court of appeals, GS 1-301.2 allows an appeal to district court of a "final decree of adoption" entered by the clerk. The Clerk's order setting aside the adoption was not a final decree of adoption so the adoption remained within the subject matter jurisdiction of the clerk. Therefore, the district court had no subject matter jurisdiction to review the clerk's order. The court of appeals held that the case would be remanded to the trial court, with the adoption going back before the clerk of court. However, given the filing of the motion to intervene in the custody case and the motion to consolidate the adoption and the custody filed by material grandparents, the court instructed the clerk to consider whether there are contested issues of fact in the adoption case. If so, the clerk is required to transfer the case to district court pursuant to GS 48-2-601(a1), which requires that the clerk transfer an adoption to district court whenever an issue of fact arises in the adoption proceeding.

Equitable Distribution

Cases Decided Between October 2009 and June 1, 2010

Rule 60(b)(6); stipulations; divisible property

- Trial court did not err in denying defendant's motion pursuant to Rule 60(b)(4) or (6) where defendant waited eleven years after entry of judgment to file the motion to set aside the judgment.
- Where parties put stipulations in writing and signed them, trial court had no obligation to inquire of the parties to make sure they understood the impact of the stipulations.
- Where trial court determined business acquired during the marriage was 88.5% separate property of defendant and 11.5% marital property, and trial court concluded that all income earned from the business after the date of separation was passive, trial court did not err in classifying 11.5% of each piece of property acquired after separation with income from the business as divisible property.

Hodges v. Hodges, unpublished opinion, 687 S.E.2d 710 (N.C. App., Nov. 3, 2009). Parties were divorced in 1996. In 1997, a consent order set aside the divorce and plaintiff filed an action for equitable distribution. Parties were then divorced again. In August 2008, the trial court entered an equitable distribution judgment. Also in August 2008, defendant filed a motion pursuant to Rule 60(b) asking that the consent order setting aside the original divorce be set aside. The trial court denied the Rule 60(b) motion. Defendant appealed both the ED judgment and the denial of the Rule 60(b).

The court of appeals upheld the trial court. Regarding the Rule 60 motion, the court of appeals held that while there is no specific time limit for filing a motion pursuant to Rule 60(b)(4) or (6), the motion must be filed within a reasonable amount of time under the circumstances. The court of appeals held that "as a matter of law, a delay of eleven years is not a reasonable time within which to seek relief from a consent judgment."

The court of appeals also rejected defendant's argument that the stipulations the trial court used to determine that the business acquired during the marriage was a mixed asset should be set aside because the trial court did not inquire whether the parties understood the stipulations at the time they were entered. Defendant argued that the case of McIntosh v. McIntosh, 74 NC App 554 (1985) requires the trial court to make such inquiries. The court of appeals disagreed, holding that McIntosh holds that any agreement or stipulation dividing marital property must be in writing and acknowledged, or if oral, the court must read the terms to the parties and "assure itself that the parties understand the terms and legal affects of their agreement and are entering the agreement of their own free will." In this case, the stipulations were in writing and admitted into the record by the trial court in the presence of both parties without objection from either party. Therefore, according to the court of appeals, the trial court was not required to make the McIntosh inquiries.

Finally, the court of appeals upheld the classification of assets purchased during the more than 10 year period of separation. The trial court concluded that the business acquired during the marriage was 11.5% marital and therefore classified 11.5% of the value of property purchased during separation with income from the business as divisible. The court of appeals held that this

implied that the trial court concluded that all income from the business earned during separation was passive and therefore divisible property to the extent earned from the marital part of the business – meaning 11.5% of all the income was divisible property. As there was no assignment of error regarding the trial court's conclusion that all income was passive, the court of appeals held that the trial court's classification of the assets purchased with this income as 11.5% divisible property was consistent with the source of funds doctrine.

Valuation; unequal distribution

- While trial court did not err in failing to assign value to business acquired during the marriage or to debt incurred during the marriage because the parties failed to present credible evidence of the value on the date of separation, the trial court did err when it distributed the business and the debt between the parties.
- If the trial court cannot determine date of separation value of an asset or a debt, the asset or debt falls outside of equitable distribution.
- Trial court did not err in ordering an unequal distribution where evidence supported finding numerous distribution factors.

Ikechukwu v. Ikechukwu, unpublished opinion, 687 S.E.2d 133 (N.C. App., November 3, 2009).

Trial court classified business and house as marital property and business associated debt as marital debt. The trial court found a date of separation value for the marital home but concluded that there was no evidence offered sufficient to support a finding of date of separation value for the business or the business debt. Nevertheless, the trial court distributed the business and the business debt between the parties. The court of appeals held that the trial court correctly determined there was insufficient evidence to support a date of separation value for either the business or the debt. However, a trial court cannot distribute marital property unless it first determines the value of that asset on the date of separation. Assets that cannot be valued fall outside of equitable distribution and parties are left with common law remedies to determine ownership. Grasty v. Grasty, 125 N.C. App. 736 (1997). The court of appeals held that the same rule applies to marital debt. If a trial court cannot value the debt, the debt falls outside of equitable distribution. The court of appeals rejected defendant's contention that the trial court erred in ordering an unequal division, finding that the trial court made findings establishing the existence of numerous distribution factors to support the unequal division.

Divisible debt; "credit" for rental value of residence

- Trial court erred in giving party "credit" for postseparation payment of marital debt without identifying reduction in marital debt as divisible property.
- Trial court erred in giving party a "credit" in the amount of ½ rental value of marital home because other party had possession of home during separation; trial court has no authority to distribute postseparation rental value of marital property.

Martin v. Martin, unpublished opinion, 691 S.E.2d 133 (N.C. App., February 16, 2010).

Case with thirty-nine months between date of separation and date of ED trial. Trial court made detailed findings about payments made on marital debts during that postseparation period of time. Trial court distinguished principal payments from interest payments, and gave 'credits' to parties to account for these payments. However, the court of appeals held that the trial court

erred in failing to identify these payments as divisible property and divide them between the parties. In addition, the trial court did not make findings as to which party made which payments on the various debts. The court of appeals held that such detail is necessary to allow the appellate court to review whether the trial court abused its discretion in determining how the divisible property should be distributed between the parties. The court of appeals also held the trial court erred when it awarded one party a "credit' in the amount of one-half the rental value of the marital residence. The trial court awarded this credit to account for the fact that the other party had exclusive possession of the marital residence during the entire period of separation. Citing Black v Black, 94 NC App 220 (1988), the court of appeals held that trial courts have no authority to award rental value for the postseparation period in equitable distribution. The Black case explains that rental value cannot be distributed (which is the same thing as 'credited') because it is not marital or divisible property. A trial court can consider postseparation possession of marital property as a distribution factor in determining how other marital and divisible property should be allocated between the parties.

Findings necessary to support classification and valuation

- Order was remanded to trial court where judgment did not contain findings of fact to support conclusion that property was marital property and did not contain basis for court's valuation of the property. Simply listing property with classification and value is not sufficient.
- When classification and/or value is disputed, trial court must make findings of fact to support marital classification and value.
- Judgment must specify that value found by trial court is value as of date of separation.

Duruanyim v. Duruanyim, unpublished opinion, S.E.2d (N.C. App., May 18, 2010).
Trial court entered an equitable distribution order awarding an unequal division of marital property and ordering that defendant pay plaintiff a $6,000 distributive award. On appeal, defendant argued that the judgment did not contain sufficient findings of fact to support the trial court's classification and valuation of the majority of the assets. The court of appeals agreed and remanded the case for additional findings of fact. According to the court of appeals, the parties listed all assets about which there was a dispute as to classification and/or valuation as Schedules B through E attached to the financial inventories filed in the trial court. Following the trial, the trial court resolved the disputes and identified the classification and value of all disputed assets. However, the judgment did not explain the basis for the trial court's decisions regarding each asset. The judgment merely listed the disputed assets and identified the classification and the value of each. On remand, the trial court is instructed to supply the factual basis for the decisions on each asset. The court clarified that findings regarding value must state specifically that the value is the date of separation value. Regarding the amount of detail required, the court of appeals stated "we emphasize our holding does not require voluminous findings from the trial court, but instead simply findings sufficiently adequate to reflect that it performed the task imposed upon it by our case law and statutes."

Third-party liability; unequal distribution

- Trial court erred in ordering that third-party corporation make payments to wife to compensate her for marital debt incurred for benefit of the corporation. Wife may have common law cause of action but relief was not appropriate in equitable distribution.

- Distribution factors justified award of 88% of marital estate to wife.

Mugno v. Mugno and Liberty Computer Systems, _ S.E.2d _ (N.C. App., June 1, 2010). Trial court joined corporation because wife claimed the corporation was marital property. Trial court concluded that husband owned stock in the corporation but that stock was his separate property. However, trial court ordered corporation to make payments to wife to repay amounts borrowed by the parties during the marriage for the benefit of the corporation through an equity line of credit secured by the marital residence. The court of appeals reversed this portion of the trial court order, holding that the equitable distribution statute does not give the trial court the authority to order the corporation to pay. According to the court of appeals, when the only claim before the trial court is equitable distribution, the trial court is limited to distributing marital and divisible property between the spouses. The court of appeals noted that wife probably has a cause of action against the corporation that can be filed to recover on the debt separate from the equitable distribution claim.

The court of appeals also upheld the trial court's distribution of the marital estate and rejected husband's argument that the division was "unconscionably disproportionate." The marital home amounted to 88% of the net marital estate and the trial court awarded the home to wife. The court of appeals held that, while there is a presumption in favor of equal distributions, trial courts can justify unequal divisions with distribution factors. In this case, the trial court found that wife earns much less income than husband, marital assets contributed to the value of his separate property during the marriage (through the loan to the corporation), and wife needed to reside in the marital home in order to care for the minor children born during the marriage.

Distribution of divisible property

- Trial court has discretion to determine most equitable way to distribute divisible property between the parties.
- Trial court is not required to distribute postseparation decrease in value of an asset to the party who receives the asset.

Wirth v. Wirth, unpublished opinion, _ S.E.2d_ (N.C. App., June 1, 2010).
This case is a second appeal – an appeal of the new order entered by the trial court following remand by the court of appeals. In original appeal, court of appeals held that the trial court erred in treating postseparation decrease in value of a marital business as a distribution factor rather than classifying that decrease as divisible property. In the first appeal, Wirth v. Wirth, 193 N.C. App. 657 (2008), the court of appeals held that an increase or decrease in the value of a marital asset after the date of separation is presumed to be divisible property. This means that if evidence is not sufficient to show whether the change in value was the result of the actions of one spouse after the date of separation, then the change in value must be classified as divisible. In this case, the trial court found that the marital business decreased significantly in value during separation but that it was impossible to separate husband's actions from market forces in causing that decrease. On remand, the trial court classified the decrease as divisible property in accordance with the mandate from the court of appeals and distributed the loss between the parties in the same percentages as the trial court distributed the rest of the marital and divisible estate; 54.27% to defendant husband and 45.73% to plaintiff wife. On the appeal following the remand, defendant husband argued that the trial court was required to distribute the loss in value to the party who received the asset, meaning he should receive 'credit' for the loss because he received the marital business as his portion of the marital estate. Because his part of the estate was

calculated using the date of separation value of the company, he argued the judge should be required to subtract the loss from the calculation of his portion of the marital estate. The court of appeals disagreed, holding that the trial court has discretion to determine the equitable distribution of all marital and divisible property. Noting that there certainly will be times when it is equitable to distribute the loss to the party receiving the asset, there is no mandate that trial courts divide divisible property in that way in all circumstances. The court of appeals stated "[w]e reiterate that the equitable distribution of marital and divisible property is within the trial court's sole discretion, and in the absence of legal error in the classification or valuation of the property, the trial court's decision is reversible only for an abuse of discretion."

Postseparation Support and Alimony
Cases Decided Between October 2009 and June 1, 2010

Cohabitation

- Trial court erred in granting summary judgment in favor of dependent spouse, finding allegations in affidavit submitted by supporting spouse insufficient to raise genuine issue of fact that wife engaged in cohabitation.
- Supreme Court adopts standard from Oakley v. Oakley, 165 NC App 859 (2004): Where objective evidence of cohabitation is not conflicting, trial court is not to consider subjective intent of parties alleged to cohabitate. Where objective evidence is conflicting, trial court must consider subjective intent of parties.

Bird v. Bird, 363 N.C. 774, 688 S.E.2d 420 (2010), reversing 688 S.E.2d 39 (2008).
Defendant filed motion to terminate alimony based on his allegation that plaintiff was engaging in cohabitation. Trial court granted plaintiff's motion for summary judgment, finding that defendant's affidavit was insufficient to raise genuine issue of material fact regarding plaintiff's cohabitation. Court of appeals reversed, finding affidavits of both plaintiff and defendant raised genuine issues of material fact relating to the claim of cohabitation and the supreme court affirmed. The supreme court held that to find cohabitation, the trial court must find both "1) a dwelling together continuously and habitually of two adults and 2) a voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people." In addition, the supreme court adopted the "methodology" defined by the court of appeals in the case of Oakley v. Oakley, 165 NC App 859 (2004); when the objective evidence in support of the elements of cohabitation is not conflicting, the trial court finds cohabitation or not based only on the objective evidence. If however, the objective evidence is conflicting, the trial court must consider the subjective intent of the parties, meaning whether they intended to cohabitate. In this case, the court seemed to say there was conflicting objective evidence. Both parties agreed the third party stayed many nights at plaintiff's house (defendant's affidavit said a minimum of 11 nights during one period of observation); they exchanged vehicles and the vehicle of the third party was observed regularly at plaintiff's home. The objective evidence that was conflicting was whether the third party actually lived in a home separate and apart from plaintiff. Third party affidavit stated that he had his own residence but plaintiff's affidavit alleged that his "residence appeared as though no one lived there." Plaintiff's affidavit raised issue as to subjective intent of parties because third party stated that he had no intent to cohabitate with plaintiff.

Pleading; counterclaim or affirmative defense

- Trial court erred when it determined defendant's answer contained a counterclaim relating to alimony. Therefore, trial court should not have dismissed plaintiff's alimony claim after concluding that defendant's allegations were deemed admitted when plaintiff failed to file a reply.

Crowley v. Crowley, 691 S.E.2d 727 (N.C. App, April, 2010).
Plaintiff husband filed complaint seeking alimony, along with other types of relief including custody, child support and equitable distribution. Defendant filed an answer which contained a

paragraph titled "Affirmative Defense". In that paragraph, defendant alleged plaintiff was not a dependent spouse and defendant was not a supporting spouse. In addition, defendant's answer contained paragraphs designated as counterclaims for child custody and child support. In the paragraphs designated as counterclaims, defendant incorporated by reference the information and allegations contained in the paragraph titled "Affirmative Defense." The trial court dismissed plaintiff's alimony claim, concluding that the plaintiff's failure to reply to defendant's counterclaims constituted an admission on the part of plaintiff to the allegations made by defendant regarding dependency. The trial court held that by incorporating the paragraph relating to alimony into the paragraphs titled "counterclaim", defendant had pleaded a counterclaim regarding alimony. A plaintiff is required to reply to a counterclaim, or allegations are deemed admitted, according to Rule 8 of the Rules of Civil Procedure. The court of appeals reversed, holding that the incorporation did not result in a counterclaim regarding alimony. According to the court of appeals, the statements made by defendant in her Answer regarding alimony were "stating in the affirmative mere denials of allegations originally made in the complaint" and did not require a reply.

Interlocutory appeal

- Appeal by defendant of trial court order denying his Rule 59 and 60 motions wherein he requested that alimony order entered by trial court be set aside was dismissed as interlocutory because equitable distribution claim remained pending between the parties in the trial court.

Musick v. Musick, 691 S.E.2d 61 (N.C. App, April, 2010).
Plaintiff filed complaint seeking alimony and equitable distribution. Trial court heard alimony case but continued equitable distribution. The trial court entered an alimony order and defendant filed motions pursuant to Rules 59 and 60, asking the trial court to reconsider the alimony order. The trial court denied both motions and defendant appealed. Even though neither party raised the issue on appeal, the court of appeals dismissed the appeal as interlocutory. According to the court of appeals, the appeal was interlocutory because plaintiff's claim for equitable distribution remained pending in the trial court. While an interlocutory appeal is appropriate if the order appealed affects a substantial right, the court of appeals held that the denial of the Rule 59 and 60 motions did not affect a substantial right.

Agreement to "waive" requirement of substantial change in circumstances

- Parties probably have right to waive by contract the "statutory right" to showing of substantial change in circumstances before alimony order can be modified.
- Finding by trial court that defendant's health had deteriorated since alimony order was entered and that the financial circumstances of both parties had changed since prior order was sufficient to support conclusion of changed circumstances even though order did not make findings about circumstances in existence when original order was entered.

Gamewell v. Gamewell, unpublished opinion, _S.E.2d_ (N.C. App, April 20, 2010).
Parties entered into a separation agreement providing for the payment of alimony by defendant to plaintiff. The agreement was incorporated into a court order. Parties subsequently entered into a consent judgment, stating in part "If parties are unable to reach agreement in September 2002, parties are entitled to review the matter without the necessity of showing a change of circumstances." Several years after that agreement, the trial court entered an order finding changed circumstances and modifying the support order. Plaintiff appealed, arguing the trial court erred in concluding there had been a substantial change without making findings about the

circumstances in existence at the time the original order was entered. Defendant argued that, pursuant to the agreement of the parties, the court was not required to find substantial change before modifying the judgment. The court of appeals stated "we agree that parties to contracts have the ability to waive certain statutory rights," but the contract in this case did not apply to the modification at issue. The agreement of the parties provided that no substantial change would be required "if the parties were unable to reach agreement in September 2002." The modification order subject to the appeal was heard by the court in June 2006, making the contract provision between the parties inapplicable to the present case. The court of appeals then held that the findings of fact in the order were sufficient despite the fact that the court made no findings regarding circumstances at time of original order. Instead, the trial court simply stated that the health of defendant had deteriorated "since the last agreement" and that financial circumstances of both parties had changed "since the time of the last agreement." According to the court of appeals, those findings were sufficient to support the conclusion that there had been a substantial change of circumstances.

Paternity

Cases Decided Between October 2009 and June 1, 2010

Paternity in custody case – Supreme Court reverses Court of Appeals

- Court of appeals held that trial court erred by denying defendant mother's request for blood test. Mom requested blood test in a "motion for proof of paternity" filed two years after court entered custody order awarding plaintiff primary custody of child.
- **Supreme Court reversed Court of Appeals, adopting dissent in Court of Appeals**
- When custody order determines paternity, party must obtain relief from judgment pursuant to Rule 60(b) before paternity can be questioned.

Helms v. Landry, 363 N.C. 738, 686 S.E.2d 674, reversing 194 N.C. App. 787, 671 S.E.2d 347 (2009).

Both parties filed separate actions seeking custody of the minor child. Trial court consolidated both actions and entered a custody order, awarding defendant primary custody and plaintiff visitation. The trial court order contained findings that defendant is the biological mother of the child and plaintiff is the biological father, even though the issue of paternity had not been raised nor previously litigated. Approximately four years later, trial court entered an order finding a substantial change in circumstances and awarding primary custody to plaintiff and visitation to defendant. Two years later, defendant filed a motion "for proof of paternity" and requested that plaintiff be ordered to submit to blood tests. The trial court denied the motion, ruling that there was no basis for the trial court to order the tests. The court of appeals reversed, holding that because there had been no formal judicial determination of paternity, GS 8-50.1(b1) requires that the trial court grant defendant's request for blood tests. The Supreme Court reversed the court of appeals by adopting the dissenting opinion filed by Judge Jackson in the court of appeals. According to Judge Jackson, the custody order included an adjudication of paternity because it contained specific findings regarding parentage. As paternity had been judicially determined, there could be no issue relating to paternity that would justify an order for blood tests unless the paternity determination is first set aside pursuant to Rule 60(b).