Family Law Update
Cases Decided and Legislation Enacted Between June 20, 2023, and October 3, 2023

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

Find the full text of these court opinions at www.nccourts.org

Custody

June 20, 2023, and October 3, 2023

Temporary custody order or permanent order

- Although the trial court designated the order as a temporary custody order, the order was a permanent order because the court did not set a clear and specific reconvening time for a permanent custody hearing.
- Grandmother had standing to file a claim for custody against the mother of the children where she alleged facts sufficient to support a conclusion that mother had acted inconsistently with her protected status.
- The trial court erred when it granted custody to grandmother without first concluding that mother had waived her constitutional right to custody.

Tillman v. Jenkins, 889 S.E.2d 504 (N.C. App., June 20, 2023). Grandmother filed a complaint for custody against mother. The complaint included a request for an emergency order and a temporary custody order. The trial court granted grandmother ex parte temporary custody and scheduled a hearing on the request for temporary custody. After the hearing, the trial court entered a temporary custody order granting grandmother custody and visitation to mother. The order set visitation for mother to include weekends, Thanksgiving break in even numbered years, Christmas break in the year of the order and half of Christmas break in subsequent years, Mother's Day, and spring break in even years.

During the hearing, counsel for mother asked the trial court when the matter would come on for a permanent custody trial. The trial court responded by setting the case for review in 90 days, stating that, after the 90-day review, the court would consider setting a trial date for the permanent hearing. Mother appealed the order.

The court of appeals first determined that the custody order was a permanent order rather than a temporary order. The court stated that "a temporary order is not designed to stay in effect for extensive periods of time or indefinitely," and that "where the trial court fails to state a clear and specific reconvening time in its otherwise temporary order, it will be treated as a permanent one." Even when an order states a clear reconvening time, the order will be treated as a permanent one if the time between the two hearings is not reasonably brief. Whether the time interval between the two hearings is reasonably brief must be determined on a case-by-case basis.

In this case, although the court set a 90-day review, the trial court made it clear that it would not try the permanent custody issue on that date but would only consider whether to set a trial date at that time. The court of appeals pointed out that by the time of the appeal, grandmother had custody of the children for almost three years. The court stated "[t]he chronic temporary, and thus interlocutory, orders have evaded appellate review and avoided addressing whether Mother is unfit or has acted inconsistent with her parental rights. Furthermore, the … order failed to state a clear and specific reconvening time for a permanent custody hearing."

After concluding that the order was permanent rather than temporary, the court of appeals held that the trial court erred by granting custody to grandmother without first determining that mother has lost her constitutional right to custody.

However, the court rejected the argument that grandmother did not have standing to seek custody. The court held that a grandparent has standing when the grandparent alleges in the complaint facts sufficient to support a conclusion that the parent was unfit or has acted inconsistent with her constitutionally protected status. In this case, the grandmother's allegations were sufficient where she alleged that mother had no stable housing, no stable employment, did not support therapy for the children even though their therapist indicated a need for therapy, and was physically unable to care for the children, and alleged that there was a substantial risk of serious physical and emotional injury to the children while in mother's custody.

Modification; change with no impact on welfare of child; consideration of child's wishes

- The trial court did not err in concluding that while there had been changes in the circumstances of the mother, the changes did not impact the welfare of the child.
- The trial court was not required to modify the existing custody order to address the desire of the 10-year-old child to spend more time with his mother.

Johnson v. Lawing, 889 S.E.2d 500 (N.C. App., June 20, 2023). The existing custody order granted primary physical custody to dad and visitation to mother. Mother's overnight visitation was "suspended" while she continued to live with her parents. She filed a motion to modify, claiming that she no longer lived with her parents and now lived in a residence "suitable and conducive to raising the child," and claiming that the child wanted to live with her. The trial court concluded that there had been a change in the circumstances of the mother, but the changes did not impact the welfare of the child. The court also concluded that it was not in the best interests of the child to modify custody.

On appeal, mother argued that the trial court erred when it considered therapy records not introduced into evidence (an argument that the court of appeals rejected based on its review of the record) and that the trial court erred by not properly considering the wishes of the child to reside with her.

The court of appeals affirmed the trial court, holding that while a trial court may consider the wishes of a child of suitable age and discretion, the wishes of the child are never controlling upon the court. In this case, the trial court made a finding that the child wanted to spend more time with mother, but also made numerous other findings about how the current custody arrangement met the needs of the child and continued to be in the best interest of the child.

UCCJEA; emergency jurisdiction can become home state jurisdiction

- A court that does not otherwise have jurisdiction to enter or to modify a custody determination can exercise temporary emergency jurisdiction when a child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse. GS 50A-204(a).

- If another state with jurisdiction has entered a child custody determination or if there is an action pending in a state with jurisdiction, a court exercising temporary emergency jurisdiction must immediately communicate with the court with jurisdiction, and any custody order entered using emergency jurisdiction must be limited in duration. GS 50A-204(c) and (d).
- If no other state with jurisdiction has entered a custody order, the temporary emergency jurisdiction exercised by a court will become permanent jurisdiction if the state becomes the home state of the child before an action is initiated in a state with jurisdiction and the temporary order entered with emergency jurisdiction so provides. GS 50A-204(b).

In re N.B. and N.W., 890 S.E.2d 199 (N.C. App., July 5, 2023).

From blog post written by Sara DePasquale and published on July 20, 2023.

In 2020, the two children who were the subject of the A/N/D action resided with their mother and her husband in Washington state. In October, mother separated from her husband and started to relocate to North Carolina. Later in October, one child moved to North Carolina and stayed with her aunt. In January, another child moved in with other relatives in North Carolina. In December, the child who lived with her aunt disclosed that mother's husband had been sexually abusing her. A report to DSS was made and mother denied any allegations and refused to cooperate with DSS.

In January, DSS filed a petition alleging abuse, neglect, and dependency for the child who disclosed the sexual abuse and neglect and dependency for the sibling. The district court entered nonsecure custody orders for the two children based upon temporary emergency jurisdiction. By March, mother had relocated to North Carolina and had housing here. An adjudication and disposition hearing was heard in March, and an order was entered in July.

The order contained a conclusion that the court initially exercised temporary emergency jurisdiction but North Carolina had obtained home state jurisdiction since mother and the two children had lived here for more than six months and there was no custody order from another state.

Mother appealed arguing that North Carolina did not have subject matter jurisdiction under the UCCJEA.

The issue on appeal was "whether temporary emergency jurisdiction under the UCCJEA may eventually ripen into home-state jurisdiction."

The answer is yes when specific criteria are met.

It is undisputed that when DSS initiated the A/N/D case, North Carolina was neither child's "home state" and that the district court properly exercised temporary emergency jurisdiction at the commencement of the action. As a result, the district court had subject matter jurisdiction to enter the nonsecure custody orders. However, mother argued that the district court lacked subject matter jurisdiction to enter an adjudication order under temporary emergency jurisdiction based upon the passage of time – six months – which made North Carolina the children's home state.

The court of appeals rejected mother's argument. The court of appeals looked to three prior published opinions. Two of those opinions involved a TPR where at the commencement of the TPR, North Carolina was the home state. Prior to the initiation of the TPRs, DSS had custody of the respective children because of underlying A/N/D cases where DSS had been awarded custody. The A/N/D cases initially involved temporary emergency jurisdiction as neither child had resided in North Carolina for six months before the A/N/D actions commenced. See In re N.T.U., 234 N.C. App. 722 (2014); In re E.X.J., 191 N.C. App. 34 (2008), aff'd per curiam, 363 N.C. 9 (2009).

In both cases, no child custody proceedings had ever been initiated in another state. Because In re N.B. does not involve a TPR, the court of appeals also looked to In re M.B., 179 N.C. App. 572 (2006). Like In re N.B., In re M.B. was an A/N/D case. In In re M.B., the district court initially exercised temporary emergency jurisdiction and adjudicated the juvenile neglected and placed the juvenile in DSS custody. The district court recognized that North Carolina had become the child's home state and ordered that its adjudication become a final order under G.S. 50A-204(d). While the appeal in In re M.B. was pending, there was confirmation that no child custody proceedings had been filed in another state. The court of appeals determined that the issue of temporary emergency jurisdiction was moot and never discussed G.S. 50A-204(temporary emergency jurisdiction).

In In re N.B., the court of appeals examined G.S. 50A-204(b), which explicitly states: if a child-custody proceeding has not been or is not commenced in a court of a state having jurisdiction under G.S. 50A-201 through 50A-203, a child-custody determination made under this section becomes a final determination if it so provides, and this State becomes the home state of the child. The plain language of this statute "contemplates that a court exercising emergency jurisdiction may enter an initial child-custody determination, which 'includes a . . . temporary . . . order.'

Here, mother and both her children lived in North Carolina for more than 6 months and there was never a child custody order from or proceeding in another state such that North Carolina was home state when the adjudication and dispositional order were entered. As a result, at the time the adjudication and dispositional orders were entered, North Carolina's temporary emergency jurisdiction had transitioned to initial custody determination. In making its holding, the court of appeals recognized it was following the holding of two unpublished cases, In re K.M., 228 N.C. App. 281 (2013) (unpublished) and In re L.C.D., 253 N.C. App. 840 (2017) (unpublished).

A Word of Caution

Subject matter jurisdiction can be raised at any time. In re K.J.L., 363 N.C. 343 (2009). It is a conclusion of law with a de novo standard of review. In re N.B. Although North Carolina can become a child's home state, transitioning North Carolina's temporary emergency jurisdiction to initial custody jurisdiction, consider the following: There cannot have been a child custody determination made in another state. A child custody proceeding cannot have been or be commenced in another state. It is possible that a child custody proceeding is initiated in a child's home state after an A/N/D petition has been filed in North Carolina and before North Carolina

obtains home state jurisdiction. Be wary about having an adjudication hearing prior to North Carolina becoming the child's home state.

In In re N.B., the court of appeals referred to the passage of time up to the entry of the adjudication and dispositional order (the hearing was conducted earlier, before North Carolina had home state jurisdiction). Since an adjudication is not a temporary order, to avoid any confusion and possible jurisdictional defects, it is prudent to wait to hold the adjudicatory hearing until North Carolina has become the child's home state.

Grandparent custody and visitation

- The trial court did not err when it dismissed grandparents' action seeking secondary custody of or visitation with the child of their deceased son.
- Thet trial court did not err when it concluded that defendant mother did not waive her constitutional right to custody.
- The grandparent visitation statutes, GS 50-13.2(b1), 13.5(j) and 13.2(a), allow grandparents to seek visitation only when there is an on-going custody dispute between the parents or when there has been a stepparent or relative adoption.
- A grandparent can seek visitation pursuant to GS 50-13.1 only when the parent has waived her constitutional right to custody.

Rose v. Powell, S.E.2d (N.C. App., September 5, 2023). The son of plaintiffs died before the birth of his daughter. Following the child's birth, the plaintiffs regularly spent time with their grandchild and defendant mother. When the child was almost two years old, defendant mother chose to end contact with plaintiffs and the visitation between the child and the grandparents stopped. The grandparents filed this action seeking secondary custody or visitation pursuant to GS 50-13.1. The grandparents alleged that mother had acted inconsistent with her constitutionally protected status when she "brought them into the family unit and represented them as an integral part of the family unit without creating an expectation that the relationship would be terminated." The trial court granted the mother's motion to dismiss after determining that the mother had not waived her constitutional right to exclusive custody.

The court of appeals affirmed. Before a trial court can consider visitation for a grandparent pursuant to GS 50-13.1, the court must first conclude that the parent has waiver her right to exclusive custody by being unfit or neglecting the welfare of the child, or by otherwise acting inconsistent with her protected status as a parent. The appellate court acknowledged that a parent's action may be deemed to be conduct inconsistent with her protected status when she "brings a nonparent into the family unit, represents the nonparent as a parent, and voluntarily gives custody of the child to the nonparent without creating an expectation that the relationship would be terminated." In this case, the defendant mother never represented the grandparents as parents nor did she cede custody of or responsibility for the child to the grandparents, and there were no allegations that the mother was unfit or otherwise incapable of caring for the child. The court of appeals also noted that the grandparents in this case could not seek visitation pursuant to the grandparent visitation statutes because the mother and child were an "in-tact family" as there was no on-going custody dispute between the parents.

Subject matter jurisdiction; void order

- A custody determination entered without subject matter jurisdiction pursuant to the UCCJEA, Chapter 50A of the NC General Statutes is void.
- A consent order does not waive challenges to subject matter jurisdiction.
- Where record indicated that mother and child resided in Utah for more than six months before the custody proceeding was filed in North Carolina, custody order had to be vacated and remanded to the trial court for a determination of whether NC had subject matter jurisdiction to enter a custody order.

Rook v. Rook, S.E.2d (N.C. App., September 19, 2023). The trial court entered a custody order following a trial. Before the trial, the parties entered a consent order stating that NC had jurisdiction to enter an initial custody determination regarding the child who had been born in NC. Mother appealed the custody order, arguing that NC did not have subject matter jurisdiction.

The court of appeals held that subject matter jurisdiction cannot be conferred by consent and an objection to jurisdiction can be raised at any time. Where the record indicated that the mother and the child had relocated to Utah more than 6 months before the custody action was filed in North Carolina, the custody order entered by the trial court had to be vacated and the matter remanded to the trial court for a determination of whether NC was the home state of the child at the time the action was filed in NC or whether Utah was the home state but had determined that NC was the more convenient forum.

Child Support
June 20, 2023, and October 3, 2023

Consent judgments; orders to non-parties; prospective support

- Where neither the transcript of the child support hearing nor the "four corners of the order" established that there was unqualified consent of the parties at the time the child support judgment was signed by the judge, the court of appeals could not find that the parties entered a consent judgment for support.
- Where there was no evidence in the record to support the trial court findings regarding the income of the parties, the child support judgment must be vacated and remanded.
- The trial court erred in ordering mother's husband to provide health insurance coverage for the children.
- Prospective support payments must begin at the time the complaint or motion seeking support is filed unless the trial court deviates from the guidelines and makes all required findings of fact to support deviation.
- The trial court failed to order prospective support where the support judgment required payments to begin at the time of the entry of the support judgment rather than at the filing of the complaint seeking support without making findings to support deviation.

Gavia v. Gavia, 890 S.E.2d 531 (N.C. App., July 5, 2023). At the conclusion of a child support hearing during which both parties testified very generally about their income without providing specific amounts, the trial court asked the attorneys if "by consent they're agreeing to a permanent child support order being entered?" The attorneys responded in the affirmative and indicated on the record that the parties would exchange more detailed information about their income and expenses. After the hearing, father's attorney prepared and signed the judgment and indicated on the judgment that mother's attorney had approved of the order by "fax and text". The parties did not sign the judgment. The judgment contained income and expenditure amounts that were not reviewed with or acknowledged by the parties in the trial court.

Mother argued on appeal that the judgment entered by the trial court was not a valid consent judgment and the court of appeals agreed. According to the court of appeals, the validity of a consent judgment depends upon the unqualified consent of the parties at the time it is entered by the trial court. Where the parties did not sign the judgment and they did not appear before the trial court to acknowledge their consent at the time the judge signed the order, the appellate court could not find that the parties consented to the entry of the judgment at the time the judge singed it.

As the judgment was not entered by consent, the court of appeals also held that it must be vacated and remanded because there was no evidence in the record to support the findings of fact in the judgment regarding the income and expenditures of the parties.

Findings in the judgment also indicated that mother's husband was in the military and could cover the children on his medical insurance. The judgment ordered that coverage for the children be provided through the new husband. The court of appeals held this to be error, as husband was not a party to the action and as a stepparent, he had no duty to provide support of any kind to the children unless he agreed to provide support in writing. There was no indication that the husband

had undertaken an obligation to support so the trial court had no authority to order him to provide insurance coverage.

Finally, mother also argued that the trial court erred in finding that there were "no arrears" and ordering that the child support payments begin at the time the judgment was entered. The court of appeals agreed, holding that prospective support must begin at the time the complaint or motion for support is filed, unless the trial court deviates from the guidelines and makes all required findings of fact to support deviation. In this case, the trial court made no findings to support deviation.

Child support when parties have a separation agreement

- A parent can seek a child support order pursuant to GS 50-13.4 even if support has been addressed in an agreement between the parties; however, the trial court must presume the amount of support provide in the agreement is the appropriate amount of support to meet the needs of the children. The party seeking support must rebut that presumption before the trial court can set support pursuant to the Child Support Guidelines.
- The trial court cannot order retroactive support for a time when the parties were subject to an agreement providing for support. The amount of support owing for that period is determined by the agreement, absent an emergency relating to the needs of the children, and the agreement is enforced through an action for breach of contract.

Clute v. Gosney, S.E.2d (N.C. App., September 12, 2023). The parties entered into a separation agreement, signed under seal before a notary, which provided, in addition to other things, that the defendant husband would pay child support. The wife filed a complaint in April 2022 alleging the husband had breached the agreement by failing to pay support, failing to pay unreimbursed medical expenses, and failing to pay a portion of their son's college expenses. She alleged that he violated the terms of the agreement beginning in August 2017 by paying less than all amounts due under the contract. The wife requested specific performance and attorney fees pursuant to the terms of the agreement. She also included a claim for child support pursuant to GS 50-13.4, asking that the court enter an order of child support, including retroactive support. The trial court granted the defendant's motion to dismiss plaintiff's complaint and plaintiff appealed.

The appellate court also held that the trial court erred by dismissing the wife's claim for an order of child support. While the trial court must presume the amount of support provided in the agreement is the proper amount of support to meet the needs of the children, the court can set support pursuant to the Child Support Guidelines if plaintiff overcomes the presumption by showing that the amount of support set out in the agreement is not just and reasonable. However, the trial court cannot order retroactive support for a period during which an agreement provided for support, absent an emergency relating to the needs of the children. The court of appeals remanded the case to the trial court to determine whether defendant breached the agreement and to enter an order of child support, either in the amount provided in the agreement or pursuant to the Guidelines if plaintiff can rebut the presumption that the amount provided in the agreement is reasonable.

For a summary of the provisions in the opinion addressing the breach of contract issue, see section below on Spousal Agreements.

Determination of gross income; childcare costs; extraordinary expenses

- The trial court was not required to include withdrawals wife made from her retirement accounts in 2020 as part of her income at the time of the child support hearing in 2021.
- A trial court has the discretion to include one-time, non-recurring payments as income, but the court must conclude the payments are income rather than a conversion of an asset to cash.
- The cost of the child's summer camps was properly included in childcare expenses where the mother testified that the child's attendance at the camps enabled her to work during the summer.
- The cost of a child's private school can be included as an extraordinary expense if the trial court determines that the cost is reasonable, necessary, and in the child's best interest.
- Absent a request for deviation, the trial court is not required to make findings of fact to support the inclusion of an extraordinary expense in the calculation of guideline support.

Klein v. Klein, S.E.2d (N.C. App., October 3, 2023). The trial court entered a child support order requiring that the father pay support. He appealed, arguing that the trial court failed to comply with the child support guidelines. In affirming the trial court, the court of appeals held:

1. The trial court did not err in calculating the mother's gross income.

   Father argued that the trial court erred by not including two withdrawals wife made from her retirement accounts in the calculation of her gross income. The court of appeals rejected the argument, holding the husband failed to show the proceeds were income rather than "the conversion of an asset into cash." In addition, the withdrawals were made in 2020 while the child support hearing was held in 2021. Child support is to be based on the income of the parties at the time of the support hearing.

2. The trial court did not err by assigning some expenses as childcare costs.

   Father argued that the wife failed to show that the cost of summer camp for the child was a childcare expense related to her employment responsibilities. The court of appeals disagreed, holding that wife's testimony that she enrolled the child in summer camps to "facilitate her professional obligations" as well as to provide the child with the opportunities and experience provided by the camps was sufficient to support the trial court's finding that the costs were childcare expenses.

3. The trial court did not err by including the cost of the child's private school as an extraordinary expense in the calculation of father's child support obligation.

   Finally, the father argued that the trial court erred by ordering him to pay all the child's private school expenses. The court of appeals pointed out that the trial court did not order that he pay all the expenses; rather the court included the cost of the school as an

extraordinary expense which was included in the calculation of the total child support obligation of the parents. The appellate court held that the trial court properly included the expense after finding that the child had attended the school since kindergarten, the parties agreed he should attend the school, the child was “thriving” at the school, and he had established strong, close relationships with his teachers and peers.

Equitable Distribution
June 20, 2023, and October 3, 2023

Jurisdiction following notice of appeal

- GS 1-294 strips a trial court of subject matter jurisdiction to enter further orders during the pendency of an appeal if the issues in the new orders are embraced by the judgment previously appealed.
- The trial court had no jurisdiction to enter an injunction prohibiting plaintiff from disposing of property while the equitable distribution judgment was on appeal.

Crowell v. Crowell, S.E.2d (N.C. App., August 1, 2023). The trial court entered an equitable distribution judgment that ordered plaintiff to sell separate property to pay a distributive award to defendant. The supreme court vacated that part of the judgment and remanded the case to the trial court. The trial court amended the ED judgment to consider plaintiff's separate property in support of the distributive award but to remove the requirement that the separate property be sold. Plaintiff again appealed. While the case was on appeal, the trial court entered an injunction prohibiting plaintiff from selling the separate property or disposing of assets received from the sale of separate property. Plaintiff again appealed.

The court of appeals held that the trial court lacked subject matter jurisdiction to enter the injunction while the second appeal was pending in the court of appeals.

GS 1-294 states:

"When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from."

According to the court of appeals, the trial court retains jurisdiction only to act on matters that are not affected by the appeal. In this case, the separate property affected by the injunction was also the property at issue in the appeal and the trial court therefore did not have jurisdiction to enter the injunction.

Pleading

- Where neither party filed a claim for equitable distribution, the filing of equitable distribution affidavits by both was insufficient to institute an action for equitable distribution.
- Plaintiff wife failed to establish that the doctrine of quasi-estoppel should bar husband from asserting that no equitable distribution action was pending before the court.

Brown v. Brown, S.E.2d (N.C. App., September 5, 2023). The husband filed an action for custody and the wife counterclaimed for custody. Neither filed a claim for equitable distribution but both filed financial affidavits, engaged in discovery regarding property and finances, and participated in financial mediation. Custody was resolved and absolute divorce was entered in a

separate civil action. When equitable distribution came on for trial, husband requested dismissal as there was no claim pending and the trial court dismissed equitable distribution.

On appeal, the wife argued that the financial affidavits filed by the parties were sufficient applications for equitable distribution and that the husband should be estopped from arguing that no equitable distribution claims were pending. The court of appeals agreed with the trial court that the affidavits were not sufficient applications for equitable distribution and held that wife had not established that the doctrine of quasi-estoppel barred husband from arguing that no equitable distribution claims were pending. The court held that quasi-estoppel provides that "a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument." In this case, husband did not "accept a transaction or instrument" by responding to her equitable distribution affidavit and he did not "accept a benefit under" the affidavit, so the estoppel theory did not apply. [The court held that wife abandoned the doctrine of equitable estoppel as a defense on appeal but indicated that the facts would not support application of that theory either.]

Final judgment and notice of appeal; marital debt; loans owed to the parties; classification of a mixed IRA; classification of settlement proceeds.

- The trial court had jurisdiction to enter two pension distribution orders after husband filed a notice of appeal of the equitable distribution judgment because the husband's appeal was an inappropriate interlocutory appeal. The equitable distribution judgment was not a final judgment until the pension distribution orders were entered.
- The trial court did not err in classifying a familial gift of money as a loan and distributing it as marital debt to the husband. There is no requirement that a loan must be evidenced by a written agreement to repay the monies.
- The trial court properly classified money due as repayment of a loan made during the marriage by husband to a colleague of husband as a marital asset to be distributed to husband.
- The trial court properly classified proceeds from the settlement of a lawsuit seeking the reinstatement of husband to the American Association of Physician Specialists as marital property after concluding that husband failed to meet his burden to show that all or a portion of the settlement was intended to reimburse non-economic loss.
- Evidence was sufficient to support the trial court conclusion that the wife successfully traced the separate component of the date of separation value of her IRA.
- Where husband failed to meet his burden to show how much of the settlement proceeds from a lawsuit received during the marriage were compensation for non-economic loss, the trial court did not err in classifying all of the proceeds as marital property.

Klein v. Klein, S.E.2d (N.C. App., October 3, 2023). The trial court entered an equitable distribution judgment and two subsequent orders distributing the husband's two federal retirement accounts. The husband filed a notice of appeal from the equitable distribution judgment and filed a second notice of appeal following the entry of the two pension distribution orders.

The court of appeals first held that husband's first notice of appeal was an inappropriate appeal of an interlocutory order because the two pension distribution orders had not been entered at the time of the first appeal. The equitable distribution was not a final judgment; the judgment was not complete until the two distribution orders were entered. Therefore, the first notice of appeal did not deprive the trial court of jurisdiction to enter the pension distribution orders.

In affirming the equitable distribution judgment, the court of appeals held:

1. The trial court properly classified monies paid by wife's aunt and uncle for the down payment on the marital residence as a marital debt after determining it was a loan to the parties, made during the marriage, for the joint benefit of the parties. The court of appeals held that the evidence supported the trial court determination that the payment was a loan, and the court rejected husband's argument that a written agreement to repay the amount was required before the loan could be classified as marital. The court of appeals held that the fact that the loan was from family members and the fact that there was no written evidence of the loan could be considered as distribution factors.

2. Evidence was sufficient to support the trial court's finding that husband loaned $15,000 to a colleague during the marriage and the trial court properly classified the right to repayment of this loan as a marital asset to be distributed to husband. The court of appeals again rejected husband's argument that the agreement to repay the money had to be in writing to be an enforceable debt.

3. Wife's testimony, supported by account statements and a letter summarizing the account statements, supported the trial court's finding that wife's IRA was a mixed asset, with 29% of the date of separation balance being marital and the rest being the separate property of the wife.

4. The trial court properly classified the settlement proceeds from a lawsuit received by husband during the marriage as marital property after concluding husband failed to meet his burden to prove the settlement was intended to replace non-economic loss. Settlement proceeds are classified by the analytic approach, meaning classification depends on what the proceeds are intended to replace. Because the funds were received during the marriage, husband had the burden to show that the proceeds, or a portion of the proceeds, were intended to replace non-economic loss such as pain and suffering, or emotional distress, and were therefore his separate property. The evidence supported the trial court finding that the focus of the lawsuit was the reinstatement of husband's certification and licensure and therefore his ability to earn a salary as a specialist. While there was evidence that the settlement also included some compensation for non-economic loss, husband failed to show how much of the settlement was compensation for those losses.

5. The husband was not entitled to a credit for the payment of a joint tax liability of the parties after separation because he paid the debt with marital funds.

*****Equitable Distribution Cases from Summer 2023 Update**

Request to enter QDRO 16 years after entry of consent judgment

- The consent judgment entered 16 years before husband filed his motions requesting the entry of a QDRO did not distribute wife's retirement accounts. Rather, the judgment ordered her to pay a distributive award to the husband in the amount of one-half of the date of separation value of her accounts.
- Where the husband's motion requested the entry of a QDRO to require payment to him in the amounts specified in the consent judgment along with passive gains and losses on those amounts, the motion was in substance a motion to amend the consent judgment pursuant to Rule 59 of the Rules of Civil Procedure.
- The trial court properly dismissed husband's Rule 59 motion filed 16 years after the entry of the consent judgment.

Bracey v. Murdock, 286 N.C. App. 191, 880 S.E.2d 707 (2022). The parties agreed to the entry of a consent order resolving their claims for equitable distribution which the court entered on February 28, 2005. That judgment provided that the wife would maintain ownership of her retirement accounts, but she was required to pay husband one-half of the date of separation balance of each account. The consent judgment also provided that a QDRO would be entered to create a tax-free transfer from one of wife's accounts. The QDRO was not prepared, and the wife did not transfer any funds to husband from her accounts.

16 years after the entry of the consent judgment, husband filed motions for a restraining order and a preliminary injunction, and for the entry of a QDRO. He requested that the QDRO transfer the amounts set out in the consent judgment as well as the passive gains and losses that had accrued on those amounts since the entry of the consent judgment. The trial court dismissed husband's motions for a failure to state a claim after concluding that his requests were barred by the 10-year statute of limitations found in GS 1-47, or in the alternative, by laches.

The husband appealed. The court of appeals affirmed the dismissal by the trial court but on different grounds. The court of appeals held that the consent judgment did not divide the wife's retirement accounts. Rather, the judgment ordered the wife to pay a distributive award in the amount of one-half of the date of separation values of the accounts. The appellate court held that the husband's motion was in substance a motion to amend the original consent judgment to require the division of the accounts and to include passive gains and losses in the calculation of the amount to be paid to husband. The court interpreted his motion to be pursuant to Rule 59 of the Rules of Civil Procedure because that is the only Rule that would give the court authority to amend the consent judgment. Because a Rule 59 motion must be filed within 10 days of entry of judgment, the trial court was required to dismiss his request.

Separation; general guardian acting for incompetent spouse

- A trial court does not have subject matter jurisdiction over an equitable distribution claim filed before the parties have separated.
- The same test employed to determine the date of separation in a divorce proceeding applies in the equitable distribution context.

- Separation begins when the parties physically separate with at least one intending to end marital cohabitation on a permanent basis.
- An incompetent spouse cannot form the requisite subjective intent to separate for purposes of equitable distribution.
- A general guardian for an incompetent spouse does not have the power to cause a separation on behalf of the incompetent spouse for the purpose of bringing an equitable distribution claim.

Dillree by and through Tobias v. Dillree, 287 N.C. App. 33, 882 S.E.2d 354 (N.C. App., Dec. 20, 2022). Plaintiff and defendant are married and lived together in the marital home until plaintiff was adjudicated incompetent based on her loss of capacity due to Alzheimer's disease. One of plaintiff's adult daughters was named general guardian. The guardian removed plaintiff from the marital home based on her belief that it was in her mother's best interest to do so. Sometime thereafter, the guardian filed this equitable distribution proceeding seeking a distribution of marital assets. Defendant husband filed a motion to dismiss, arguing the trial court had no jurisdiction to consider equitable distribution because the parties had not separated. The trial court denied the motion and defendant appealed. The court of appeals allowed the appeal, reversed the trial court, and dismissed the proceeding for a lack of jurisdiction.

A trial court has no subject matter jurisdiction to consider equitable distribution unless the parties have separated at the time the complaint for equitable distribution is filed. The court of appeals held that the same test employed to determine separation for the purpose of divorce also applies to determine separation for the purpose of equitable distribution. The parties must live physically separate and apart and at least one must have the intent to cease marital cohabitation and to remain permanently separate and apart. In this case, there was no evidence that the husband intended to separate and there was no evidence that the wife intended to separate before she was adjudicated incompetent. The appellate court held that the wife did not have the capacity to form the intent to separate after she was declared incompetent, and the court further held that a "general guardian lacks the authority to cause a legal separation on behalf of an incompetent spouse for the purpose of equitable distribution." Because the guardian could not create a marital separation, the parties were not separated when the equitable distribution proceeding was initiated, so the trial court had no subject matter jurisdiction over the claim.

Time for filing equitable distribution; statute of limitations; distribution of marital debt

- A claim for equitable distribution accrues when the parties separate and expires upon the entry of an absolute divorce if the claim for equitable distribution is not filed before the entry of the divorce judgment.
- Where neither party filed for divorce and equitable distribution until seventeen years after separation, the claim for equitable distribution was timely.
- The 3-year statute of limitations in GS 1-52 and the 10-year statute of limitations in GS 1-56 do not apply to claims for equitable distribution.
- The trial court's findings regarding distribution factors supported the trial court's unequal division of the marital debt.
- The trial court had the discretion to order husband to pay his share of the marital debt by monthly payments in the amount of $1000.

Read v. Read, 886 S.E.2d 579 (N.C. App., April 18, 2023). The parties were separated for seventeen years before plaintiff wife filed an action for absolute divorce and equitable distribution. The marital estate consisted entirely of marital debt; student loans incurred by the wife during the marriage and an unpaid tax bill from the time the parties lived together. After the court entered the judgment of absolute divorce, defendant husband filed a motion to dismiss the equitable distribution claim, arguing that plaintiff's delay in asserting the claim violated the legislative intent of fairness and timeliness in the ED statutes, and that the claim was barred by the statute of limitations. The trial court denied the motion to dismiss and entered an equitable distribution judgment, ordering defendant husband to pay 30% of the marital debt. Defendant appealed.

The court of appeals rejected the defendant's argument that allowing the ED claim to be filed seventeen years following separation violated the legislative intent of the ED statute. The court of appeals held that while the statute contains provisions to ensure that ED claims are resolved by the court in a timely manner after they are filed, there is no limit in the statute on when the claim can be brought following separation if a judgment of absolute divorce is not entered. An ED claim accrues on the date of separation and is extinguished only if the claim is not filed before the entry of the absolute divorce. The court of appeals stated that the legislative intent "allows divorcing parties the flexibility to file for divorce and equitable distribution on a timeline that is appropriate for their unique situation."

The court of appeals also rejected the defendant's argument that claims for ED are subject to either the three-year statute of limitation in GS 1-52 or the 10-year statute of limitations in GS 1-56. Citing *Bruce v. Bruce*, 79 NC App 579 (1986), which held that the statutes of limitations do not apply to claims for absolute divorce, the court held that if divorce is not subject to the limitations, then equitable distribution also cannot be subject to the limitations. The court held that the time limitation on claims for equitable distribution is found in GS 50-11(e) which specifies that the claim must be asserted before entry of the divorce judgment.

The husband also argued that the trial court erred in ordering that he pay 30% of the marital debt. The debt consisted of student loans incurred by wife to attend chiropractic school during the marriage and a tax debt incurred by the parties while they were living together. The trial court found that 24% of the student loans were used to pay tuition while 76% were used to pay living expenses of the family. The trial court classified all the debt as marital and distributed the percentage used for tuition to the wife and divided the remainder between the parties. The court of appeals held that the trial court properly considered all distribution factors raised by the evidence in deciding that an equal distribution of the debt was not equitable and did not abuse its discretion in ordering the distribution. The court also held that the trial court had the discretion to order husband to pay his portion of the debts by making monthly payments in the amount of $1,000. Evidence established that he earned a salary sufficient to allow him to make the payments.

Request to enter DRO 13 years after entry of consent judgment

- An IRA can be distributed by a DRO (a domestic relations order) even though it is not a qualified retirement plan pursuant to ERISA. While a qualified ERISA plan must be

distributed by a QDRO (qualified domestic relations order as defined in 29 USC section 1056(d)(3)(A)), other plans are distributed by other domestic relations orders (a DRO).

- A request for a DRO to distribute an IRA as provided in an equitable distribution judgment is a request to effectuate or complete the judgment and is not an action to enforce a judgment. Therefore, defendant's request for the DRO was not barred by the 10-year statute of limitations found in GS 1-47.

Welch v. Welch, 886 S.E.2d 921 (N.C. App., May 2, 2023).

A post On The Civil Side blog, May 17, 2023:

Equitable Distribution: QDROs, DROs, and a statute of limitations

In this earlier post, I wrote about whether the 10-year statute of limitations for initiating an action on a judgment bars the entry of a QDRO if the request for the QDRO is made more than 10 years following entry of the equitable distribution judgment. https://civil.sog.unc.edu/so-someone-forgot-to-draft-that-qdro-now-what/

The court of appeals recently answered this question, holding that the entry of a QDRO, or a DRO as discussed further below, is a procedural method of effectuating and completing a judgment rather than a substantive mechanism for enforcement of a judgment. Therefore, a request for the court to enter the order is not an action on a judgment and is not barred by the statute of limitations.

***Welsh v. Welch* (NC App, May 2, 2023)(*Welch II*)**

An equitable distribution consent judgment entered in 2008 ordered that plaintiff transfer one-half of his ownership interest in an IRA to defendant. Plaintiff failed to make the transfer. In 2019, defendant filed a motion for contempt or, in the alternative, for a Rule 70 order directing another person to execute the documents to effectuate the transfer. The trial court dismissed the defendant's motions after ruling that the 10-year statute of limitations in GS 1-47(1) barred all actions to enforce a judgment filed more than 10 years after its entry. Defendant appealed but the court of appeals agreed with the trial court, holding that both the contempt motion and the motion for the Rule 70 order were actions seeking to enforce the ED judgment. *Welch v. Welch*, unpublished opinion, 278 NC App 375 (2021)("Welch 1"). The court of appeals, however, specifically declined to address the authority of the trial court to enter a domestic relations order to effectuate the transfer.

Following that appeal, defendant filed another motion in the trial court, this time asking the court to enter an "IRA Domestic Relations Order (DRO) pursuant to IRC section 408(d)(6) transferring the current balance of plaintiff's Schwab IRA account" to "effectuate" the equitable distribution judgment and to effectuate her vested property rights in the IRA that were created by the ED judgment. The trial court denied the motion, first concluding that the IRA was not a "qualified retirement plan" pursuant to ERISA and therefore could not be distributed by a QDRO or other order and concluding that defendant's motion was another action seeking to enforce the ED judgment and was therefore barred by the 10-year statute of limitations set out in GS 1-47.

This time the court of appeals disagreed with the trial court and held that the entry of a DRO (domestic relations order) is the appropriate procedural mechanism for distributing an IRA and holding that the statute of limitations does not bar a request for entry of a DRO as a means of effectuating a prior order if the entry of the DRO does not affect the substantive rights of the parties.

QDRO or DRO??

The court of appeals held that defendant's interest in plaintiff's IRA vested when the equitable distribution consent judgment was entered granting defendant one-half of plaintiff's IRA. GS 50-20.1(g) provides that an interest in a retirement account is distributed "by means of a qualified domestic relations order [a QDRO], or as defined in section 414(p) of the Internal Revenue Code of 1986, or by domestic relations order [a DRO] or other appropriate order." GS 50-20.1(h) specifically states that these methods of distribution apply to the distribution of individual retirement accounts [IRAs].

The court of appeals pointed out that distribution of employer-sponsored retirement accounts subject to the federal Employee Retirement Income Security Act of 1974 (ERISA) require a "special class of DRO" called a qualified domestic relations order (a QDRO) as defined by 29 USC section 1056(d)(3)(A). But IRAs that are not funded by an employer are not subject to ERISA and can be distributed by "a simpler DRO." The DRO will contain whatever findings of fact, conclusions of law, and other information required by the administrator of the specific IRA to be distributed. Contrary to the conclusion of the trial judge, "the IRA does not need to be a qualified retirement plan under ERISA for the trial court to issue a DRO."

The Statute of Limitations

GS 1-47 specifies that the statute of limitations for initiating an action upon a judgment is ten years from the date of entry of the judgment. In the first appeal of this case, the court of appeals held that a motion for contempt and a Rule 70 motion were "actions to enforce a judgment" and subject to the 10-year limitation period. In this appeal, the court held that the request for entry of a DRO is not "an action on a judgment" but rather a request to effectuate or complete the equitable distribution judgment.

As support, the court of appeals quoted the Vermont Supreme Court:

> "We simply disagree with the conclusion that entry of a DRO is an attempt to enforce the underlying final divorce order or that the filing of a DRO is an attempt to enforce the underlying final divorce order or that the filing of a DRO constitutes an execution upon the judgment. … [T]he right to obtain the retirement funds awarded in a final divorce order depends upon the approval of a third-party, the plan administrator. There is no 'judgment' to execute or enforce until that step has been taken."

Johnston v. Johnston, 212 A.3rd 627, 636 (Vt. 2019).

Also citing a Michigan appellate court, the court of appeals explained that while the statute of limitations would apply to an attempt to claim a *substantive* right to retirement benefits granted by a judgment, the limitation statute does not apply to a request for the *procedural* mechanism required to accomplish the distribution ordered by the equitable distribution judgment. *Dorko v. Dorko*, 934 NW2d 644 (Mich. 2019).

Does it matter that the ED judgment did not order entry of a DRO?

It is common for equitable distribution judgments to specifically order that appropriate domestic relations orders be entered to effectuate the distribution of retirement accounts. In *Welsh* II however, the consent judgment stated that the distribution would happen by way of a "trustee to trustee transfer." The court of appeals noted this but stated that the fact that the judgment did not order transfer by a DRO or a QDRO did not impact the holding in this case. The court explained that the principles outlined in the opinion allow the trial court to enter a domestic relations order to effectuate the judgment, even if the trial court did not specifically order entry of the DRO or QDRO in the equitable distribution judgment.

Effect of Chapter 13 Bankruptcy Discharge on Distribution of Military Pension

- Plaintiff's Chapter 13 bankruptcy discharge did not prohibit the trial court from distributing a percentage of the marital portion of plaintiff's military pension to defendant.
- A non-filing spouse has a proprietary interest in the marital portion of a military pension that is nondischargeable in bankruptcy.

Brown v. Brown, 886 S.E.2d 656 (N.C. App., May 2, 2023). While their equitable distribution claim was pending, husband plaintiff filed for Chapter 13 bankruptcy. He listed the ED claim in the bankruptcy petition and defendant wife received notice of the bankruptcy, but she did not respond. Plaintiff complied with the Chapter 13 plan and received a full discharge. Defendant thereafter sought an ED order granting her a share of plaintiff's military pension and the trial court awarded a portion of the marital component of the pension. Husband appealed, arguing that the ED claim was discharged in bankruptcy.

The court of appeals affirmed the trial court, holding that while a non-filing spouse's interests in marital property can be discharged in bankruptcy if not fixed prior to the filing of the bankruptcy petition, marital rights in military pensions are not subject to discharge because a spouse has a fixed propriety interest in the pension created by state and federal law. GS 50-20(b)(1)(defining military pensions as marital property) and the Uniformed Services Former Spouses Protection Act, 10 USA section 1408 (authorizing states to classify and distribute military pensions as marital property).

Distributive award

- A trial court cannot order that separate property be sold to pay a distributive award.
- However, a trial court can consider a party's separate property when determining that party's ability to pay a distributive award.

- The finding of fact in an amended judgment entered following remand that plaintiff had separate property that could be sold to pay the distributive award did not violate the law of the case.
- A trial court cannot order that a distributive award be reduced to judgment in the initial equitable distribution judgment ordering the payment of the distributive award.

Crowell v. Crowell, 888 S.E.2d 227 (N.C. App., June 6, 2023). The trial court entered an equitable distribution judgment distributing a significant amount of marital debt to defendant and ordering plaintiff to pay a distributive award. The judgment also ordered plaintiff to sell specific separate property to pay the distributive award. That judgment was appealed, and the supreme court vacated the judgment, holding that a trial court does not have the authority to order a party to sell separate property to pay a distributive award.

Following remand, the trial court entered an "amended equitable distribution judgment". The amended judgment contained a finding of fact that plaintiff had the ability to pay the distributive award, ordered the same distributive award as the original judgment, and ordered that a portion of the distributive award was "reduced to judgment and shall be taxed with post judgment interest and collected in accordance with North Carolina law."

Plaintiff appealed again and argued that the amended judgment violated the law of the case because the trial court ordered the same distributive award and made findings of fact regarding plaintiff's ability to pay based in part on plaintiff's ability to liquidate separate property to pay the award. The court of appeals rejected plaintiff's argument, holding that the trial court can consider the separate property of a party to determine that party's ability to pay a distributive award. While the supreme court held that the trial court cannot order a party to sell separate property to pay an award, the court did not prohibit the trial court from considering that the party can choose to liquidate separate property to pay the award when determining whether a party has the ability to pay a distributive award.

However, the court of appeals held that a trial court does not have the authority to order that a distributive award be reduced to judgment, at least as part of the initial equitable distribution judgement. The appellate court acknowledged that dicta in *Romulus v. Romulus*, 216 NC App 28 (2011), indicates that past due distributive awards may be reduced to judgment but held that there is no statutory or case law authority allowing an amount not past due to be reduced to judgment.

PSS and Alimony
June 20, 2023, and October 3, 2023

Foreign support order; impact of death of payor

- The failure of plaintiff to register the Colorado support order did not deprive the superior court of subject matter jurisdiction to consider plaintiff's claim for breach of contract.
- The law of the jurisdiction where a contract is executed governs the validity of the contract and the interpretation of the contract.
- Colorado law provides that a support obligation arising from a consent judgment terminates upon the death of the payor unless the agreement underlying the consent judgment expressly provides that the support obligation will continue after death.

Cusick v. Estate of Longin, S.E.2d (N.C. App., October 3, 2023). Plaintiff wife and her husband entered into a separation agreement providing that husband would pay maintenance to wife for a period of time. The agreement was incorporated into a Degree of Marital Dissolution entered by a court in Colorado. Husband died after making some payments pursuant to the consent judgment but before all payments required by the agreement were made.

The wife filed this action against husband's estate, seeking to enforce the remaining payments after husband's estate denied her claim. Defendant estate argued that the claims should be dismissed for lack of subject matter jurisdiction and for failure to state a claim. The superior court dismissed the plaintiff's claim after concluding she had failed to state a claim and plaintiff appealed.

The court of appeals first addressed defendant's argument that the trial court lacked subject matter jurisdiction to address plaintiff's request to enforce the support order. The estate argued that pursuant to GS 52C-6-602, a support order from another state must be registered in North Carolina before it can be enforced in this state. The court of appeals agreed that this statute, part of UIFSA (The Interstate Family Support Act, Chapter 52C), requires that foreign orders of support be registered before a NC court can modify or enforce the order. However, in this case, the plaintiff's claim was for breach of contract rather than for enforcement of the court order. Therefore, the superior court had subject matter jurisdiction to adjudicate plaintiff's claim.

The court of appeals affirmed the trial court order granting defendant's Rule 12(b)(6) motion after concluding that plaintiff's complaint failed to state a claim for relief because the support obligation of husband terminated upon his death. Holding that the law of the state where a contract is executed governs the validity and the interpretation of the contract, the court of appeals held that Colorado law provides that an agreement to pay support terminates upon the death of the payor unless the agreement explicitly provides otherwise. In this case, the agreement incorporated into the Colorado order did not explicitly provide that the support obligation would survive husband's death.

Illicit sexual behavior; circumstantial evidence

- The wife's evidence was sufficient to support the trial court's finding that the husband committed at least one act of illicit sexual behavior.
- Circumstantial evidence of inclination and opportunity is sufficient to support a finding of illicit sexual behavior.
- Evidence of husband's expenditures for non-marital purposes was evidence of his inclination and evidence that he spent significant time away from home was sufficient to establish his opportunity.

Klein v. Klein, S.E.2d (N.C. App., October 3, 2023). The trial court ordered the husband to pay alimony and he appealed. The court of appeals affirmed the trial court after noting that husband challenged "nearly every potential aspect of the alimony award." Most arguments dealt with the sufficiency of the evidence to support the trial court findings and the sufficiency of the findings to support the conclusions, which the court of appeals addressed in a summary fashion.

The husband also argued that the trial court erred in relying on circumstantial evidence to support the finding that he committed at least one act of illicit sexual behavior. The trial court based the finding on wife's testimony that husband spent a substantial amount of time away from home and her evidence of his significant expenditures during the marriage for non-marital purposes including:

> "lingerie and sex store purchases for individuals other than [Wife]; pornography; numerous hotel charges; ATM withdrawals of large sums of cash that lined up with the hotel charges; PayPal charges to at least one female, for sex; spyware that he installed on [Wife's] phone; charges for a secret email account; numerous background checks for potential sexual partners; Match.com; among other similar expenditures for non-marital purposes."

The court of appeals stated that acts of illicit sexual behavior often are proved by establishing a spouse's inclination and opportunity to commit an act. Acknowledging that this case presented facts different from existing case law which usually involves evidence of a spouse's involvement with a particular individual, the court held that the evidence of husband's significant expenditures and the nature of those expenditures, established his 'inclination,' and his significant time away from home established his 'opportunity.'

***Cases Decided Between October 4, 2022, and June 5, 2023 (taken from summer 2023 update)

Illicit sexual behavior; summary judgment

- A dependent spouse is barred from receiving alimony if she committed an act of illicit sexual behavior before the date of separation, unless the supporting spouse also committed an act of illicit sexual behavior before the date of separation.

- The trial court erred in granting husband's motion for summary judgment on wife's claim for alimony based on wife's admission that she committed an act of illicit sexual behavior before the date of separation when husband had not yet responded to wife's discovery requests regarding whether he also had committed an act of illicit sexual behavior.

Watson v. Watson, 885 S.E.2d 858 (N.C. App., April 4, 2023). The trial court granted partial summary judgment on wife's claim for alimony based on wife's admission that she had engaged in adultery before the date of separation. GS 50-16.3A(a) provides that a dependent spouse is barred from alimony if she commits an act of illicit sexual behavior before the date of separation. However, that statute also provides that if both the dependent spouse and the supporting spouse commit acts of illicit sexual behavior before the date of separation, then alimony is awarded or denied in the discretion of the trial court. Because husband had not yet responded to discovery requests by wife regarding whether he also had committed an act of illicit sexual behavior before the date of separation, the court of appeals held that the trial court was "premature in granting summary judgment."

Postseparation support; entry of divorce judgment

- Entry of a judgment of absolute divorce barred wife from refiling her request for postseparation support that she had dismissed before the divorce judgment was entered.
- A pending claim for postseparation support is not affected by the entry of a divorce judgment but a claim not pending at the time of divorce is barred pursuant to GS 50-11.

Brosnan v. Cramer, 885 S.E.2d 853 (N.C. App., April 4, 2023). Plaintiff wife filed an action seeking alimony, attorney fees, custody, child support, equitable distribution, and postseparation support. She thereafter took a voluntary dismissal without prejudice of her request for postseparation support. Defendant husband filed a separate action for absolute divorce and summary judgment divorce was granted. Wife then refiled her request for postseparation support, and the trial court entered an order of postseparation support, ordering that husband pay PSS to wife until the death of either party, plaintiff's remarriage or cohabitation, the dismissal of plaintiff's alimony claim, or the entry of an order resolving plaintiff's alimony claim, whichever occurs first.

Husband appealed and the court of appeals granted a writ of certiorari to consider the interlocutory appeal. The court of appeals vacated the PSS order, holding that the entry of the divorce judgment barred wife from refiling the PSS claim pursuant to GS 50-11. Entry of a divorce judgment has no effect on a claim for PSS that is pending at the time the divorce judgment is entered. However, an absolute divorce bars claims for alimony, PSS and equitable distribution not pending at the time the divorce judgment is entered. Because wife had dismissed her PSS claim before the divorce judgment was entered, the trial court had no subject matter jurisdiction to enter the PSS order.

Spousal Agreements
June 20, 2023, and October 3, 2023

Breach of contract and specific performance; military pension

- The trial court did not err in concluding defendant breached the terms of the separation agreement between the parties by failing to pay plaintiff a portion of his military pension as required by the separation agreement.
- The fact that plaintiff was not eligible to receive the payments directly from the Defense Finance and Accounting Service ("DFAS") did not relieve defendant of his obligation to pay plaintiff a portion of his pension.
- The trial court appropriately ordered specific performance where plaintiff's remedy at law was inadequate because the agreement required monthly payments.

Diener v. Brown, S.E.2d (N.C. App., September 5, 2023). The parties entered into a separation agreement which provided in part that plaintiff would receive 15% of defendant's military pay for the rest of his life. The agreement also specified that plaintiff would be "responsible for coordinating with DFAS for payments to come to her." Plaintiff submitted the request to DFAS for direct payment, but the request was denied because the parties had not been married for 10 years or more, as required by 10 USCA sec. 1408(d)(2). Defendant failed to pay and plaintiff filed this action for breach of contract. The trial court concluded defendant breached the separation agreement and ordered specific performance of all amounts due under the contract.

Defendant's argument on appeal, which the court of appeals described as "perilously close to being frivolous," was that he was not required to pay plaintiff because she was not able to secure direct payment from DFAS. The appellate court held that defendant violated the clear terms of the contract by failing to pay plaintiff 15% of his monthly pension payments.

The court of appeals also upheld the trial court order of specific performance. Specific performance is appropriate when a party's remedy at law is inadequate. In this case, the remedy at law was inadequate because the contract requires monthly payments into the future. If plaintiff was limited to a money judgment for amounts due and owing, she would need to repeatedly sue to secure her portion of the pension.

Breach of contract and specific performance; order for child support when parties have executed an agreement for support; retroactive support

- A separation agreement not incorporated into a divorce decree may be enforced by an action for breach of contract and the equitable remedy of specific performance.
- To state a claim for breach of contract and specific performance, a complaint must show the existence of a valid contract, its terms, and either full performance on plaintiff's part or that she is ready, willing, and able to perform.
- A claim for anticipatory breach of contract must allege that the defendant refused to perform "the whole contract or of a covenant going to the whole consideration."

- A statement that defendant threatened not to pay son's future college expenses was insufficient to state a claim for anticipatory breach of contract.
- An action for breach of a contract signed under seal is subject to the ten-year statute of limitation rather than the three-year statute of limitations.,

Clute v. Gosney, S.E.2d (N.C. App., September 12, 2023). The parties entered into a separation agreement, signed under seal before a notary, which provided, in addition to other things, that the defendant husband would pay child support. The wife filed a complaint in April 2022 alleging the husband had breached the agreement by failing to pay support, failing to pay unreimbursed medical expenses, and failing to pay a portion of their son's college expenses. She alleged that he violated the terms of the agreement beginning in August 2017 by paying less than all amounts due under the contract. The wife requested specific performance and attorney fees pursuant to the terms of the agreement. She also included a claim for child support pursuant to GS 50-13.4, asking that the court enter an order of child support, including retroactive support. The trial court granted the defendant's motion to dismiss plaintiff's complaint and plaintiff appealed.

The court of appeals held that wife's complaint was sufficient to state a claim for breach of contract and specific performance. She properly alleged the amount of support provided in the complaint, and specifically set out the terms providing that husband would contribute to unreimbursed medical expenses related to the children and that he would provide insurance coverage for the children. She also alleged that he had breached the agreement by failing to pay as provided in the agreement.

However, the court of appeals held that plaintiff failed to properly plead a claim for recovery of the son's college expenses because husband had not yet breached that part of the agreement but had only threatened not to pay when the expenses are incurred in the future. A valid claim for anticipatory breach of contract must allege that the repudiated term was the "whole contract or of a covenant going to the whole consideration." Because the claim in the complaint referenced only one discreet part of the contract, that which addressed the college education of the children, the complaint failed to properly allege a claim for anticipatory breach of contract.

The court of appeals rejected the husband's argument that wife's claims were barred by the three-year statute of limitation. Because the agreement was executed under seal, the 10-year statute applied.

The appellate court also held that the trial court erred by dismissing the wife's claim for an order of child support. While the trial court must presume the amount of support provided in the agreement is the proper amount of support to meet the needs of the children, the court can set support pursuant to the Child Support Guidelines if plaintiff overcomes the presumption by showing that the amount of support set out in the agreement is not just and reasonable. However, the trial court cannot order retroactive support for a period during which an agreement provided for support, absent an emergency relating to the needs of the children. The court of appeals remanded the case to the trial court to determine whether defendant breached the agreement and to enter an order of child support, either in the amount provided in the agreement or pursuant to the Guidelines if plaintiff is able to rebut the presumption that the amount provided in the agreement is reasonable.

New Legislation

Lifetime Civil No-Contact Order Expanded to Cover Human Trafficking Victims

We have Chapter 50B authorizing civil domestic violence protective orders to protect victims of domestic violence and Chapter 50C authorizing civil no-contact orders to protect victims of sexual misconduct and stalking who do not have the personal relationship with the perpetrator required for a 50B DVPO. In 2015, the General Assembly enacted Chapter 50D authorizing permanent, non-expiring civil no-contact orders to provide additional protection to victims of sexual violence. Effective August 1, 2023, Chapter 50D was expanded to authorize permanent protection for victims of human trafficking.

Who is covered?

Chapter 50D now authorizes the entry of a permanent injunction prohibiting any contact by a respondent with the victim of a sex offense or human trafficking the respondent was convicted of committing. When a person is convicted of any criminal offense that requires the person to register as a sex offender under Article 27A of Chapter 14 of the General Statutes, the victim of that criminal offence can seek a no-contact order that will remain in effect through the lifetime of the convicted person without any need for the victim to return to court to continue the protection in effect. For actions filed on or after August 1, 2023, the same remedy is available to the victim of a person convicted of any criminal offense under Article 10A of Chapter 14 of the General Statutes (Human Trafficking) that is not a sex offense.

GS 50D-2 specifies that the offense leading to the conviction that supports the entry of the no-contact order must have been an offense committed in North Carolina. The action for a 50D order can be initiated either by the victim or by an adult who resides in North Carolina on behalf of a minor or otherwise incompetent victim.

The Chapter authorizes entry of the lifetime protective order when the victim proves:

- The respondent was convicted of a human trafficking or sex offense against the victim;
- The victim did not seek a permanent no-contact order in the criminal case pursuant to GS 15A-1340.50; and
- Reasonable grounds exist for the victim to fear future contact with the respondent.

GS 50D-5(a).

Procedure

GS 50D-2 provides that the action for a permanent no-contact order is commenced by the filing of a complaint or by the filing of a motion in any existing action. As with Chapter 50B and

Chapter 50C proceedings, no court costs or attorneys' fees can be assessed for the filing or service of the complaint, or for the service of any order, except when ordered as a sanction for a violation of Rule 11 of the Rules of Civil Procedure. The address of the victim may be omitted from all filed court documents if the victim states that disclosure of the address would place the victim or any member of the victim's family or household at risk for further unlawful conduct.

The complaint and summons must be served by personal service by the Sheriff in accordance with Rule 4 of the Rules of Civil Procedure. Service by publication is authorized only when the Sheriff is unable to serve.

GS 50D-3(a) requires that the summons inform respondent that an Answer must be filed within 10 days of service. While this provision indicates an intent that the process for securing a permanent no-contact order be an expedited process, the statute contains no further direction regarding the timing of the hearing. The Chapter does not authorize the entry of ex parte or temporary relief.

Entry of Order by Default

If a respondent is properly served with the complaint and summons but fails to file an Answer within 10 days, a permanent no-contact order can be entered by default for the remedy requested in the complaint. GS 50D-3(c). That same section of the statute authorizes the entry of a no-contact order by default for the remedy requested in the complaint if respondent files an Answer but "fails to appear on any subsequent appearance or hearing date agreed to by the parties or set by the court."

Remedy

Subject to the right of the respondent to request recession of the order as discussed below, any no-contact order entered pursuant to Chapter 50D remains in effect for the lifetime of the respondent. GS 50D-6. The statute does not authorize the entry of orders of shorter duration.

When petitioner establishes that entry of the order is appropriate, the court may grant one or more of the following forms of relief:

- (1) Order the respondent not to threaten, visit, assault, molest, or otherwise interfere with the victim.
- (2) Order the respondent not to follow the victim, including at the victim's workplace.
- (3) Order the respondent not to harass the victim.
- (4) Order the respondent not to abuse or injure the victim.

- (5) Order the respondent not to contact the victim by telephone, written communication, or electronic means.
- (6) Order the respondent to refrain from entering or remaining present at the victim's residence, school, place of employment, or other specified places at times when the victim is present.
- (7) Order other relief deemed necessary and appropriate by the court.

GS 50D-5(b).

Notice of Orders Entered

If the respondent is not in court on the day the no-contact order is granted, the order must be served upon respondent by Rule 4 service of process. A certified copy of any 50D order entered must be delivered by the clerk of court to the sheriff and a copy must be issued to the police department “promptly” if the victim resides within a municipality. The sheriff and the police are required to retain the copy of the order.

Enforcement

Because a 50D no-contact order is a civil judgment, contempt is available to enforce the order. GS 50D-8. In addition, as with 50B DVPOs, a person who knowingly violates a 50D order is guilty of a Class A1 misdemeanor. GS 50D-10(a). In addition, GS 50D-10(b) authorizes the warrantless arrest of any person an office has probable cause to believe has violated a 50D order.

Rescission

The statute does not authorize modification of 50D orders. However, GS 50D-9 allows the victim to request that the court rescind the no-contact order. The court has discretion to grant the request only if the court determines that reasonable grounds for the victim to fear any future contact with the respondent no longer exist.

AOC Forms

2015 S.L. 91, sec. 2 directed the Administrative Office of the Courts to develop the appropriate forms to “implement the processes provided under Chapter 50D,” and the AOC did so. The forms now have been updated to reflect the inclusion of victims of human trafficking and are posted on the AOC website:

AOC-CV-540: Complaint

AOC-CV-541: Summons

AOC-CV-542: Notice of Hearing

AOC-CV-543: Order for Permanent No-Contact

AOC-CV-544: Motion and Order to Show Cause For Failure to Comply

AOC-CV-545: Contempt Order

AOC-CV-546: Motion to Rescind

AOC-CV-547: Order Rescinding No-Contact Order