Family Law Update
Cases Decided Between
October 4, 2022, and June 5, 2023

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Custody
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Custody jurisdiction; person acting as a parent; jurisdiction by necessity; third party custody

- The 11-day period between the child's leaving North Carolina and the initiation of the custody proceeding in Michigan was a 'temporary absence' from North Carolina for the child. Therefore, North Carolina remained the home state of the child at the time the Michigan case was filed.
- The stepfather of the child was not a 'person acting as a parent' because he did not have physical custody of the child immediately before the custody action was filed in North Carolina and he did not claim a legal right to custody of the child.
- North Carolina properly exercised "jurisdiction by necessity" under the UCCJEA because no state had home state jurisdiction or significant connection/substantial evidence jurisdiction at the time the action was initiated in North Carolina.
- The trial court did not err in concluding father had not waived his constitutional right to custody.

Sulier v. Veneskey, 285 N.C. App. 644, 878 S.E.2d 633 (2022). Mother and father lived together at the time of the child's birth in 2013 but separated when the child was two years old. Mother moved away with the child, married, and changed her last name. Father did not have contact with the child after the separation and he did not know the location of the child and the mother, at first due to a restraining order and after the expiration of the restraining order, because mother moved frequently and did not tell father where she and the child lived.

In 2017, the mother and child returned to North Carolina and lived in this state with the stepfather. Father lived in South Carolina and did not know where the child lived. Mother died on May 10, 2020. Shortly after mother died, the stepfather signed a document wherein he agreed that maternal grandmother would take custody of the child and take the child to live with her in Michigan. On May 18, 2020, the grandmother took the child to Michigan, and on May 29, 2020, she initiated custody proceedings in Michigan. After being served with grandmother's custody complaint and learning the location of the child, father filed an action against maternal grandmother for custody in North Carolina in July 2020.

The Michigan court held a telephone conference regarding jurisdiction with the North Carolina judge and, following that conference, entered an order concluding that Michigan did not have subject matter jurisdiction to enter an initial custody determination and dismissing grandmother's action. Grandmother thereafter filed a counterclaim seeking custody of the child in the North Carolina action initiated by father.

The North Carolina court concluded that North Carolina was the home state of the child at the time grandmother filed the action in Michigan and at the time father filed the custody complaint in North Carolina. The trial court also concluded that North Carolina had significant connection jurisdiction at the time father filed his complaint. Following an evidentiary hearing, the trial court concluded that father had not waived his constitutional right to custody. Therefore, the trial

court dismissed grandmother’s claim for custody and ordered that the child be immediately returned to father. Grandmother appealed.

The court of appeals affirmed the decisions of the trial court.

Jurisdiction conference between the Michigan judge and the NC judge.

Grandmother first argued that she was prejudiced by the failure of the trial court to follow the procedure set out in GS 50A-110 when it communicated with the judge in Michigan by telephone. That statute requires that the parties be given an opportunity to be heard before a ruling is made on jurisdiction following a telephone conference between judges if the parties do not participate in that telephone conference. The Michigan judge dismissed the Michigan proceeding without hearing from the parties. The court of appeals rejected her argument, finding that grandmother had the opportunity to present arguments on jurisdiction at a second jurisdictional hearing held after the dismissal of the Michigan action. The second hearing involved both the NC judge and the Michigan judge as well as both parties. The appellate court also noted that the Michigan appellate court had affirmed the actions of the Michigan trial court.

Subject matter jurisdiction

Unless there are grounds for emergency jurisdiction, GS 50A-201(a) provides that North Carolina has subject matter jurisdiction for an initial custody determination only if:

> “(1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:
>
> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
>
> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;
>
> (3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or
>
> (4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).”

<u>Home state jurisdiction</u>

Grandmother argued that the trial court erred in concluding that NC was the home state of the child at the time she initiated her action in Michigan and at the time father filed his action in North Carolina. The court of appeals rejected grandmother's argument regarding Michigan, holding that North Carolina was the home state of the child at the time grandmother took the child to Michigan because the child had resided in NC for more than 6 months with her mother and her stepfather. North Carolina remained the home state at the time grandmother filed her action in Michigan because the child had been in Michigan only 11 days, a period the court of appeals found to be a temporary absence from North Carolina. Because the time in Michigan before the filing of the Michigan proceeding was a temporary absence for the child, North Carolina remained the home state of the child when grandmother filed her action.

However, when the father filed the action in North Carolina, the child had resided in Michigan with the grandmother for almost 2 months. GS 50A-201(a) provides that the home state of a child will maintain home state jurisdiction for six months after a child leaves the state if a parent or a person acting as a parent remains in the state. The trial court found that stepfather was a person acting as a parent and concluded that North Carolina had home state jurisdiction at the time father filed the custody proceeding in North Carolina. The court of appeals disagreed, holding that stepfather did not meet the definition of person acting as a parent found in GS 50A-102(13):

> "Person acting as a parent" means a person, other than a parent, who:
>
> a. Has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child-custody proceeding; and
>
> b. Has been awarded legal custody by a court or claims a right to legal custody under the law of this State."

The stepfather had not been awarded legal custody by a court, and he was not claiming a right to legal custody under the law of this state. Rather, the stepfather had signed a document agreeing to grandmother's custody of the child at the time grandmother took the child to Michigan. Because no parent or person acting as a parent remained in North Carolina, North Carolina did not have home state jurisdiction at the time father filed the complaint for custody.

<u>Significant Connection Jurisdiction</u>

When there is no state that can exercise home state jurisdiction, GS 50A-201(a)(2) allows the court to exercise jurisdiction if:

> "a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
>
> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships."

The trial court also concluded that North Carolina had significant connection jurisdiction, but the court of appeals disagreed. The court held that while the child had a significant connection with the state, there was no parent or person acting as a parent who also had a significant connection with the state at the time father initiated the action.

Jurisdiction by Necessity

GS 50A-201(a)(4) allows a court to exercise jurisdiction when:

> "No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3)."

Because neither North Carolina or Michigan had home state or significant connection/substantial evidence jurisdiction and no other state had grounds to exercise jurisdiction, North Carolina properly exercised "jurisdiction by necessity" as authorized by that subsection.

Waiver of Father's Constitutional Right to Custody

Grandmother argued that the trial court also erred in concluding that father did not waive his constitutional right to custody, but the court of appeals disagreed. The appellate court held that the trial court findings of fact regarding the efforts of the mother and the grandmother to hide the child from the father and regarding the father's efforts to take custody of the child upon the death of the mother were sufficient to support the conclusion that father did not abdicate his constitutionally protected right to custody of his child.

Custody jurisdiction; home state and temporary absence

- North Carolina was not the home state of the child at the time the custody action was filed in North Carolina.
- Texas was the home state of the child at the time the custody action was filed in North Carolina so North Carolina did not have subject matter jurisdiction to enter an initial custody determination.
- The time the child spent in the summer in North Carolina was a temporary absence from Texas, therefore the time the child spent in North Carolina was counted as time in Texas.

Hosch v. Hosch-Carroll, unpublished opinion, 286 N.C. App. 158, 878 S.E.2d 681 (2022).

Child was born in NC and lived in NC with her mother until March 2020.

Child and Mother moved to Texas in March 2020.

Child came back to NC to visit her grandmother and her godparents from May 2020 until August 2020.

Child returned to Texas in August 2020.

Mother sent child to stay in NC with her godparents in December 2020.

Grandmother filed custody action in NC in April 2021.

The NC trial court granted custody to grandmother in July 2021.

The court of appeals vacated the custody order after concluding that NC had no subject matter jurisdiction at the time grandmother filed her custody action in April 2021. Texas became the home state of the child in September 2020, after mother and child lived in Texas for 6 months. The summer the child spent in NC with her godparents was a temporary absence from Texas and therefore the time in NC was included in the calculation of the 6-month period in Texas. GS 50A-102(7).

When the child left Texas in December 2020, Texas remained the home state of the child until June 2021 because the mother remained in Texas. GS 50A-201(a)(1). Because Texas was the home state at the time grandmother filed the North Carolina action in April 2021, North Carolina lacked subject matter jurisdiction to enter an initial custody determination. GS 50A-201(a).

Findings of fact sufficient to support custody determination

- The trial court's findings of fact were sufficient to support the trial court's determination that it was in the best interest of the child to grant the father primary physical and sole legal custody of the child with visitation to the mother.
- If the findings of fact are sufficient to show the trial court made a reasoned decision regarding custody, a trial court is not required to make detailed findings about every aspect of a child's life.

Frazier v. Frazier, 286 N.C. App. 565, 881 S.E.2d 839 (2022). The trial court granted primary physical custody and sole legal custody to the father with visitation to mother. The trial court order contained findings that the mother had made allegations that father's wife allowed the child to be sexually abused but DSS found no evidence of abuse, that the mother told the child to lie about sexual abuse, that the mother interfered repeatedly when a social worker attempted to interview the child, and that the parents could not co-parent. Mother argued on appeal that these findings were insufficient to support the custody order; she contended that the trial court also was required to make findings regarding the "suitability of each parent to provide for the child's needs, the child's preferences, [and] the emotional or physical health of the child" as well as findings regarding the quality of education the child would receive living with father as compared to the education the child would receive living with mother.

The court of appeals affirmed the trial court order, holding that the findings made by the trial court were sufficient to show that the trial court made "a reasoned decision" regarding custody.

Attorney fees; grandparent visitation claim

- Trial court order that grandparents pay mother's attorney fees must be remanded for further findings where the trial court order did not effectively distinguish between

- attorney fees incurred by mother to defend against the grandparents' request for visitation and attorney fees incurred by mother to defend against father's claim for custody.
- GS 50-13.6 authorizes the award of attorney fees to a party acting in good faith who lacks sufficient means to defend the litigation; this statute does not authorize the award of attorney fees as a sanction.

Sullivan v. Woody, 882 S.E.2d 707 (2022). Mother and father litigated custody and paternal grandparents requested visitation. The trial court entered a custody order resolving custody between the parents and granting visitation to the grandparents. The trial court also ordered both father and grandparents to pay mother's attorney fees pursuant to GS 50-13.6. On the first appeal, the court of appeals remanded the order for attorney fees to the trial court for additional findings to show that grandparents were ordered to pay only fees incurred by mother to defend against the grandparents' visitation claim and not for fees incurred in defending against the custody claim by father. Following remand, the grandparents again appealed. The court of appeals remanded again, finding that the trial court order still did not adequately establish that the order against the grandparents was based only on fees incurred by mother to defend the grandparents' claim.

Evidence; authentication of protective services records

- The trial court acted under a misapprehension of the law and abused its discretion when it excluded child protective services records on the basis that there was no live witness present to authenticate the records. Trial court should have first determined whether the records qualified as public records pursuant to Rule 902(4) of the Rules of Evidence which can be authenticated by affidavit without live testimony.

Kozec v. Murphy, 882 S.E.2d 425 (N.C. App., Dec. 29, 2022). The trial court entered an order modifying a permanent custody order. Father appealed the modification, arguing that the trial court erred in denying his request to enter child protective service records into evidence based upon the trial court's belief that live testimony was required to authenticate the records. The court of appeals agreed with father. According to the court of appeals, child protective service records may qualify as a public record that can be authenticated by affidavit pursuant to Rule 902(4) of the Rules of Evidence without live testimony. The court of appeals vacated the custody order and remanded the case to the trial court for consideration of whether the records qualify as a public record or are otherwise admissible.

Third party custody; findings in temporary order not binding at permanent hearing

- The trial court in permanent custody hearing was not bound by the determination made by the court in the temporary custody order that the parents had waived their constitutional right to custody by conduct inconsistent with their protected status.
- The trial court erred when it failed to hear evidence at the permanent custody trial regarding whether father had waived his constitutional right to custody.

Duncan v. Transeau and Duncan, <u>unpublished opinion</u>, 883 S.E.2d 226 (N.C. App., Feb. 21, 2023). Grandmother filed custody action against both parents, alleging both parents were unfit and had waived their constitutional right to custody. When the matter came on for temporary custody, the trial court gave the parties one hour per party to present evidence. After the

evidentiary hearing, the trial court entered a temporary custody order. In the order, the trial court determined that both parents had waived their constitutional right to custody by conduct inconsistent with their protected status. The court found this by clear, cogent and convincing evidence.

When the matter came on for trial on permanent custody, the trial court ruled that it was bound by the findings and conclusions in the temporary order regarding the parents' loss of their constitutionally protected status and proceeded on the issue of the child's best interest. The trial court entered a custody order, concluding mother and father were fit and proper to have custody of the child and ordering a gradual transition of custody from grandmother to mother with visitation to father. Father appealed, arguing that the trial court erred in proceeding with best interest at the permanent custody trial without first determining that he had waived his constitutional right to custody.

The court of appeals agreed with father, holding that the trial court was not bound by the findings and conclusions reached by the trial court at the temporary custody hearing. The trial court was required to hear evidence on whether the father had lost his constitutional rights before proceeding with best interest at the hearing on permanent custody.

Exclusion of expert witnesses for failure to disclose expert before trial; legal custody

- Rule 26(b)(4)(a)(1) of the Rules of Civil Procedure requires the disclosure of experts prior to trial even if disclosure is not requested in discovery or required by a discovery order.
- Rule 26 does not provide a time frame for the disclosure of experts, unless the parties agree to exchange written reports from expert witnesses pursuant to Rule 26(b)(4)(a)(2). The time frame for disclosure when the parties have agreed to exchange written reports do not apply when the parties have less than 120-days' notice of trial.
- When an expert witness is not disclosed prior to trial, the trial court has discretion to determine the appropriate sanction for the failure to disclose.
- An appropriate sanction may be the exclusion of the expert testimony if the court determines that the failure to disclose gave the offering party an unfair tactical advantage.
- The trial court did not err in excluding the testimony of two experts offered by father where father failed to disclose the experts to mother before the start of the custody trial.
- The trial court did err in excluding the testimony and report of another expert when the report of the expert had been provided to mother more than a year before the start of the custody trial, but father failed to show he was prejudiced by the exclusion of this evidence.
- The trial court did not err in granting primary legal custody to the mother.

Aman v. Nicholson, 885 S.E.2d 100 (N.C. App., March 7, 2023). Mother filed for custody against father. A temporary custody order was entered granting primary physical custody to mother and visitation to father. The temporary order required that both parents obtain a psychological evaluation and provide the results of the evaluation to the other party. Both parents also were ordered to participate in individual and joint psychological counseling.

On the first day of the permanent custody trial, father provided mother with the names and CVs of three potential expert witnesses, and reports written by two of the potential expert witnesses. One of the witnesses had conducted the evaluation of father required by the temporary custody order and his report had been provided to mother approximately one year prior to the start of the custody trial. Mother had not received notice of the other two potential experts before the first day of the trial and she had not seen the second report. She objected to father's evidence from the experts due to father's failure to disclose the experts before trial as required by Rule 26(b)(4)(a)(1). The trial court excluded all three of father's experts and the two reports after concluding that father's failure to disclose the experts before trial gave him an unfair tactical advantage.

The trial court conducted the custody trial and awarded primary physical custody to mother and visitation to father. The trial court also awarded legal custody to mother, allowing mother to make "any significant decisions in the life of the child such as major healthcare procedures, educational decisions, or extracurricular activities" should the parents be unable to agree.

On appeal, father argued that the trial court erred in excluding his experts and the reports because the custody trial was scheduled with less than 120 days' notice, citing Rule 26((b)(4)(f), and because mother had been given one expert's report more than a year before the custody trial began. The court of appeals rejected father's argument relating to the fact that the parties had less than 120 days' notice of trial, holding that the time frames referenced by that section of Rule 26 apply only when the parties have agreed to exchange written reports of experts. In this case, there was no such agreement. In the absence of such an agreement, Rule 26 provides no time frame for the disclosure; the rule only specifies that disclosure be made before trial.

The court of appeals held that the trial court did not err in excluding two of the experts and the one report mother had not seen before the trial. The appellate court held that the trial court findings that the failure to exclude the experts would result in further delay of the custody trial, that father offered no justification for the failure to disclose the experts before trial, and that the late disclosure gave father an unfair tactical advantage were sufficient to show that the trial court had not abused its discretion in excluding the evidence as a sanction for the failure to disclose in a timely manner. However, the court of appeals held that the trial court should not have excluded the testimony of the expert who had provided the report to mother more than one year before the trial began. Because she had earlier access to the report, there was nothing to indicate that the use of this report or the expert's testimony would have resulted in any surprise to mother or unfair advantage to father. This error by the trial court did not result in remand of the case, however, because father failed to demonstrate he had been prejudiced by the exclusion of the testimony of this particular expert.

The court of appeals also rejected father's argument that the trial court erred in granting mother the right to make all major decisions regarding the child's health, education, and welfare. The court held that the trial court adequately supported this allocation of legal custody with findings that mother had been the child's primary caretaker since birth, limiting her work schedule to spend more time with the child than did father, and with findings that mother was in a much better position than father to understand the child's medical, educational, and social needs.

Child Support
Cases Decided Between October 4, 2022, and June 5, 2023

Imputing income

- The trial court did not abuse its discretion when it imputed income to father based on a determination that he acted in bad faith to suppress his income.
- The Child Support Guidelines place an obligation on parents to provide income verification even if that information is not requested in discovery.
- The failure to provide income verification as required by the Child Support Guidelines and/or by local rules can be support for a determination that a parent is seeking to suppress their income to avoid paying child support.
- Evidence was sufficient to support the trial court's findings of fact that supported the trial court's conclusion that father was acting in bad faith to avoid paying child support.

Cash v. Cash, 286 N.C. App. 196, 880 S.E.2d 718 (2022). Mother filed a motion to modify child support. Two months before the hearing on the motion, father filed a financial affidavit indicating that he was employed and earned $99,000 per year. One week before the hearing, father filed an amended affidavit stating that he had been laid off from his job and that his income was $0. Following the hearing, the trial court entered an order modifying support.

The trial court concluded there had been a substantial change in circumstances and concluded that income should be imputed to father due to his bad faith intentional attempt to avoid or minimize his child support obligation. The trial court's conclusion that he acted in bad faith was based on findings that he intentionally failed to comply with requirements that he provide income verification regarding his employment prior to the modification hearing, findings that evidence from father's former employer that father had been laid off was "not credible", and findings that father had no intention of filing for unemployment or looking for other employment.

Father appealed, arguing that the findings of fact made by the trial court to support the conclusion that he was acting in bad faith were not supported by the evidence. The court of appeals disagreed and affirmed the trial court. The court of appeals held that father failed to provide income verification as required by both the Child Support Guidelines and by the local rules of the district where the action was tried and held that the failure to provide income verification as required is evidence that a parent is attempting to suppress income to avoid paying support. The appellate court pointed out that the Child Support Guidelines require that a parent provide such verification even if verification is not requested in discovery. The court of appeals also held that evidence supported the trial court's finding that father's employer's testimony that father had been laid off was not credible.

Sufficiency of motion to modify; consideration of facts not specifically included in motion

- Defendant's motion to modify was sufficient to comply with Rule 7(b)(1)'s requirement that a motion "state with particularity the grounds therefore, and … set forth the relief sought."

- The purpose of the particularity requirement in Rule 7 is to inform the other party of the basis for the motion and to allow that party the opportunity to respond.
- The trial court did not err in considering facts not specifically alleged in father's motion to determine there had been a substantial change in circumstances.

Koonce v. Koonce, unpublished opinion, 286 N.C. App. 380, 878 S.E.2d 857 (2022). Father filed a motion to modify child support and postseparation support. His motion cited GS 50-13.7 (the statute authorizing the modification of child support orders), alleged that there had been a substantial change in circumstances, and stated that he "no longer has access to funds [in a trust that he previously received money from] to support his previous level of spending." The trial court granted his motion to modify, and mother appealed.

Mother argued that father's motion was insufficient to comply with the requirements of Rule 7(b)(1) of the Rules of Civil Procedure. That Rule provides:

> "An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion."

The court of appeals held that father's motion was sufficient, noting that the purpose of Rule 7(b)(1) is to assure that the opposing party can comprehend the basis for the motion and have a fair opportunity to respond. The court held that father's motion was sufficient where it cited GS 50-13.7, alleged that there had been a substantial change in circumstances, and specifically stated that the relief sought was modification of the support order.

The wife also argued that the trial court erred when it considered father's depression and his employment when it determined there had been a substantial change in circumstances because these matters had not been raised in father's motion to modify. The court of appeals rejected this argument as well, stating that "[mother] could expect the trial court to consider evidence of [father's] current finances, as well as the effect that [father's] depression could have on his earning potential because [father's] motions to modify child support and postseparation support were based on a change in his financial circumstances."

Stipulations; rental income

- Child support obligations generally are determined using the parties' actual income at the time the support order is entered.
- Stipulations should be reduced to writing, and if not reduced to writing, the stipulations must appear in the record along with a showing that the court made "contemporaneous inquiry of the parties at the time the stipulations were entered into."
- The trial court erred in using income from 2014 and 2016 to enter a child support order in 2021 without a stipulation in the record that the parties agreed to the use of those earlier incomes.

- Gross rental income is defined as gross receipts minus ordinary and necessary expenses associated with earning the income.
- The Child Support Guidelines provide that ordinary and necessary business expenses do not include "business expenses determined by the court to be inappropriate for determining gross income".
- While the trial court has discretion to determine what expenses should be deducted from gross receipts, the trial court's findings of fact must explain its decision relating to the expenses claimed by a party.

Eidson v. Kakouras, 286 N.C. App. 388, 880 S.E.2d 760 (2022). The trial court entered a child support order in January 2021. The order contained findings of fact regarding the income of the parties in 2014 and 2019 and the child support order was based on those incomes. The order stated that the parties had stipulated to the use of those incomes, but father argued on appeal that there was no such stipulation. The court of appeals agreed with father that no stipulation appeared anywhere in the record. An oral stipulation is valid; however, if a stipulation is not written, it must appear on the record and the record must show that the trial court "made contemporaneous inquiry of the parties at the time the stipulations were entered into" to be sure the parties understood the effect of their agreement.

Father also argued that the trial court erred in calculating his gross rental income receipts because the court failed to deduct what he contended were his reasonable and necessary business expenses associated with earning the rental income. The court of appeals held that the trial court has discretion to determine which expenses to deduct but the trial court must explain why expenses are not deducted. In this case, the court instructed the trial court to make further findings on remand to explain why expenses were not deducted.

Contempt; credit for overpayment of support; Rule 11 sanctions

- Trial court did not err in concluding father was in civil contempt for his failure to comply with a child support order even though father withheld support based on his belief that he was entitled to credit for his past overpayment of support.
- A party cannot unilaterally modify support or decide not to comply with an order for support based on the belief he is entitled to credit for past overpayment of support. A party must apply to the court for modification of the support order.
- Trial court conclusion that father had the ability to pay amounts required by the support order was supported by findings of fact regarding his annual income from employment and social security, and the finding that he recently received $100,00 from the sale of a house.
- Trial court did not err in ordering father to pay mother's attorney fees for the contempt proceeding pursuant to GS 50-13.6 where evidence supported the trial court's conclusions that mother was acting in good faith and had insufficient means to defray the cost of the action, and that father had willfully refused to provide adequate support for the child before mother filed her motion for contempt.
- The trial court erred when it imposed Rule 11 sanctions against father after concluding that his request for credit based on his past overpayment of support was not based on "a plausible legal theory" recognized under North Carolina law.

- A court is not required to grant a credit to a parent even when the court finds that the parent has overpaid support, but a credit may be appropriate "when an injustice would exist if credit were not given."

Barham v. Barham, 286 N.C. App. 764, 881 S.E.2d 911 (2022). Plaintiff father and defendant mother had eight children. Following their separation, mother had primary custody of the children and father was ordered to pay child support. There have been a series of child support orders between the parties since 2011, with the last order entered in January 2020, requiring father to pay $716 per month for the one child remaining a minor. Rather than paying the amount required by the order, in January 2020, father began paying one cent per month. In February 2020, father filed a motion asking that the court establish that he had a "credit" for child support in the amount of $12,486.95. According to father, he had mistakenly made 26 rather than 24 payments of support in the years 2013 through 2019, entitling him to a credit against his future support obligation. Mother filed a motion for contempt based on father's failure to pay amounts due under the January, 2020 order and asked for attorney fees. In addition, mother asked for Rule 11 sanctions, arguing father had no plausible legal theory to support his request for credit against his future support obligation.

The trial court concluded father was in civil contempt, ordered that he pay attorney fees to mother pursuant to GS 50-13.6, and found father violated Rule 11 by filing a motion for credit when no such cause of action is supported by North Carolina law. As a sanction, the court ordered father to pay an additional attorney fee to mother. Father appealed.

The court of appeals affirmed the trial court on the issue of contempt and attorney fees for the contempt proceeding. The appellate court rejected father's argument that his failure to pay was justified by the fact that he was entitled to a credit for the overpayment of support or that at least he could not be found to have willfully violated the support order because he believed he was entitled to a credit. The court held that a court has discretion to apply a credit under appropriate circumstances, but a parent is not entitled to unilaterally modify a support order to apply a credit before the court determines a credit is appropriate. The parent must comply with the support order until the court determines a credit is appropriate.

The court of appeals also held that the trial court made sufficient findings to support the conclusion that father had the ability to pay support in accordance with the order where the trial court made findings that father made $60,000 per year from his employment, received $2,500 in social security payments per month, and recently received $100,000 from the sale of a house. The appellate court also concluded that the trial court's award of attorney fees pursuant to GS 50-13.6 was supported by the findings that mother was acting in good faith and had insufficient means to defray the cost of the contempt proceeding. In addition, because this was an action for support only, the trial court was required to find father had failed to provide adequate support before the contempt action was filed. The trial court's finding that father willfully failed to comply with the support order was sufficient to show he failed to provide adequate support.

The court of appeals reversed the imposition of Rule 11 sanctions after concluding the trial court was incorrect when it concluded that North Carolina law did not authorize the award of a credit for the overpayment of support. The appellate court explained that while a parent may not

unilaterally reduce support due to a belief he is entitled to a credit and a trial court is never required to give credit when a parent has paid more than required by a support order, a credit may be awarded when the court concludes that "an injustice would exist if no credit is given," citing *Brinkley v. Brinkley*, 135 NC App 608 (1999).

Attorney fees

- Where the only issue before the court at the time of trial was child support, the trial court erred in awarding attorney fees to plaintiff father pursuant to GS 50-13.6 without first concluding that the person ordered to pay attorney fees had failed to provide support adequate under the circumstances existing at the time of the institution of the action.
- Where custody claim was resolved by a consent order approximately nine months before the child support hearing, the matter was solely a child support action.

Limerick v. Rojo-Limerick, 885 S.E.2d 96 (N.C. App., March 7, 2023). Plaintiff father filed this action seeking divorce from bed and board, child custody, child support, and attorney fees. Defendant mother filed counterclaims for custody, child support, equitable distribution, alimony, and attorney fees. Plaintiff subsequently filed a voluntary dismissal of his claim for divorce from bed and board, and defendant dismissed her claims for equitable distribution, and alimony. The parties then resolved custody by a consent order. When the matter came on for trial nine months after entry of the consent order, only the issue of child support remained to be tried. The trial court ordered plaintiff father to pay child support and ordered defendant mother to pay attorney fees to father. The trial court concluded that father was a party acting in good faith with insufficient means to defray the cost of the action, that he had paid reasonable support since separation, and that defendant mother had unnecessarily increased plaintiff's attorney fees by her actions during the litigation.

The court of appeals reversed the order requiring mother to pay attorney fees. When an action is for support only, GS 50-13.6 allows the award of fees to a party acting in good faith who had insufficient means to defray the cost of the action only if the court concludes that the party ordered to pay support failed to provide adequate support under the circumstances existing at the time of the institution of the action. Because father was the person ordered to pay support and the trial court found he had been paying reasonable support since separation, GS 50-13.6 did not authorize the trial court to order mother to pay his attorney fees.

Domestic Violence Chapter 50B
Cases Decided Between October 4, 2022, and June 5, 2023

Allegations sufficient to state a claim

- The trial court erred by dismissing plaintiff's complaint for failure to state a claim.
- When considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), the court must take the allegations in the complaint as true.
- The act of attempting to cause bodily injury, or intentionally causing bodily injury, as set out in GS 50B-1(a)(1) does not include an element that this act cause plaintiff fear.

Rollings v. Shelton, 286 N.C. App. 693, 882 S.E.2d 70 (Dec. 6, 2022). Plaintiff filed an action seeking a domestic violence protective order pursuant to GS Chapter 50B. She alleged defendant committed an act of domestic violence in that 5 days before, he "choked her after an argument," he had hit her on prior occasions, and he "keyed her car" the day before she filed the action. She wrote on the complaint form that, after he keyed her car, "she was starting to get scared of him." The complaint also alleged that he owned a gun and he had threatened her with the gun "saying he would kill himself if she left him." She alleged that she was "afraid for her life" and she checked the boxes on the form complaint (AOC-CV-303) indicating that she believed "there is a danger of serious and immediate injury" to her, defendant had firearms, defendant had threatened her with a deadly weapon, and defendant had threatened suicide.

At the 10-day hearing, defendant moved for a dismissal pursuant to Rule 12(b)(6), the failure of plaintiff to state a claim. The trial court granted the motion, indicating on the record that the delay of 5 days between his alleged act of choking her and the filing of the complaint, as well as her statement in the complaint that she did not "start to get scared of him" until the day before she filed the complaint indicated that she was not in fear of further acts of domestic violence. Plaintiff appealed.

The court of appeals reversed the trial court's dismissal, holding that plaintiff properly pled an act of domestic violence. The court held that her allegation that defendant choked her was sufficient to allege the act of "attempting to cause bodily injury, or intentionally causing bodily injury" found in GS 50B-1(a)(1). Plaintiff was not required to plead or prove this act caused her fear.

Act of domestic violence; court must grant DVPO when act of DV has occurred.

- If the trial court finds defendant committed an act of domestic violence against the plaintiff, the issuance of a DVPO is mandatory, not discretionary.
- An attempt to cause bodily injury is an act of domestic violence when committed against a person with whom the defendant has a personal relationship; plaintiff is not required to also show fear of serious bodily injury or continued harassment.

Chociej v. Richburg, 883 S.E.2d 649 (N.C. App., Feb. 21, 2023). Plaintiff filed an action seeking a domestic violence protective order pursuant to GS Chapter 50B. She alleged the

defendant assaulted her on two occasions. The trial court found defendant had assaulted plaintiff but also found that plaintiff sought the DVPO because defendant had reported information to her employer that caused plaintiff to lose her job. The trial court denied her request for a DVPO because the court did not believe plaintiff feared serious bodily injury or continued harassment by defendant.

The court of appeals reversed, holding that GS 50B-3(a) requires a trial court to grant a DVPO that, at a minimum, restrains future acts of domestic violence, if the court finds defendant committed an act of domestic violence. In this case, the trial court found that the defendant assaulted the plaintiff on two occasions. The court of appeals held that this finding meant that, at a minimum, the defendant attempted to cause bodily injury to the plaintiff. An attempt to cause bodily injury is an act of domestic violence pursuant to GS 50B-1; a showing of fear of bodily injury or continued harassment is not required. Therefore, the trial court was required to issue a DVPO that, at a minimum, ordered defendant not to commit future acts of domestic violence.

Equitable Distribution
Cases Decided Between October 4, 2022, and June 5, 2023

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, 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, S.E.2d (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 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 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.

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, _ S.E.2d _ (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, _ S.E.2d _ (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, _ S.E.2d _ (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
Cases Decided Between October 4, 2022, and June 5, 2023

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.

Bosnan v. Crameer, 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
Cases Decided Between October 4, 2022, and June 5, 2023

Interpretation of agreements, claims that terms are ambiguous

- When the language of a contract is clear and unambiguous, effect must be given to its terms and the terms cannot be contradicted by parol or extrinsic evidence.
- An ambiguity exists when either the meaning of the words or the effect of provisions is uncertain or capable of several reasonable interpretations.
- The Mediated Settlement Agreement at issue was unambiguous and allowed wife to designate either husband or a Trust set up for the benefit of the children as the beneficiary of her life insurance policy.

Galloway v. Snell, 885 S.E.2d 834 (N.C., April 28, 2023), reversing 282 NC App 239, 871 S.E.2d 408 (2022). Melissa Galloway Snell was married to Jeffrey Snell. When they separated, they executed a Memorandum of Mediated Settlement Agreement. A judgment of absolute divorce was granted and a few months later, Melissa passed away. At the time of her death, her life insurance policy provided that the proceeds from the policy would go to the Melissa Galloway Snell Living Trust. The beneficiaries of the trust were the four children of the parties.

Husband argued that the designation of the Trust as the beneficiary of the life insurance policy violated the terms of the Mediated Settlement Agreement, and the Trust filed this action seeking a declaratory judgment that the Settlement Agreement permitted Melissa to lawfully name the Trust as her beneficiary. Husband counterclaimed for a declaratory judgment that the Settlement Agreement required that the proceeds of the life insurance be paid to him.

The trial court concluded that the Agreement was not ambiguous and allowed Melissa to name either the husband or the Trust created for the benefit of the children as the beneficiary and granted summary judgment for Plaintiff Trust. Husband appealed and the court of appeals held that the agreement was ambiguous and ordered the case remanded to the trial court for further proceedings. One judge dissented and appeal was taken to the supreme court.

The supreme court reversed the court of appeals, holding that the Agreement was not ambiguous and allowed Melissa to name the Trust as the beneficiary of her life insurance policy. The court held that the agreement clearly provided that Melissa would maintain a life insurance policy with husband as the beneficiary. However, the Agreement also provided that once she established a Trust in favor of the children, *any* life insurance policy of either party could designate the Trust as the beneficiary. The court held that there was no support in the Agreement for husband's argument this provision did not apply to the life insurance policy required for him as such an interpretation would require the court to ignore the words "*any* life insurance policy."

Civil No-Contact Orders Chapter 50C
Cases Decided Between October 4, 2022, and June 5, 2023

Findings of fact required when 50C order is denied

- The trial court erred in failing to make findings of fact following the trial on plaintiff's request for a civil no-contact order.
- When the trial court tries a case without a jury, Rule 52(a)(1) requires that the court make findings of fact and conclusions of law, even if it determines that plaintiff has not met her burden of proof and dismisses the action.

Haidar v. Moore, 286 N.C. App. 415, 881 S.E.2d 634 (Nov. 15, 2022). Plaintiff filed an action seeking a civil no-contact order pursuant to GS Chapter 50C. She alleged defendant committed an act of nonconsensual sexual conduct. Following a trial, the trial court determined that plaintiff failed to prove grounds for the issuance of a no-contact order and dismissed plaintiff's complaint. Plaintiff appealed.

The court of appeals vacated the dismissal and remanded the case to the trial court for findings of fact. According to the appellate court, when a trial court tries a case without a jury, Rule 52(a)(1) requires the court to make findings of fact and conclusions of law in the order resolving the matter. Without appropriate findings and conclusions, appellate review is not possible.

Finding of specific intent is required to support conclusion of harassment

- The civil no-contact order was reversed where the trial court failed to check box on order form indicating that defendant acted with intent when he placed plaintiff in fear of continued harassment.

Figueroa v. St. Clair, unpublished decision, 885 S.E.2d 862 (N.C. App., May 2, 2023). Plaintiff filed an action seeking a civil no-contact order pursuant to GS Chapter 50C. She alleged the defendant committed an act of unlawful conduct by placing her in fear of continued harassment. The trial court entered an order finding that defendant did place plaintiff in fear of continued harassment, but the trial court did not check the box on the order form finding defendant acted with intent. Citing the court's earlier opinion in *DiPrima v. Vann*, 277 NC App 438 (2021), the court of appeals held that GS 50C-1(6) provides that, to be an act of unlawful conduct, harassment must be committed with the specific intent "to place the plaintiff in fear for their safety, or the safety of their family or close personal associates, or cause the person substantial emotional distress by placing the person in fear of death, bodily injury, or continued harassment and in fact cause that person substantial emotional distress." Where the trial court failed to find defendant acted with specific intent, the civil no-contact order had to be reversed.