

**Family Law Update
Cases Decided and Legislation Enacted Between
June 21, 2022, and September 20, 2022**

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Miscellaneous
June 21, 2022, and September 20, 2022

When can a Chief District Court Judge sign an order/judgment for another judge

In the Matter of E.D.H., 381 N.C. 395, 873 SE2d 510 (N.C., June 17, 2022).

Facts:

Trial judge conducted TPR trial and took the matter under advisement.

Trial judge scheduled an in chambers conference with attorneys for August 27, 2020.

Trial judge retired Dec. 31, 2020.

Chief District Court Judge signed TPR judgment on Feb. 15, 2021.

TPR judgment states “Findings of fact, conclusions of law, and decretal announcement in chambers Aug. 28, 2020, by [trial judge], administratively and ministerially signed by Chief District Court Judge.”

Respondent argued on appeal that TPR judgment was a nullity because it was signed by a judge who did not preside over the trial.

Holdings:

TPR affirmed.

A substitute judge cannot find facts or state conclusions of law in a matter over which he or she did not preside.

However, if the trial judge made findings of fact and conclusions of law before retiring and the chief judge did nothing more than put his signature on the order and enter it ministerially, the order is valid pursuant to the authority granted in Rule 63 of the Rules of Civil Procedure.

Respondent had the burden to show that the trial judge did not make the findings of fact and conclusions of law as stated in the TPR judgment.

It is a reasonable inference that on the day after the scheduled in chambers meeting with counsel, the trial court would announce the findings of fact and conclusions of law that appear in the judgment.

Respondent failed to show that the chief judge entered the order despite not knowing whether the trial judge made the findings of fact and conclusions of law that appear in the judgment.

Compare *In the Matter of K.N.*, 874 S.E.2d 594 (N.C., July 15, 2022)

Facts:

The trial court entered an order terminating the parental rights of father.

Father appealed.

Court of Appeals vacated the order and remanded the case to the trial court. Remand instructions provided that the trial court could make additional findings of fact based on the record or conduct a new evidentiary hearing.

Original trial judge died.

All parties agreed that case could be assigned to the Chief District Court Judge.

Chief Judge held a hearing and indicated her intent to review the record, the trial transcript, and any proposed finding of fact the parties wished to submit for consideration. The chief judge did not reopen the evidence or hold any additional evidentiary hearings.

The chief judge entered a new order terminating the parental rights of the father and father appealed.

Held:

TPR vacated and the matter remanded to the trial court for a new trial.

A judge who did not preside over the trial has no authority to find facts or state conclusions of law.

The chief judge could not use the findings of fact made in the original TPR by the presiding trial judge because that judgment was vacated by the Court of Appeals, and the Chief Judge could not make additional findings following remand because she did not hear the evidence that supported the findings.

Custody

June 21, 2022, and September 20, 2022

Modification; effect of change on welfare of child

Trial court erred when it strictly bifurcated the hearing of father's motion to modify the existing child custody order to prevent father from presenting evidence to show how the alleged changed circumstances impacted the best interests of the child.

Cash v. Cash, 874 S.E.2d 653 (N.C. App., June 21, 2022). Father filed a motion to modify a custody order that had been in effect since the child was one-year old. At the time father filed his motion, the child was 10-years old. The trial court denied father's request to modify after concluding that there had not been a substantial change in circumstances affecting the welfare of the child.

Father appealed, arguing that the trial court erred when it prohibited him from introducing evidence regarding the best interests of the child. The trial court bifurcated the hearing, requiring that father first prove a substantial change in circumstances before addressing the best interests or welfare of the child. When father completed his evidence regarding substantial change, the trial court denied his motion to modify, never reaching the issue of the child's best interest. Father argued, and the court of appeals agreed, that the strict bifurcation prohibited him from showing that the change in circumstances affected the welfare of the child.

The court of appeals noted that the changes established by father's evidence are the types of changes that normally together would establish a substantial change in circumstances – remarriage of both parents, relocation of both parents, addition of stepparents and stepsiblings, changes in the child's medical condition and educational needs, and changes in work and school schedules, but only if the moving party can show how these changes impacted the welfare of the child. The appellate court held that the trial court abused its discretion when it refused to allow father to introduce evidence regarding how these changes affected the child.

Grandparent custody; conduct inconsistent with a parent's protected status

- Grandparents have standing to seek custody when they allege facts that would constitute parental unfitness or abandonment, or other conduct sufficient to result in the forfeiture of the parent's constitutionally protected status as a parent.
- The trial court did not err when it concluded that both parents acted inconsistent with their protected status and awarded maternal grandmother primary custody of the child.
- Father waived his constitutional right to custody of his child by being absent from the child's life for nearly 5 years, by voluntarily ceding care of the child to the grandmother, by willfully failing to pay support when he had the financial ability to do so, and by making no affirmative effort to exercise parental rights, to visit or to obtain custody of the child until grandmother initiated this custody proceeding.
- The trial court's findings of fact supporting the conclusion that father waived his constitutional right to custody were supported by clear, cogent, and convincing evidence.

Drum v. Drum, 874 S.E.2d 916 (N.C. App., July 5, 2022). Maternal grandmother filed this custody action against mother and father of child. The 7-year-old child had lived with plaintiff

grandmother since the child was between six and 8 months old. The trial court determined that mother was unfit due to substance abuse and concluded that father had waived his constitutional right to custody by visiting the child only sporadically throughout her life, by willfully failing to pay child support when he was financially able to do so, and by allowing grandmother to assume all responsibility for the care and upbringing of the child without any indication that he intended that relationship to be temporary. The trial court granted joint legal custody to grandmother and father, primary physical custody to grandmother and visitation to father.

Father appealed, arguing that the grandmother did not have standing to seek custody and arguing that the trial court findings of fact were not supported by clear, cogent, and convincing evidence as required to support the conclusion that father had waived his constitutional right to custody.

The court of appeals rejected both arguments and affirmed the trial court. According to the court of appeals, grandparents have standing when they allege in the complaint facts sufficient to support the conclusion that the parent is unfit or has otherwise acted in a manner inconsistent with their protected status as a parent. At trial, the grandparent must show the parent's "violation of his constitutionally-protected status" by clear, cogent, and convincing evidence.

In this case, the court of appeals held that sufficient evidence supported the trial court findings that father leaving the child in the care of the mother and grandmother for most of the child's life established that he clearly "withheld his presence, his love, his care, the opportunity to display filial affection, and willfully neglected to lend support and maintenance" for the child. While acknowledging that leaving a child in the care of another alone is not sufficient to waive a parent's constitutional protections, in this case father "knowingly ceded daily care and support of his child" to the grandmother for most of the child's life, and "failed to check on the child and took few steps as a parent to ensure her upbringing and welfare until the commencement of these proceedings." In addition, the court of appeals held that the willful failure to pay support for the child, when father had the physical and financial ability to do so, was grounds for determining that he waived his constitutional right to custody.

Third party custody; conduct inconsistent with a parent's protected status

- Clear and convincing evidence supported the trial court's determination that father acted inconsistent with his constitutionally protected parental rights.
- Findings that father had voluntarily relinquished parental authority on a permanent basis to the child's maternal aunt, along findings regarding his multiple criminal convictions resulting in his long-term incarceration, were sufficient to support the conclusion that father waived his constitutional right to custody.

Webb and Webb v. Jarvis and Peatross v. Jarvis, 816 S.E.2d 123 (N.C. App., July 19, 2022). Following the death of the child's mother, maternal aunt Peatross was appointed guardian of the child. The child resided with the aunt and the aunt provided almost all care for the child. Father Jarvis had regular contact with the child but also was engaged in criminal behavior. He was eventually convicted of several criminal offences and sentenced to 85-110 months in prison. The

trial court concluded that father waived his constitutional right to custody and awarded aunt full custody of the child. Father appealed.

The court of appeals affirmed the trial court, holding that clear, cogent, and convincing evidence supported the trial court findings of fact, and the findings of fact supported the conclusion that father waived his constitutional right to exclusive custody by acting inconsistently with his protected status as a parent. Specifically, he allowed aunt to assume all parental responsibility for the child on a permanent basis both when he did not seek to set aside the guardianship order and when he made the decision to engage in criminal behavior that he knew would result in his imprisonment if convicted, leaving only the aunt to provide care for the child.

Modification

- Findings of fact regarding negative and drastic changes in the behavior of the children after father’s visitation time was increased and findings that the children were “newly emotionally distressed” and that father was unconcerned with these changes were sufficient to support the trial court’s determination that there had been a substantial change in circumstances affecting the welfare of the children in the three months since the previous order was entered.
- A parent’s intensifying anger and hostility toward the other parent can create a substantial change in circumstances.
- Findings of fact regarding the children’s “dysfunctional behavior” which started after father’s visitation was increased were sufficient to support the trial court determination that the substantial change in circumstances affected the welfare of the children.

Davidson v. Tuttle, _ N.C. App. _, _ S.E.2d 123 _ (Sept. 20, 2022). The first custody order between the parties was entered in 2016. That order granted mother primary custody and visitation to father. In August 2019, the trial court modified the 2016 order to grant father more visitation time with the children. Shortly thereafter, in November 2019, mother filed a motion to modify, alleging that there had been a substantial change in circumstances in that the children had not adjusted well to the new schedule and that the children “were no longer thriving” as they were under the previous schedule. The trial court concluded that there had been a substantial change in circumstances and modified custody to decrease and alter father’s visitation time. Father appealed, arguing that there had not been a substantial change in circumstances sine the entry of the August 2019 order.

The court of appeals affirmed the trial court, holding that the trial court detailed findings of fact were supported by substantial evidence and were sufficient to support the conclusion that there had been a substantial change in circumstances affecting the welfare of the children. The trial court found that immediately following the increase in visitation time with father, the children went from “well-adjusted” to engaging in “dysfunctional behavior”, including screaming and cursing, throwing objects, calling their mother profane names, and telling her that they hated her and wanted her to die. Noting that there was no other explanation offered for the change in the children, the trial court also made findings regarding the father’s explicit and intense feeling of anger and hostility toward the mother.

Legislation

Mandatory Mediation of Contempt *Legislation not in effect until Dec. 1, 2022**

S.L. 2022-48. “An Act to ... Amend the Requirements for Custody Mediation.”

Amends GS 50-13.1(b) to allow but not require that contempt issues arising in custody cases be sent to mandatory custody and visitation mediation. Applies to motions for contempt filed on or after Dec. 1, 2022.

Child Support

June 21, 2022, and September 20, 2022

Affidavits as evidence; findings regarding reasonable needs of child

- Trial court erred when it relied on affidavits introduced during PSS hearing to determine the reasonable needs of the child in a child support hearing.
- Trial court finding as to the total “lump sum” of the child’s reasonable needs was insufficient to support the amount of support ordered; the trial court is required to show the methodology used to compute the lump sum by establishing amounts for the individual needs of the child.

Jain v. Jain, 874 S.E.2d 663 (N.C. App., June 21, 2022). In a case that fell outside of the Guidelines due to the high income of the parties, the trial court concluded that the child had reasonable monthly needs in the amount of \$6,885 and ordered father to pay child support in the amount of \$6,196.50. Father appealed, arguing that the findings of fact regarding the reasonable needs of the child were not supported by the evidence and that the trial court failed to make sufficiently specific findings of fact regarding the needs of the child. The court of appeals agreed with father and remanded the case to the trial court.

First, the court of appeals held that the trial court erred when it relied on information regarding the expenses of the child contained in an affidavit introduced in a PSS hearing conducted by the judge immediately prior to the hearing on the issue of child support. The appellate court held that the trial court can rely on affidavits to establish the reasonable needs of the child, but only if the affidavits are introduced as evidence in the child support hearing.

Second, the court of appeals held that the findings of fact made by the trial court did not establish specifically how the trial court determined the total amount of the child’s reasonable needs. The general finding that the child “does have reasonable needs with regards to clothing electricity, and utilities, as well as food, transportation, subscriptions to gym memberships and other recreational activities” was insufficient to support the trial court’s determination that the child had needs that totaled \$6, 885. The court held that the trial court needed to show how it calculated the “lump sum value” of all the child’s needs.

Contempt

- Trial court did not err in granting plaintiff’s Rule 60(a) request to correct a clerical error in an order for civil contempt where record showed the trial court made a mathematical error in the calculation of arrears.
- The testimony of mother regarding father’s financial circumstances was sufficient to support the trial court’s finding that father had the present ability to comply with the child support order.
- A trial court has the discretion to stay incarceration to allow a party to comply with the purge provision in an order for civil contempt.
- Order providing that father be incarcerated for failure to pay the purge within the time provided in the original civil contempt order was not a second contempt order but rather was an enforcement order effectuating the civil contempt order.

- The filing of Rule 59 and Rule 60 motions following the entry of the civil contempt order did not relieve defendant of the obligation to comply with the terms of the contempt order within the time frame provided in the contempt order.
- Father was required to comply with the support order even when one child resided with him pursuant to an agreement between the parents. Absent a modification of the support order by a court, father's failure to pay constituted a willful violation of the support order.

Bossian v. Bossian, 875 S.E.2d 570 (N.C. App., July 5, 2022). A custody order granted mother primary physical custody of both children and a child support order required father to pay support to mother in a lump sum amount for both children. The trial court entered an order finding defendant father in civil contempt for the failure to pay child support, unreimbursed medical expenses, and an equitable distribution distributive award. The trial court ordered father to pay a total purge amount within 42 days following the entry of the contempt order. After entry of the trial court contempt order, plaintiff mother filed a motion pursuant to Rule 60(a) asking that the court correct a clerical error made in the calculation of the total support arrearages due. Father filed a motion pursuant to Rule 59 asking that the contempt order be set aside due to a lack of evidence that he had the present ability to pay the purge amount set out in the order and due to a lack of evidence that he acted willfully when he failed to pay support while one minor child was living with him pursuant to an agreement between the parents.

The trial court held a hearing on both motions six months after the date provided in the original contempt order for father to purge the civil contempt. The trial court granted mother's Rule 60 motion after concluding that there had been a clerical error in the calculation of the support arrears and denied father's Rule 59 motion after concluding there was sufficient evidence to support the finding that father had the present ability to pay the purge amount ordered and that he had acted willfully when he failed to pay support. The trial court also ordered father incarcerated on the original contempt order after finding that father had not paid the required purge within the 42 days provided in the original order. Father appealed the entry of the Rule 60 order, the denial of his Rule 59 request, and the order incarcerating him for the failure to comply with the original contempt order.

The court of appeals affirmed the trial court. Regarding the Rule 60 motion, the court held that the original contempt order contained a clear clerical error in the calculation of the support arrears where the court intended to include support owed for 20 months but only actually included 8 months. Regarding the Rule 59 motion, the court of appeals held that mother's testimony about father's financial circumstances was sufficient to support the trial court's finding that he had the ability to pay. The appellate court noted that father never contested mother's testimony during the contempt hearing and offered no evidence of his own regarding his ability to pay.

The court of appeals also held that the trial court did not err when it concluded that father was required to comply with the child support order even during the time that one of the children resided with him rather than with the mother as provided in the custody order. The appellate court held that parties do not have the authority to modify a support order without court action. Absent a modification of the order by the trial court, father was obligated to comply with the support order and his failure to do so was a willful violation of the order.

The court of appeals also rejected father's argument that the trial court erred in ordering him incarcerated at the end of the hearing on the requests for relief pursuant to Rules 59 and 60. He argued that he had no notice that there would be a "second contempt hearing" after the hearing on the pending motions and argued that he was not given an opportunity to present a defense. The court of appeals held that the trial court did not hold a second contempt hearing but rather only effectuated the enforcement of the original contempt order. The court held that a judge entering a contempt order has the discretion to stay the enforcement of the order and that the trial court had the authority to "effectuate the consequences of defendant's continued contempt."

Defendant also argued that the filing of the Rule 59 and Rule 60 motions relieved him of the obligation to comply with the terms of the original contempt order while those motions were pending. The court of appeals disagreed, holding that defendant was obligated to comply with the terms of the contempt order and the pending motions requesting modifications of that order did not relieve him of that obligation to comply.

Determination of income; proof of business expenses; no deduction for temporary support and equitable distribution payments

- Trial court did not err when it declined to deduct from defendant's income amounts he claimed were reasonable business expenses where trial court determined defendant's testimony about the expenses was not credible and "was largely evasive with the purpose of misleading the court."
- The child support guidelines do not allow a court to deduct from a party's income amounts paid in temporary child support or as an equitable distribution distributive award.

Britt v. Britt, 876 S.E.2d 310 (N.C. App., July 19, 2022). Following trial, the trial court determined defendant's income and set support pursuant to the Guidelines. On appeal, defendant argued that the trial court erred in failing to deduct what he claimed to be reasonable and ordinary business expenses from his monthly income. He also argued that the trial court was required to deduct amounts he paid for temporary child support and for a distributive award ordered in the equitable distribution proceeding between the parties.

The court of appeals affirmed the trial court. Although the appellate court agreed that the business income of a parent is determined by subtracting the reasonable and ordinary business expenses of the party from the monthly income received by the business, the appellate court concluded that the trial court did not err when it found that defendant's testimony about the expenses was not credible, was evasive and was intended to mislead the trial court. Because he failed to offer credible evidence of his business expenses, the trial court appropriately determined that his income was the amount of income deposited into his accounts each month.

The court of appeals also rejected defendant's argument that the trial court should have deducted the amounts he paid for temporary child support and for the distributive award to determine his monthly income. According to the appellate court, the Child Support Guidelines do not authorize such deductions.

Child support claim filed in a custody action

- Trial court had jurisdiction to hear a motion in the cause for child support filed in an action initiated as a claim for custody.
- The list of ways a child support claim can be maintained found in GS 50-13.5(b) is not an exhaustive list of procedural methods by which to maintain an action for child custody and/or support. The statute allows a support claim to be brought by motion in a custody action..

Kubica v. Morgan, unpublished opinion, 874 S.E.2d 232 (N.C. App., July 19, 2022). Plaintiff initiated this proceeding by filing a complaint for custody. After custody was resolved, defendant filed a motion in the cause requesting child support. Plaintiff filed a motion to dismiss the motion in the cause, arguing that GS 50-13.5(b) does not permit a party to bring an action for support within a child custody proceeding. The trial court denied the motion to dismiss and entered a support order. Plaintiff appealed, arguing that the trial court had no subject matter jurisdiction to enter a support order.

The court of appeals affirmed the trial court. GS 50-13.5(b) states that:

“a child support action may be maintained as follows:

- (1) As a civil action.
- (2) Repealed by Session Laws 1979, c. 110, s. 12.
- (3) Joined with an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.
- (4) As a cross action in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.
- (5) By motion in the cause in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.
- (6) Upon the court's own motion in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.
- (7) In any of the foregoing the judge may issue an order requiring that the body of the minor child be brought before him.”

The court of appeals held that this statutory list is not an exhaustive list of procedural methods by which to maintain an action for custody and/or support and held that each claim may be maintained in other ways. A claim for support may be initiated by the filing of a motion in the cause in an existing custody proceeding. The appellate court also pointed to the language in GS 50-13.5(a) that “the words ‘custody’ and ‘support’ shall be deemed to include custody or support, or both,” as indicating that the legislature intended to allow support and custody claims to be filed in the same action.

Retroactive modification; determination of income

- GS 50-13.10 only prohibits the modification of vested past due child support payments that have not been paid.

- A trial court can modify payments made before the filing of a motion to modify if equitable considerations exist which would create an injustice if modification is not allowed.
- Trial court did not err in ordering mother to repay amounts paid by father for support after a child turned 18.
- Where it was unclear from the modification order how the trial court arrived at its finding of fact as to mother's total monthly income, order was remanded to trial court for additional findings of fact.

Berens v. Berens, _ N.C. App. _, _ S.E.2d _(August 2, 2022). The trial court entered an order modifying child support because one of the children covered by the order turned 18 and had graduated high school. The trial court ordered mother to repay father \$40,859.28 for amounts he paid after the child turned 18.

Mother appealed, arguing that the trial court erred by modifying child support payments that had become due and vested before father filed his motion to modify. She argued that GS 50-13.10(a) prohibits the retroactive modification of any support payment that became due and owing before the filing of a motion requesting modification. That statute provides:

“Each past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, or otherwise modified in any way for any reason, in this State or any other state, except that a child support obligation may be modified as otherwise provided by law, and a vested past due payment is to that extent subject to divestment, if, but only if, a written motion is filed, and due notice is given to all parties either:

- (1) Before the payment is due or
- (2) If the moving party is precluded by physical disability, mental incapacity, indigency, misrepresentation of another party, or other compelling reason from filing a motion before the payment is due, then promptly after the moving party is no longer so precluded.”

The court of appeals disagreed with mother's interpretation, holding that the statute only prohibits the retroactive modification of “past due” payments, meaning payments that have not been paid by the obligor. Because father had made all payments required by the existing support order, the trial court had the authority to order the repayment of those payments, if retroactive modification is allowed pursuant to common law rules in existence before the enactment of GS 50-13.10. According to the court of appeals, the common law allows the court to modify payments already made by an obligor to a custodial parent if “equitable considerations exist which would create an injustice if modification is not allowed.” In this case, the court of appeals affirmed the order of repayment based on the fact that mother was aware that the child had turned 18 and graduated high school, was aware that father was seeking a modification of support and was not prejudiced by the retroactive change in support.

However, the court of appeals remanded the case to the trial court to make additional findings of fact to support the amount of prospective support ordered. The trial court found that mother's monthly income was \$17,992.15, but the court of appeals held that it was “unclear from the order” how the trial court arrived at this amount.

Domestic Violence

June 21, 2022, and September 20, 2022

Act of domestic violence; harassment

- Placing a person in fear of continued harassment does not require multiple acts by the defendant.
- An act does not constitute harassment if it serves a legitimate purpose.
- Determination of whether an act serves a legitimate purpose is a question of fact for the trial court to determine based on the totality of the circumstances established by the evidence and the demeanor of the witnesses.
- In this case, evidence supported trial court's finding that defendant's conduct was intended to harass plaintiff.

Keenan v. Keenan, _ N.C. App. _, _ S.E.2d _ (August 16, 2022). Plaintiff filed an action for a domestic violence protective order alleging that defendant came to her house to cut her grass after she repeatedly told him not to do so and that he refused to leave when she told him repeatedly to do so. She also alleged that she was very afraid of defendant due to his history of physically, emotionally, and verbally abusing her, and alleged that he was showing “a progression of unstable behavior,” and sending her text messages, including sexual ones, despite being asked to stop. At the 10-day hearing, defendant did not deny cutting plaintiff's grass but argued that he was doing it because the grass was so high that it created an unsafe environment for the children of the parties living with plaintiff. The trial court concluded that defendant committed an act of domestic violence by placing plaintiff in fear of continued harassment that rose to such a level as to inflict substantial emotional distress and entered a DVPO against defendant.

On appeal, defendant first argued that a finding that he committed the act of placing the aggrieved party in fear of continued harassment requires that the court find he committed two or more acts. According to defendant, GS 50B-1(a)(2) defines domestic violence to include:

“Placing the aggrieved party of a member of the aggrieved party's household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress.”

Defendant argued that because G.S. 14-277.3A includes both a definition of harassment and a definition of “course of conduct,” both definitions must be met to constitute the act of domestic violence set out in GS 50B-1(a)(2). Course of conduct is defined in GS 14-277.3A(b)(1) as “two or more acts ...”.

The court of appeals rejected defendant's interpretation of G.S. 50B-1(a)(2), concluding instead that the plain language of the statute clearly imports only the definition of harassment from G.S. 14-277.3A(b)(2). The appellate court explained that G.S. 14-277.3A is the comprehensive criminal stalking statute and held that the legislature obviously intended only to incorporate the definition of harassment into the domestic violence statute. The definition of harassment does not require more than one act by the defendant.

Defendant next argued that the trial court erred in concluding that his actions did not serve a legitimate purpose. The definition of harassment in G.S. 14A-277.3A(b)(2) requires that the act “serve no legitimate purpose,” and defendant contended that because he cut plaintiff’s grass to protect the welfare of the children, his actions could not have placed plaintiff in fear of continued harassment.

The court of appeals also rejected this argument, holding that the determination of whether his conduct served a legitimate purpose is a factual inquiry for the trial court rather than a legal question subject to review on appeal. The appellate court concluded that the evidence that defendant trespassed on plaintiff’s property to mow her lawn, despite being told not to do so was sufficient to support the trial court’s conclusion that defendant acted to torment or terrify plaintiff. The court stated:

“Whatever persuasive value Defendant’s characterization of the events may have—that his actions served the legitimate purpose of mowing Plaintiff’s lawn and were directed at Plaintiff’s lawn rather than Plaintiff—they do not establish that his actions were somehow legitimate as a matter of law or negate competing interpretations of his conduct. Indeed, the ability to torment a person while ostensibly targeting a nearby object makes conduct of this type especially appealing to a passive-aggressive harasser, producing the intended effect while maintaining deniability. This very phenomenon underscores the importance of the factfinder’s credibility determination. Here, where the finder of fact determined that Defendant’s conduct did not serve a legitimate purpose, we will not undermine that determination by speculating over a cold Record.”

Legislation

Magistrate ex parte DVPOs and Civil No-Contact Orders

S.L. 2022-47. “An Act to Make Various Changes Affecting the North Carolina Court System”

Sec. 4, effective July 7, 2022, amends G.S. 50B-2(c1) and 50C-6(d). When the chief district court judge has authorized a magistrate to hear requests for ex parte Chapter 50B DVPOs and/or Chapter 50C civil no-contact orders, that magistrate can accept the complaint and issue the summon when the clerk’s office is closed.

Renewal of DVPO *Legislation not in effect until December 1, 2022****S.L. 2022-48. “An Act to Allow Judges to Temporarily Renew a Domestic Violence Protective Order Upon the Timely Filing of a Motion to Renew a Domestic Violence Protective Order and to Amend the Requirements for Custody Mediation.”**

Applies to pending motions to renew filed before, on, or after December 1, 2022. Amends GS 50B-3(b) to provide that when a motion to renew a protective order has been timely filed but the hearing on the motion to renew is scheduled for a time after the expiration of the existing DVPO, the court may temporarily renew the DVPO upon the ex parte request of the plaintiff for a fixed period of time not to extend beyond the date of the renewal hearing or 30 days from the date the current order is set to expire, whichever occurs first. The court can extend the order further upon the express written consent of both parties or their attorneys. The temporary renewal cannot extend a temporary award of custody beyond the maximum one-year period.

Equitable Distribution

June 21, 2022, and September 20, 2022

Reopening evidence *sua sponte*

- Trial court did not abuse its discretion when it reopened the evidence, *sua sponte*, after the end of trial and before the entry of judgment. The trial court has discretion to reopen evidence *sua sponte* when the ends of justice require it.

Shropshire v. Shropshire, 875 S.E.2d 11 (N.C. App., June 21, 2022). The trial court entered an equitable distribution judgment and plaintiff husband appealed. He argued that the trial court erred when it reopened the evidence *sua sponte* after the trial had concluded but before the court entered the equitable distribution judgment and requested that he produce evidence of the date of trial value of his retirement plans. He argued that the trial court improperly shifted the burden of proof to him to prove there was divisible property in his retirement account.

Both parties listed their respective 401K retirement plans on their respective equitable distribution affidavits as marital property but neither party alleged in the affidavits that the accounts contained divisible property. During the trial, plaintiff husband asked defendant wife about the date of trial value of her retirement accounts, and her response provided the court with evidence that her account had increased in value between the date of separation and the date of trial. Wife (a self-represented litigant) asked the trial judge to require plaintiff to provide the same information about his accounts. The trial court asked husband about the date of trial value of his accounts, but husband responded that he did not know the date of trial values. The trial court told wife that the court would return to the issue before the end of trial but did not. The trial court took the matter under advisement at the end of the evidence but before entering judgment, the trial court *sua sponte* ordered the reopening of the evidence and required that plaintiff provide evidence of the date of trial value of his accounts.

The court of appeals held that a trial court has the discretion to reopen evidence when the ends of justice require it. The appellate court stated the “in light of the broad discretion afforded to a trial judge as well as a judge’s duty to provide a fair and just trial, we conclude that [the trial judge] did not abuse her discretion by reopening the evidence on her own motion.”

Valuation of dental practice

- Methodology used by the trial court to value a dental practice was sufficiently reliable.
- The trial court did not err in using the fair market value of the practice as determined two years before the parties separated where the trial court determined there had been no change that would affect that value in the intervening time.

Logue v. Logue, _ N.C. App. _, _ S.E.2d _ (Sept. 20, 2022). The trial court classified wife’s dental practice as marital property and found that it had a value of \$195,395. On appeal, wife argued that the trial court failed to apply a reliable valuation methodology to value the practice. The court of appeals affirmed the trial court, finding that the trial court properly used the amount wife had paid for her share of the dental practice two years before the parties separated after concluding there had been no change that would affect the fair market value in the intervening two years.

The court of appeals held that there are “many possible approaches to valuation,” and described the one used in this case as the fair market value approach; assessing the market value of a closely held business by determining “the price that a willing buyer would pay a willing seller for it.” The appellate court noted that the price paid by wife two years before the separation was determined using information from experts regarding the value of the practice, including the value of the goodwill. The trial court made findings of fact regarding the state of the business during the intervening time, including findings regarding the balance sheet and tax records, and findings about the progress in transitioning the most experienced dentist out of full-time practice (the good will). The court of appeals held that the trial court adequately supported its determination that there had been no change that likely impacted the market value of the practice.

Unequal distribution; divisible property; valuation of cars; delay in entry of judgment

- The trial court’s determination that an equal distribution was not equitable was supported by findings regarding distribution factors found in GS 50-20(c).
- Sufficient evidence supported the trial court’s finding of fact regarding the value of the marital residence where wife offered the tax value of the property and the balance on the mortgage as well as her own opinion as to the value of the property.
- The post-separation change in the value of the marital residence was not divisible property because it was caused by the post-separation actions of wife; the net value increased because wife paid off encumbrances and made improvements to the property.
- Valuation of cars was properly supported by evidence of the Kelly Blue Book value for both cars and by the lay opinion of the wife.
- Husband failed to show that the 15-month delay between the end of the equitable distribution trial and the entry of the equitable distribution judgment caused him prejudice.

Mosiello v. Mosiello, _ N.C. App. _, _ S.E.2d _ (Sept. 20, 2022). The trial court entered an equitable distribution judgment concluding that an equal distribution was not equitable and distributing a larger share of the marital estate to wife. Husband appealed. After addressing each of husband’s arguments on appeal as set out in the bullet points above, the court of appeals affirmed the judgment of the trial court.

*****Cases from Summer 2022 Update**

Marital debt; student loans incurred for adult child

- Marital debt is debt incurred during the marriage by either or both spouses for the joint benefit of the parties.
- The party seeking a marital classification of debt has the burden of proving the amount of debt owed on the date of separation and of proving that the debt was incurred for the joint benefit of the parties.

- Fact that student loans incurred during the marriage to pay expenses of a college education for the adult daughter of the parties were in the sole name of the husband did not establish that the debt was his separate property.
- Trial court did not err in concluding that student loans were incurred for the joint benefit of the parties where the parties agreed to take out the loans for the daughter, both parties actively participated in obtaining the loans, and both agreed that they wanted to provide their daughter a college education.

Purvis v. Purvis, 280 N.C. App. 345, 867 S.E.2d 700 (2021). During the marriage, the daughter of the parties attended Sweet Brier College. To pay for the expense of her education, the daughter incurred student loans in her name and husband incurred student loans in his name. The loan proceeds incurred by husband were paid directly to Sweet Brier College and were used by the daughter for tuition, books and living expenses. The parties made a joint decision to incur the loans to help the daughter, but they decided that the loans would be in the sole name of the husband due to discrepancies in the credit scores of the parties. The parties made payments on the loan during the marriage using funds from their joint checking account. On the date of separation, the outstanding debt for the loans incurred by husband was \$164,163.00.

In the equitable distribution proceeding, wife moved for summary judgment on the issue of the classification of the loan debt, arguing that the loans were the separate debt of husband. The trial court denied her motion and ruled that the loan balance was a marital debt. Wife appealed, arguing that husband failed to establish that the debt was incurred for the joint benefit of the parties.

The court of appeals affirmed the trial court after concluding that the student loan debt was incurred for the joint benefit of the parties. The court explained:

“Here, the parties do not dispute that there was a joint agreement to incur the debt. Nor do the parties dispute that Defendant actively participated in obtaining the loans. The parties’ affidavits demonstrate there was a joint benefit, in that their daughter’s tuition, books, and living expenses were covered by the loan rather than out-of-pocket expenses. Further, “providing [their] daughter with a formal education was something that [they] both wanted and agreed, to do.”

The court distinguished appellate decisions from Nebraska and Rhode Island that classified student loan debt for adult children as separate debt, explaining that those cases involved situations where one spouse did not know about the debts at the time they were incurred and did not consent to the loans at the time they were incurred.

Divisible property; unequal distribution

- Passive postseparation appreciation of marital property is divisible property. Passive postseparation appreciation of an account containing both marital and separate funds is divisible only to the extent that the appreciation is attributable to the marital component of the account.

- As long as the trial court considers and makes findings of fact regarding all distribution factors listed in GS 50-20(c) about which evidence is admitted, the trial court has discretion to determine whether an equal distribution of marital property is equitable.

Asare v. Asare, 281 N.C. App. 217, 869 S.E.2d 6 (2022). Husband appealed trial court order for alimony (holdings regarding the alimony award are discussed below in Alimony section) and equitable distribution.

Divisible property. The trial court classified husband’s Vanguard retirement account as part marital property and part separate property but classified all postseparation appreciation of the account as divisible property. Husband argued that the trial court erred in concluding that all postseparation appreciation of the account was appreciation of marital property because part of the account was separate property, and testimony from his expert established that a portion of the passive postseparation appreciation was attributable to the separate property in the account. The court of appeals agreed with husband, concluding that the testimony from the expert clearly established the portion of the passive appreciation attributable to the separate property in the account.

Unequal distribution. Husband also argued that the trial court erred in making an unequal division of marital property, allocating 57% of the marital estate to wife and 43% to husband. The court of appeals rejected his argument, holding that because the trial court made detailed findings of fact regarding each of the distribution factors listed in GS 50-20(c), the trial court had discretion to determine that an equal distribution was not equitable.

Distributive award, unequal division

- Trial court did not err in ordering payment of distributive award where trial court determined that an in-kind distribution was not practical because the marital dental practice and office suite needed to be distributed to defendant and other marital assets were not sufficient to offset the value of those assets.
- The trial court did not err in ordering husband to refinance mortgage on dental office suite to pay the distributive award where findings of fact showed husband had “sufficient ownership, control, and equity interest in the [property] to allow him to refinance the [property].”
- Trial court did not err in distributing bank accounts to husband as his personal property rather than including the accounts in the value of the dental practice where the accounts were not included in the valuation expert’s valuation of the dental practice.
- Trial court is not required to make findings regarding the weight assigned by it to any distribution factor.

Brady v. Brady, 282 N.C. App. 420, 871 S.E.2d 565 (2022). The trial court entered an equitable distribution judgment, ordering an unequal division in favor of wife and ordering husband to pay a distributive award to wife. Husband appealed.

Husband first argued that the trial court erred by ordering him to pay a distributive award to wife. The court of appeals rejected his argument, holding that the trial court’s findings of fact supported the conclusion that the presumption in favor of an in-kind distribution had been

rebutted. The trial court found that the husband's dental practice and dental office suite were marital assets that needed to be distributed to husband and found that other marital assets were not sufficient to offset the distribution of the practice and office suite to husband.

Husband also argued that the trial court erred by ordering him to refinance the mortgage on the dental office suite to pay the distributive award because there was no evidence that he had the ability to refinance the mortgage. The court of appeals rejected husband's argument, holding that the trial court's findings regarding husband's ownership of and equity in the dental office suite were sufficient to show he had the ability to refinance the loan.

Husband then argued that the trial court erred in distributing bank accounts to him as his personal property rather than including those accounts in the value of the marital dental practice. The court of appeals also rejected this argument, holding that the record showed that husband's valuation expert did not include the accounts as assets of the dental practice.

Finally, husband argued that the trial court findings of fact did not support the unequal division in favor of wife because the findings did not show how the trial court weighed the distribution factors identified in the judgment. The court of appeals affirmed the unequal division, holding that a trial court is not required to reveal the exact weight assigned to any given distribution factor.

**Cases from Summer 2022 Update

Postseparation Support and Alimony Cases Decided Between October 5, 2021 and June 7, 2022

Extraordinary expenses; life insurance policy as security for arrears

- Trial court is not required to make findings of fact to support extraordinary expenses included in an award of Guideline child support.
- Life insurance policy was not security for husband's alimony or child support obligation, so the trial court erred in ordering husband to maintain the policy on his life for the duration of his 20-year alimony obligation.
- Attorney fee order was remanded where attorney billing affidavit used to calculate the amount of attorney fees included fees for work on the equitable distribution action between the parties.

Wadsworth v. Wadsworth, 281 N.C. App. 636, 868 S.E.2d 636 (2021). The trial court entered a child support and alimony order. The trial court ordered husband to pay alimony in the amount of \$1,900.00 a month for 20 years, prospective monthly child support, and an \$18,026.75 child support arrearage. The court also ordered husband to maintain a life insurance policy with a \$550,000.00 death benefit as “security for” the child support arrearage and for the alimony award. In addition, the trial court ordered husband to pay attorney fees to wife. Husband appealed.

The court of appeals rejected husband's argument that the trial court's findings regarding the day care expenses of the children and the extraordinary expenses included in the trial court calculation of prospective child support were not supported by the evidence. The appellate court held that wife's testimony and financial affidavit supported the day care expenses and held that the trial court was not required to make findings of fact to support amounts included for extraordinary expenses.

However, the court of appeals agreed with husband's argument that the trial court erred when it ordered that he maintain a life insurance policy in the amount of \$550,000 with proceeds payable to wife for as long as he was obligated to pay alimony. The appellate court acknowledged that GS 50-16.7(b) allows the court to secure the payment of support “by means of a bond, mortgage, or deed of trust, or other means ordinarily used to secure an obligation to pay money,” but held that the life insurance ordered by the court in this case was not security within the meaning of the statute.

First, the court held that the order to maintain the life insurance policy violated the statutory requirement that the alimony obligation of husband terminate upon his death. As the life insurance would be paid only upon his death, the trial court order required husband's obligation to continue after his death. Second, the amount of the life insurance policy was more than husband's total potential obligation for support and child support arrears. Assuming he survived the entire 20 years of the alimony award, the parties never reconciled, and the wife never

remarried, husband would owe only a total of \$474,026.75 for that 20-year period. Finally, the life insurance policy was not security for the amount husband owed because the amount of the life insurance policy remained static throughout the 20-year term. If husband died, wife would receive \$550,000, regardless of how much husband had paid before his death. The court explained that should husband pay all he owes pursuant to the court order but die the day before his last alimony payment was due, wife would receive all he had paid plus an additional \$550,000 payment. The court of appeals referred to this as a “windfall” to wife, more than doubling the amount awarded to her by the trial court.

The court of appeals remanded the award of attorney fees after concluding that the attorney fee affidavit used to support the award included fees charged for work on the equitable distribution proceeding between the parties. Attorney fees are authorized by statutes for child support and alimony but there is no statutory authority for an award of fees in equitable distribution cases.

Imputing income; form of payment

- An award of alimony is based on the income and financial circumstances of the parties at the time of the alimony hearing.
- Trial court did not err when it imputed income to husband after finding that he deliberately depressed his income to avoid paying alimony and to impact the equitable distribution proceeding.
- Trial court’s detailed findings of fact regarding the factors listed in GS 50-16.3A(b) were sufficient to explain the amount and duration of the alimony award.
- The trial court has authority to order both a lump sum and periodic payments of alimony.

Asare v. Asare, 281 N.C. App. 217, 869 S.E.2d 6 (2022). Husband appealed trial court order for alimony and equitable distribution (holdings regarding equitable distribution are discussed in Equitable Distribution section above).

Imputing income. Husband argued that the trial court erred in ordering him to pay alimony when he testified that his income decreased substantially between the date of separation and the date of the alimony trial. The court of appeals held that alimony is determined based on the income and financial circumstances at the time of the alimony hearing but rejected husband’s argument that evidence showed his income had decreased. Rather, the court of appeals held that the trial court imputed income to husband after concluding that he depressed his income and assets in bad faith to avoid paying alimony and to impact the equitable distribution proceeding. The trial court finding that the husband’s “lack of employment and lack candor [with the court].... [was a] strategy designed to minimize potential ramifications or obligations pertaining to alimony and equitable distribution” was sufficient to support the trial court’s decision to impute income to husband.

Explanation of amount and duration of award. The court of appeals also rejected husband’s argument that the trial court failed to adequately explain the amount and duration of alimony awarded. The court of appeals held that the trial court’s findings as to the factors listed in GS 50-16.3A(b) regarding the earnings and earning capacities of the parties; the ages and physical, mental and emotion conditions of the spouses; contributions of the parties to the

education, training, or earning power of the other; the relative needs of the parties; the standard of living during the marriage; and other considerations relating to the economic circumstances of the parties were sufficient to provide the required reasoning for the amount and duration of the award.

Award of both lump sum and periodic payments. Husband also argued that the trial court erred in ordering that he pay lump sum alimony in the amount of \$72,000 as well as a monthly payment of \$1,200 for 5 years. He argued that GS 50-16.7(a) authorizes a court to order only one form of payment, but the court of appeals disagreed, citing other appellate opinions affirming combinations of lump sum and monthly payment awards. The court of appeals held that the trial court findings regarding the potential difficulty of enforcing periodic payments due to the fact that husband lives in a foreign country, as well as his lack of credibility as to his assets and financial circumstances, were sufficient to support the trial court's decision to order both forms of payment.

Findings to support amount and duration of award

- Trial court erred by failing to make a specific finding as to the amount of the supporting spouse's reasonable monthly expenses.
- Trial court erred in failing to consider supporting spouse's monthly child support obligation as part of his reasonable monthly expenses.

Brady v. Brady, 282 N.C. App. 420, 871 S.E.2d 565 (2022). The trial court ordered husband to pay wife alimony in the amount of \$5,250 per month for 10 years. Husband appealed, arguing that the trial court findings of fact were not supported by the evidence. The court of appeals held that the findings of fact supported by the evidence were sufficient to support the trial court's decision that wife was a dependent spouse and entitled to alimony for a period of ten years (findings included 20-year marriage, illicit sexual behavior by husband, wife was stay-at-home parent of four children), but held that the trial court's findings of fact regarding husband's ability to pay the amount of support ordered were insufficient. The trial court concluded that husband's claimed monthly expenses in the amount of \$11,974.00 were not reasonable but failed to make findings to show what the trial court determined his reasonable expenses to be. In addition, the court of appeals held that the trial court should have included husband's monthly child support obligation in the calculation of his reasonable monthly expenses.