

Family Law Update
Cheryl Howell
School of Government
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Custody

Hunt v. Long

- ▶ Child living with mom; not much contact with dad
- ▶ Mom dies
- ▶ Grandma files for custody
- ▶ Claims dad has lost constitutional right to custody:
 - Failed to help care for the child while mom was alive, and
 - Unfit due to serious problem with alcohol

Grandparent Custody

- ▶ Grandma has standing because she is a relative
- ▶ No on-going custody proceeding necessary because this is not a claim brought pursuant to Grandparent Visitation statutes
- ▶ She must allege and prove father has waived constitutional right to exclusive care, custody and control of child
 - Unfit, neglect or conduct otherwise inconsistent with protected status

Third Party Custody

- ▶ Parent waives constitutional rights either by being unfit *or* by otherwise acting inconsistent with protected status.
 - Test is 'disjunctive'
 - *Hunt v. Long*
- ▶ Parent can be fit and proper but still lose constitutional protection

Contempt

- ▶ *McBride* applies to custody contempt cases
- ▶ Record must show court inquired about counsel if written waiver is not in file
 - *D'Allessandro*

Child Support

Actual Present Income

- ▶ *Hinshaw v. Kuntz*
 - Error not to include bonuses
- ▶ *Loosvelt v. Brown*
 - Error not to find actual present income
- ▶ *Zurosky v. Shaffer*
 - Can use most reliable evidence to support finding of actual present income

Proof of Income

- Who has burden of proof?
 - Both parties????
- "Verified through documentation of both current and past incomes." Guidelines
 - One full month of pay stubs, employer statement, receipts, expenses
 - Most recent tax return "to verify earnings over longer period of time"

Proof of Income

- ▣ Sanctions can be imposed for failure to comply.
 - Guidelines
- Financial affidavit is binding
 - *Row v. Row*, NC App (2007): trial court correct to use obligor’s affidavit rather than testimony of obligor’s expert witness at trial
- ▣ Signed statement by employer is admissible to prove income
 - GS 110-139(c1) - both IV-D and non-IV-D

Non-recurring Income

“When income is received on an irregular, non-recurring, or one-time basis, the court may average or pro-rate the income over a specified period of time or require an obligor to pay as child support a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support.”

Guidelines

Hinshaw v. Kuntz

- Annual bonuses were not ‘non-recurring’ income.
 - Amounts should have been included in calculation of gross income
- Can court order that a percentage of any bonus received in the future be paid as child support?
 - Would that be actual present income??

Retroactive Support

- ▶ *Respass v. Respass*, 754 SE2d 691 (2014)
 - Must be based on actual expenditures
 - Conference of Chief Judges cannot change case law
- ▶ S.L. 2014-77
 - Conference of Chief Judges can prescribe guidelines for prospective and retroactive support
 - After Jan. 1, 2014 - use either actual expenditures *or* guidelines

Retroactive Support

- ▶ Unless based on guidelines, retroactive support is based on obligor's fair share of actual expenses incurred before child support action filed.
 - Findings must include date expense was incurred
 - Need both obligor and custodial parent's ability to pay at the time the expense was incurred
 - Obligor has no responsibility for pre-birth expenses except medical per GS 49-15.
 - *Loosvelt v. Brown*

High Income Cases

- ▶ Base support on standard in GS 50-13.4
 - Needs of children and ability of parents to pay
- ▶ Support is not based on actual present expenses of children
 - "Children of wealthy parents are entitled to ... advantages... What amount is reasonable for a child's support is to be determined with reference to the special circumstances of the particular parties."

High Income Case

- ▶ Standard for retroactive support?
 - Both prospective and retroactive support must be based on the standard found in GS 50-13.4.
 - *Zurosky v. Shaffer*

Attorney Fees

- ▶ No need to find obligor refused to pay adequate support before action was filed when action is for *both* custody and support
 - *Loosvelt v. Brown*
- ▶ No need to find party ordered to pay fees has the ability to pay the amount ordered
 - *Loosvelt v. Brown*
 - *Respass v. Respass*

Allocation of Tax Exemption

- ▶ Need to change allocation made in original order was a substantial change in circumstances sufficient to allow modification
 - *Laws v. Laws, unpublished opinion*

Temporary or Permanent Order

- ▶ Rule that a custody order is temporary if entered with prejudice, includes clear reconvening time, or leaves issues unresolved “logically applies to child support orders as well.”
 - *Sarno v. Sarno*

- ▶ Determine whether child support order is temporary or permanent by determining the “intent of the trial judge.”
 - *Gray v. Peele*

Temporary or Permanent Order

- ▶ Final support orders were interlocutory orders that could not be appealed because custody issues remained pending in trial court
 - *Sarno v. Sarno*
 - *Gray v. Peele*

Location of Child

- ▶ Most support orders must include address of custodial parent and child
 - No address required if obligor has committed DV and court has determined notice to obligor is inappropriate
 - Custodial parent no longer required to keep obligor informed of child’s address
 - S.L. 2014-115, s. 44.5
 - Effective August 11, 2014

Judgments for Arrears

Pulley v. Frazier, 751 SE2d 621 (2013)

- ▶ GS 50-13.4 authorizes judgments on arrears which include an order for periodic payments
- ▶ Judgments can be enforced for 10 years following entry
- ▶ Judgments cannot be 'renewed' but a party can file independent action seeking a new judgment based on the old judgment
- ▶ The new judgment for arrears also can include order for periodic payments

Questioning a *Pro Se* litigant

- ▶ *Evidence Rule 611* gives trial judge the authority to question a witness to gather information necessary to resolve the case
- ▶ Questioning should be focused to procure only the information needed to decide the issues before the court
- ▶ *Rettig v. Rettig*, unpublished opinion
· 753 SE2d 740 (2013)

GS 50-13.13

- ▶ Relief from child support order based on proof that obligor is not father of the child
- ▶ Motion must be filed within *a year* of date moving party knows or should know he is not father
- ▶ Motion must allege requirements of GS 50-13.13(b)
- ▶ Court must find 'good cause to believe' moving party is not the father *before* ordering genetic testing
 - *James & Yoes v. Sutton*, unpublished, 753 SE2d 397 (2013)

Orders from other states.....

- ▶ Defenses to registration are limited to those set out in GS 52C-6-607
 - *Kendall*, 752 SE2d 764 (2014)
- ▶ Once an order is registered, all provisions in the order – even those unrelated to the support obligation – can be enforced in this State
 - *Moore v. Marshall*, 757 SE2d 319 (2014)

Separation Agreements

Statute of Limitations

- ▶ Actions seeking to set aside agreement:
 - 3 year statute applies to actions in tort
 - 10 year statute applies to actions in contract when contract is a sealed instrument
 - *Crogan v. Crogan*

Alimony Postseparation Support

Parsons, 752 SE2d 530 (2013)

- ▶ Financial affidavits are evidence
- ▶ In determining reasonable needs, court can consider expenses likely to arise in the future
 - Evidence of future house maintenance expenses was not "too speculative"

Marital Misconduct

- ▶ Indignities
 - Requires pattern of conduct; isolated incidence is insufficient
 - Must spouse seeking to prove indignities prove lack of provocation????????
 - *Dechkovskaia, 754 SE2d 831 (2014)*

Marital Misconduct

▶ Abandonment

- Fact that husband did not object to wife's leaving the marital home did not preclude conclusion that wife abandoned husband
 - *Sorey v. Sorey*, 757 SE2d 518 (2014)

Civil Contempt

- ▶ Trial court's extensive "inventory of plaintiff's financial circumstances" supported conclusion that he had the ability to comply with the \$20,000 purge
- ▶ Finding that plaintiff could pay within 60 days of entry of contempt order was a sufficient finding of present ability to comply
 - *Gordon v. Gordon*, 757 SE2d 351 (2014)
