

Family Law Update
Cases Decided and Legislation Enacted Between
June 4, 2014 and Sept. 26, 2014

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Court opinions can be found on the website of the N.C. Administrative Office of the
Courts: www.nccourts.org

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Custody

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Third party custody

- Trial court can apply best interest test to determine custody in case between natural parent and third party if parent is unfit *or* if parent has acted inconsistent with his/her constitutionally protected status.
- The test is “disjunctive”, meaning a parent loses protected status *either* by being unfit or by acting inconsistent with his/her protected status.
- A finding that a parent is fit does not preclude a finding that a parent has acted inconsistent with his/her protected status.
- Where third party alleged parent is unfit, trial court erred in awarding custody to father without conducting best interest test after concluding parent had not acted inconsistent with his protected status but without addressing the claim that he was unfit.

Hunt v. Long, unpublished opinion, _S.E.2d _ (N.C. App., July 15, 2014). Grandmother sought primary custody of grandson following the death of child’s mother. She claimed the father was unfit due to his excessive drinking of alcohol. She and several other witnesses testified to observing father drinking excessively on numerous occasions and she introduced evidence that father had been convicted of DWI twice and had lost his driver’s license. There also was evidence that the father had not visited the child frequently while the child lived with the mother and that father had not paid much child support. The trial court awarded full custody of the child to father after concluding that grandmother failed to prove father had acted inconsistent with his constitutionally protected status a parent. The grandmother appealed and the court of appeals remanded to the trial court for further findings of fact on the issue of father’s fitness. The court of appeals held that the trial court cannot apply the best interest of the child test to resolve a custody case between a parent and a child unless it first concludes that the parent has lost his constitutionally protected status. However, a parent can lose protected status either by being unfit or by otherwise acting inconsistent with his protected status. In this case, the trial court erred by not addressing grandmother’s claim that father was unfit to parent the child.

Jurisdiction

- Trial court properly exercised temporary emergency jurisdiction to issue nonsecure custody order for child taken into custody of DSS after parent was arrested in North Carolina.
- Fact that trial court order did not make findings of fact to support conclusion that the exercise of temporary emergency jurisdiction was appropriate did not deprive the trial court of jurisdiction.
- Trial court had subject matter jurisdiction to terminate parental rights of respondent where trial court appropriately exercised emergency jurisdiction when juvenile petition was filed,

no previous custody order had been entered by any other state regarding the child, and no action was initiated in the home state of the child before the child resided in North Carolina for 6 months.

- Because North Carolina was the home state by the time the petition was filed seeking to terminate the parental rights of the petitioner, the trial court had subject matter jurisdiction pursuant to the UCCJEA.

In the Matter of N.T.U., a minor child, 760 S.E.2d 49 (N.C. App, July 1, 2014). Juvenile petition was filed when petitioner was arrested in North Carolina and incarcerated. At the time the juvenile petition was filed, South Carolina was the home state of the child. The trial court entered an order stating that it was exercising temporary emergency jurisdiction pursuant to GS 50A-204. Because there was no previous custody order entered by any state regarding the child and no action regarding custody was pending in any other state, the trial court did not make contact with the court in South Carolina. The child was adjudicated dependent. After the child had been in DSS custody for well over 6 months, DSS filed a petition to terminate the parental rights of petitioner and the trial court entered an order terminating his parental rights. On appeal, petitioner argued that the trial court had no subject matter jurisdiction to enter either the adjudication order or the termination of parental rights but the court of appeals disagreed. The court of appeals held that because the child was left alone in North Carolina with no caretaker at the time the petitioner was arrested, the North Carolina court had grounds to exercise temporary emergency jurisdiction. The court rejected father's argument that the trial court erred by failing to make specific findings of fact regarding the grounds for jurisdiction in the adjudication order. According to the court of appeals, jurisdiction requires that grounds exist but jurisdiction is not dependent upon the trial court making specific findings of fact about the grounds. In addition, by the time the petition to terminate petitioner's parental rights was filed, North Carolina had become the child's home state, giving subject matter jurisdiction to the North Carolina court pursuant to GS 50A-201.

Contempt; right to court-appointed counsel

- Trial court erred in failing to inquire about defendant's desire and eligibility for court-appointed counsel before holding him in civil contempt where record contained no indication that defendant had waived his right to counsel.
- Order denying modification requested by father remanded to trial court because although order addressed father's basis for seeking modification of custody provisions relating to one of the parties' three children, the order made no findings regarding his evidence relating to the other two children of the parties.

D'Alessandro v. D'Alessandro, 762 S.E.2d 329 (N.C. App, August 5, 2014). Trial court held defendant in civil contempt for failure to abide by provisions of custody order. Defendant appeared pro se at the contempt hearing. The transcript of the proceeding indicated that the trial judge believed defendant had executed a waiver of court-appointed counsel and the trial court did not make further inquiry before holding defendant in contempt and ordering him incarcerated

until he paid the purge amount. The court of appeals reversed and remanded, holding that because there was no waiver of counsel in the record, the trial court had the duty to inquire as to defendant indigency and desire for court-appointed counsel before proceeding with the civil contempt hearing because it was 'obvious' the trial court anticipated ordering defendant be incarcerated if found in civil contempt.

The trial court also denied father's motion to modify the existing custody order setting out the custodial provisions relating to three children. The order denying father's request made findings of fact addressing father's contentions relating to one child but did not specifically address the contentions he made regarding the other two children. The court of appeals noted that the trial court probably did not make findings because it did not find father's contentions to be supported by fact or law, but the court of appeals nevertheless held that the trial court should make findings so the parties understand that the father's motion was "addressed in full." The court of appeals stated that comprehensive findings are especially important in cases such as this one, where the proceedings have been "protracted and contentious," so the parties understand that all of the allegations have been resolved.

Child Support

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Bonus income; retroactive support; attorney fees

- Trial court abused its' discretion when it decided not to include bonus income regularly received by both parents when determining the total gross income of the parties for the purpose of determining child support.
- The guidelines do not require the trial court to deal with regular income and non-recurring income separately. Rather, if a party receives irregular or non-recurring income, the trial court is required to "average or pro-rate the income or order the obligor to pay a percentage of his or her non-recurring income equivalent to the percentage of his or her recurring income for child support."
- The trial court did not err in refusing mother's request for retroactive child support where father had paid support pursuant to the terms of an unincorporated separation agreement before the complaint for child support was filed.
- Trial court did not err in refusing mother's request for attorney fees where evidence established that she had the means to defray the cost of litigation and where there was no evidence that father had refused to pay adequate support before the action was filed.

Hinshaw v. Kuntz, 760 S.E.2d 296 (N.C. App., July 1, 2014). In setting support for parties with income in excess of \$25,000 per month, trial court made findings of fact that both parents received regular bonuses from their employment but declined to calculate the average amount of bonuses to include in the determination of total gross income of the parties. The trial court reasoned that because the regular compensation of both parents was more than sufficient to meet the reasonable needs of the children, there was no need to include the additional bonus income. The court of appeals reversed, holding that because the definition of income contained in the child support guidelines includes bonus income, the trial court was required to calculate and include the amounts received by both parties in the determination of total gross income. The court of appeals rejected father's contention that the trial court should have included the bonus income as non-recurring, irregular income and calculate it separately from the child support obligation based on the recurring income of both parties. The court of appeals first held that the bonuses at issue in this case are not non-recurring; rather the court specifically found that both parties receive the bonuses every year. Even if they had been non-recurring income, the court of appeals held that there is no requirement that a child support obligation based on non-recurring income be calculated separately from the obligation based on the recurring income of the parties. The court of appeals held that the guidelines require that the trial court average or pro-rate the irregular income and include that amount in the child support order, or order the obligor to pay a percentage of the non-recurring income equivalent to the percentage of his recurring income paid for child support.

Retroactive support:

The parties executed a separation agreement and the agreement was not incorporated. The agreement provided father would pay child support in the amount of \$1,750 and alimony for approximately one year. The agreement further provided that when the alimony obligation expired, the parties would negotiate the amount of child support father would pay based on the guidelines. When the alimony provision terminated, father increased his child support payment to \$2,750 but mother did not agree that amount was sufficient. She filed the present action for support, requesting both prospective and retroactive support. Mom claimed that because the child support provision in the separation agreement ‘expired’ when the alimony provision ended, the parties did not have a separation agreement for child support. The trial court disagreed and refused her request for retroactive support. The court of appeals affirmed, holding that a trial court cannot award retroactive child support when the parties are operating under a separation agreement before the child support action is filed. The court of appeals agreed with the trial court’s determination that the agreement in this case did provide for child support at least in the amount of \$1,750 and father paid in excess of that amount every month until the present action was filed.

Attorney fees:

Mother argued that trial court erred in refusing her request for attorney fees but the court of appeals affirmed the trial court decision. According to the court of appeals, the record indicated that mom had a monthly income surplus of approximately \$4,000 after accounting for her reasonable needs and her responsibility for the needs of the children. In addition, because this was an action for support only, the trial court could not award attorney fees to her without first determining father had failed to provide adequate support before the action was filed. The court of appeals held that where father had complied with terms of the separation agreement and even had paid in excess of the amount agreed upon in that contract, the trial court could not have awarded fees to mom.

High income support; retroactive support order; needs of children; attorney fees

- Because a parent’s child support obligation does not begin until a child is born, the trial court erred in including nursery and maternity clothes expenses incurred by mother before birth of child in setting amount of retroactive support. While GS 49-15 provides that a father can be ordered to pay a portion of pre-birth medical expenses incurred by mother, the trial court has no authority to order the payment of any other pre-birth expense.
- Trial court erred in including expenses in calculation of retroactive support where no evidence was introduced as to date the expenses were incurred.
- Trial court must make finding as to father’s ability to pay at time expenses were incurred when setting retroactive support; finding of his ability to pay at time of hearing is insufficient to support an award of retroactive support.
- Trial court erred in not making findings as to custodial parent’s responsibility for expenses considered as basis for award of retroactive support; noncustodial parent’s responsibility for

retroactive support must be based on his allocated share of responsibility for the expenses incurred on behalf of the child.

- Trial court erred in not making a specific finding as to father's actual present income when setting prospective support obligation.
- Trial court must make findings as to reasonable needs of the child in setting prospective child support. In high income case, trial cannot simply 'divide the father's wealth.'
- Trial court is not required to set support based on actual present needs of the child and actual historical expenditures related to the child; determination of amount necessary to meet 'reasonable' needs will vary based on amount of income and resources available to both parents.
- While trial court must consider all factors listed in GS 50-13.4 in setting prospective child support, the trial court does not need to assign a monetary value to every factor. For example, fact that mother will provide all caretaking because father lives on other side of the country is a significant "non-monetary, but truly priceless, contribution" that must be considered when setting a support obligation.
- Where parties agreed to custody with mother early in the proceeding but no custody order was entered by the court until the final custody and child support order, action was one for both custody and support for purpose of setting an award of attorney fees.
- GS 50-13.6 does not require that the trial court make a finding that a party ordered to pay attorney fees pursuant to that statute actually has the ability to pay the amount ordered.

Loosvelt v. Brown, 760 S.E.2d 351 (N.C. App., July 15, 2014). Plaintiff father filed action seeking to establish paternity and to establish custody and support obligations. Trial court ordered plaintiff to pay prospective child support of \$7,342 per month, \$39,655 in retroactive support, and \$25,000 attorney fees.

Retroactive support:

The court of appeals reversed and remanded the award of retroactive support after concluding that insufficient evidence was presented by mother to support some of the award and that the trial court failed to make sufficient findings to support other portions of the award. The court of appeals reversed the portion of the retroactive award based on expenses mom incurred furnishing the child's nursery and buying maternity clothes before the birth of the child. According to the court of appeals, a parent's child support obligation does not begin until a child is born. Because retroactive support is based only on a parent's responsibility for actual expenses, the award based on pre-birth expenses was error because father had no responsibility for those expenses. The court of appeals notes that GS 49-15 does allow a trial court to order a parent to pay a share of pre-birth medical expenses associated with the birth of the child, but held that there is no authority to order reimbursement for any other type of pre-birth expense.

The court of appeals also reversed the portion of the retroactive award based on expenses mother proved she incurred but failed to prove when she incurred them. Retroactive support must be based on expenses incurred before the child support action was initiated and the party seeking retroactive support has the burden of proving not only the nature and amount of the expense but also that the expenses were incurred before the filing date of the child support proceeding.

Because retroactive support must be based on a parent's share of actual expenses incurred for a child, the court of appeals remanded the case to the trial court for further findings regarding the

mother's responsibility for the expenses incurred. The trial court made findings only of the actual amount of the expenses and ordered father to pay the entire amount. The court of appeals held that the trial court must make findings as to the appropriate allocation of responsibility for the expenses between the parents.

Finally, the court of appeals remanded the order of retroactive support for findings as to father's ability to pay the expenses at the time the expenses were incurred. Because retroactive support is based on a parent's responsibility for expenses at the time those expenses actually were incurred, the trial court must determine the parent's ability to pay at the time the expenses were incurred in order to determine the parent's responsibility. The finding by the court as to father's ability to pay at the time of the hearing was insufficient to support the award.

Prospective Support:

The prospective child support order contained findings that the father's financial affidavit listed his monthly income as \$24,409, that father spent approximately \$88,617 per month, and that he "is a man with substantial income." However, the order contained no finding as to the father's actual present monthly income at the time of trial. Because the award of prospective support must be based on the trial court's determination of father's income and ability to pay, the court of appeals remanded this issue to the trial court for a determination of his actual income.

In setting an order for prospective support in a case falling outside the scope of the child support guidelines, the trial court also must make findings as to the reasonable needs of the children. The court of appeals remanded for further findings because the amount of support ordered (\$7,342) far exceed the amount of reasonable needs found by the trial court (\$2,194). The court of appeals noted that the finding regarding needs of the child by the trial court was based on historical actual expenditures provided by the mother. The court held that the amount of support ordered does not need to be based on the actual amounts currently being spent on the child, noting that the amount of a child's reasonable needs will reflect the standard of living the income of the parents will support, but the trial court must make findings to show how the amount ordered is related to the needs of the child. The court cited the case of *Williams v. Williams*, 261 NC 48 (1964), where the NC Supreme Court stated that "[c]hildren of wealthy parents are entitled to the educational advantages of travel, private lessons in music, drama, swimming, horseback riding, and other activities in which they show interest and ability. What amount is reasonable for a child's support is to be determined with reference to the special circumstances of the particular parties." According to the court of appeals, the trial court in this case erred by simply "splitting the wealth" of the father in setting the amount of support rather than making detailed findings to support the amount ordered. The court stated "A child support award can be made by using estimates of needs based on the higher standard of living made possible by [the father's] income, but the trial court must make findings of fact which assign a monetary value to these needs."

The trial court also erred by failing to make findings about the custodial mother's responsibility with regard to the child's support. In remanding to the trial court for further findings, the court of appeals noted that GS 50-13.4 requires the trial court to consider "child care and homemaker contributions of each parent" in setting support. The court of appeals held that the trial court is not required to place a monetary value on this factor and stated that in this case, the trial court should consider that mom will "bear 100% of the daily responsibilities of child care and making a home for the child. Only [mom] will make the daily physical and emotional sacrifices required to raise a child. All the law requires of [dad] is that he make a monthly payment. If the trial court does consider [mom's] non-monetary, but truly priceless, contributions, it should make findings of fact regarding those contributions...".

Attorney Fees

Court of appeals upheld the trial court award of attorney fees to mom in the amount of approximately \$25,000, rejecting dad's argument on appeal that the trial court failed to make adequate findings of fact to support the award. The dad argued that because the parties settled the issue of custody early in the case, the trial court could not award fees to mom without finding that dad had failed to pay adequate support before the action was initiated. The court of appeals acknowledged that had the parties entered into a consent order concerning custody early in the case, the matter would have been one for support only and such finding regarding his failure to pay would have been required. However, the issue of custody was not resolved by consent order until the time the support order was entered. Because the proceeding was one for both support and custody, the additional finding regarding failure to pay was not required.

In addition, the court of appeals rejected dad's argument that the trial court was required to make a specific finding that he had the ability to pay the amount of attorney fees ordered. The court of appeals held that GS 50-13.6 does not require such a specific finding about ability to pay.

Contempt; right to court-appointed counsel

- Trial court erred in failing to inquire about defendant's desire and eligibility for court-appointed counsel before holding him in civil contempt where record contained no indication that defendant had waived his right to counsel.

D'Alessandro v. D'Alessandro, 762 S.E.2d 329 (N.C. App, August 5, 2014). Trial court held defendant in civil contempt for failure to abide by provisions of child support order. Defendant appeared pro se at the contempt hearing. The transcript of the proceeding indicated that the trial judge believed defendant had executed a waiver of court-appointed counsel and the trial court did not make further inquiry before holding defendant in contempt and ordering him incarcerated until he paid the purge amount. The court of appeals reversed and remanded, holding that because there was no waiver of counsel in the record, the trial court had the duty to inquire as to defendant's indigency and desire for court-appointed counsel before proceeding with the civil contempt hearing because it was 'obvious' the trial court anticipated ordering defendant be incarcerated if found in civil contempt.

Modification; allocation of tax exemption for minor child

- Fact that parent could no longer claim tax exemption for child who had reached the age of 19 was sufficient to support the conclusion that there had been a substantial change in circumstances.

Laws v. Laws, unpublished opinion, _S.E.2d _ (N.C. App, August 19, 2014). Original child support order provided that father would take tax exemption for both children of the parties because mother had no taxable income. Mom filed motion to modify, requesting that tax exemption for child who remained a minor at the time of her motion be allocated to her. Trial court modified the order to give mom the tax exemption and the court of appeals affirmed. The court of appeals held that the fact that one child had reached the age where no tax exemption was available for that child constituted a substantial change in circumstances, allowing the trial court to modify the original support order.

Support order entered while custody claim pending may be a temporary order

- While trial court designated child support order as a ‘permanent’ support order, fact that motion to modify custody was pending made appeal of child support order an inappropriate interlocutory appeal.
- Rule that a custody order is temporary if it is entered without prejudice, sets a clear and specific reconvening time, or does not resolve all issues “logically applies to the child support context as well.”

Sarno v. Sarno, 762 S.E.2d 371 (N.C. App, August 19, 2014). Trial court entered permanent custody order but continued hearing on child support. Before trial court conducted the trial on child support, father filed motion to modify custody. Before the modification motion was addressed, the trial court conducted the child support trial and entered a ‘permanent’ child support order. The parties appealed the trial court order of support and the court of appeals dismissed the appeal as an inappropriate interlocutory appeal. The court of appeals held that although the support order was designated a permanent order, the pending motion to modify raised issues about the custodial arrangement. Because the amount of child support depends on the custodial arrangement, the court of appeals held that issues remained pending in the trial court which made the appeal of the child support order inappropriate. Citing opinions setting out the rule for determining whether a child custody order is a final or a temporary order – the order is temporary if it states it is entered without prejudice, if it sets a clear and specific reconvening date for the court to revisit the issue, or if it leaves issues unresolved – the court of appeals stated that this rule “logically applies to the child support context as well.” The court of appeals held the child support order was an interlocutory order because the issue of custody was pending in the trial court.

Support order may be temporary if child custody issue is pending

- Trial court order of child support was an interlocutory order where issue of custody remained pending in the trial court.
- Even though a child support and a child custody claim can be brought and heard by the trial court independently, the two claims are “legally interdependent.”
- Support order entered in IV-D child support enforcement court was a temporary support order where motion to modify custody remained pending in domestic relations court.

Gray v. Peele, 761 S.E.2d 739 (N.C. App, August 19, 2014). Trial court – in IV-D court – denied father’s motion to modify child support after concluding there had been no substantial change in circumstances. Father appealed but the court of appeals dismissed the appeal as an inappropriate interlocutory appeal because a motion to modify custody remained pending in the trial court. In determining that the appeal was interlocutory, the court of appeals discusses the rules for determining when a custody or support order is a temporary order rather than a permanent order. The court of appeals held that to determine whether a child support order is permanent, the court looks to the intent of the trial judge. Because the amount of support is dependent upon the custodial arrangement, the court of appeals held that the support order

entered in this case while a custody claim was pending was intended to be “a temporary order entered by the child support enforcement court to provide for payment of child support until the pending motion to modify custody can be determined and child support set based on the actual custodial schedule.”

Determination of income; retroactive support

- Trial court did not err in determining husband’s actual present income using evidence of his income several years prior to support hearing where evidence he provided of his actual present income was found to be totally unreliable by the trial judge.
- In high-income case falling outside the guidelines, trial court is to apply the same standard – that found in GS 50-13.4 – to set both prospective and retroactive support.

Zurosky v. Shaffer, _S.E.2d _ (N.C. App., September 2, 2014). Father argued on appeal that trial judge erred in determining his actual present income based on evidence of his income from 2003-2008 when the support order was entered in 2013. The court of appeals held that the trial court correctly used the last reliable evidence as to father’s actual income. The use of the earlier information was justified by the fact that all current information supplied by father was found to be completely unreliable by the trial judge.

In addition, father argued that the trial court made insufficient findings of fact to support the award of retroactive child support. Without discussing case law indicating that retroactive support must be determined based upon a parent’s responsibility for a share of actual expenditures made on behalf of a child before the child support action was filed, the court of appeals states that both prospective and retroactive support must be determined based upon the standard found in GS 50-13.4 – a consideration of the needs of the child and relative ability of both parents to pay. As the trial court in this case made numerous findings as to the parents’ income levels and the needs of the children, the court of appeals rejected father’s argument and affirmed the order for retroactive support.

Legislation

S.L. 2014-77 (S 794). Amends GS 50-13.4(c1) to clarify that the Conference of Chief District Court Judges has the authority to promulgate child support guidelines that address the method for computing a parent’s obligation for retroactive support.

S.L. 2014-115, s. 44.5 (H 1133). Amends GS 110-136.3 to require that the address of the custodial parent, and the address of the child if the child’s address is different from the custodial parent, be included in any IV-D child support order and any non-IV-D child support order that contains a wage withholding requirement. The address of the parent or the child is not required if there is an existing order prohibiting disclosure of the custodial parent or child’s address to the obligor, or if the court has determined that notice to the obligor is inappropriate because the obligor has made verbal or physical threats that constitute domestic violence. The amendment

also removes the requirement that a custodial parent keep a noncustodial parent informed as to the address of the minor child. Effective August 11, 2014.

Equitable Distribution

Cases Decided and Legislation Enacted Between June 4, 2014 and Sept. 26, 2014

Classification burden of proof; distributive awards

- Stipulation by wife that she did not make any direct financial contribution to the acquisition of property or the payment of debt during the marriage did not mean there was no marital contribution to the acquisition of property or payment of debt. Contribution by either or both spouses results in marital contribution.
- Land gifted by wife's parents to wife and husband before the date of marriage was jointly owned separate property of both spouses.
- Modular home affixed to the land also was jointly owned separate property because the trial court concluded that husband made a gift of the modular home to the wife before the date of marriage.
- The trial court did not err in dealing with assets and accounts related to husband's business as separate assets and accounts rather than as a business where trial court made findings that husband intermingled his personal and business-related assets and accounts and did not maintain a business structure.
- Funds in a bank account are presumed marital to the extent they were deposited during the marriage. Spouse claiming separate interest has burden of tracing all or a portion of the date of separation value of the account to his/her separate property.
- Husband's obligation to pay wife's attorney fees arising out of her child support, PSS and alimony claims was not a marital debt.
- Trial court erred by failing to make specific findings of fact to show how the presumption in favor of an in-kind distribution was rebutted before ordering an \$8,000 distributive award.
- Fact that one marital asset was a sole proprietorship will justify a distributive award.
- Fact that marital bank accounts, containing funds far in excess of the amount of the distributive award, were distributed to defendant was sufficient to establish the presence of liquid assets to satisfy the distributive award without additional findings of fact by the trial court.

Clark v. Dyer, _S.E.2d _ (N.C. App., September 2, 2014). Court of appeals affirmed trial court order of equitable distribution but remanded for clerical corrections and clarifications regarding classification and distribution of some assets.

Lot and modular home:

The court rejected husband's contention that the trial court erred in failing to distribute the marital residence, a modular home built on a lot gifted to the parties before marriage by the wife's parents. The trial court ruled and the court of appeals affirmed that the lot and the modular home was not marital property because it had been acquired by both parties before the date of marriage – meaning it was jointly held separate property that the trial court could not distribute.

Assets and accounts related to husband's business:

Court of appeals also rejected husband's argument that the trial court erred by classifying and distributing assets and accounts related to a business that he started operating years before the marriage. The trial court determined that husband intermingled assets and accounts of his business with his personal assets and accounts and disregarded any business structure, and therefore classified and distributed the assets and accounts separately rather than as part of a business entity. The court of appeals held that the trial court properly classified one account as entirely marital where evidence showed that while the account had been in existence before the marriage, defendant had made numerous deposits and withdrawals during the marriage. Because the funds acquired during the marriage are presumed marital, husband had burden of tracing his separate funds out of the date of separation value of the account. Because he was unable to trace, the trial court properly classified the entire account as marital.

Husband also argued that the trial court erred by not including in the distribution the attorney fee debt incurred by husband as a result of an order entered as part of the child support and alimony order entered by the trial court. The court of appeals held that "we cannot fathom why plaintiff would argue that an award of attorney fees incurred by defendant on these claims, which obviously did not exist on the date of separation, could possibly be marital debt or included in the distribution award."

Distributive award:

Court of appeals remanded case for additional findings to support the \$8,000 distributive award the trial court ordered husband to pay to wife. The trial court order failed to specifically address how the presumption in favor of an in-kind distribution had been rebutted. The court of appeals noted that the fact that one marital asset was a sole proprietorship would be sufficient to support the distributive award. The court of appeals rejected husband's argument that the trial court needed to make findings as to how the distributive award would be paid. The court of appeals held that such specific findings are not necessary when there are obvious liquid assets available from which the award can be paid. In this case, husband was awarded bank accounts containing funds in excess of the amount of the distributive award.

Distribution of divisible property; stipulations; valuation

- Trial court did not err by distributing the passive depreciation of marital property to one spouse while distributing the marital property itself to the other spouse. Trial court has discretion to determine most equitable way to distribute marital and divisible property.
- Where parties stipulated in a final pre-trial order that an asset was marital property but did not stipulate as to value, trial court did not err by failing to distribute the property.
- As the fact finder, the trial court has discretion to accept some of an expert's valuation while rejecting parts of the valuation.

Zuroskey v. Shaffer, _ S.E.2d _ (N.C. App., September 2, 2014).

Distribution of divisible property:

Trial court classified husband's ownership interest in vacation home as marital property and valued the interest on the date of separation. In addition, the trial court found that the value of the marital interest had decreased during separation as the result of market forces. The depreciation was classified as divisible property. The trial court distributed the marital interest in the vacation home to husband but distributed the depreciation as a negative asset to wife. The court of appeals rejected husband's argument that, unless the trial court finds the depreciation was caused by the

fault or misconduct of one of the parties, the depreciation must be distributed to the party who receives the marital asset. According to the court of appeals, as long as the trial court properly classifies assets and considers all distribution factors raised by the evidence, the trial court has discretion to distribute both appreciation and depreciation of a marital asset separately from the asset itself.

Stipulation in pre-trial order:

Parties stipulated in the final pre-trial order that reward points associated with a credit card were marital property but they did not stipulate regarding the value of those points or how they would be distributed. The trial court refused to distribute the points after concluding neither party had produced convincing evidence as to the value of the points. The court of appeals rejected husband's contention on appeal that the trial court violated the pretrial order by failing to distribute an asset the parties stipulated was marital. Without value, the trial court cannot distribute an asset unless the parties stipulate to a distribution. The parties also stipulated that airline dividend miles were marital property and should be distributed to wife. Even though there was no stipulation or evidence of value, the court of appeals held that the trial court properly followed the pre-trial order by distributing the dividends to wife. However, where the parties stipulated that a tax return was divisible property, the trial court did err in concluding that the refund was not marital or divisible property. The court of appeals held that on remand, the trial court must classify the return in accordance with the stipulation.

Valuation of business and jewelry:

Trial court accepted wife's expert's valuation of date of separation value of the marital business but rejected that expert's opinion as to the date of distribution value. The trial court rejected husband's expert's value altogether. The court of appeals rejected husband's argument on appeal that the trial court erred in choosing some but not all of wife's expert's opinions and rejecting all of his expert's opinions, holding that it is up to the trial court as fact finder to determine credibility of experts. Same holding regarding trial court's decision to accept some and reject other expert opinion regarding the value of marital jewelry. The trial court has discretion to determine which expert is the most credible and accept part or all of that expert's opinion.

In-kind distribution

- Trial court was not required to make findings required for a distributive award where distribution of \$178,667 to wife was an in-kind distribution of marital cash and checks.

Sauls v. Sauls, _ S.E.2d _ (N.C. App, September 16, 2014). Trial court determined that the husband held \$330,000 in cash in a safe in the marital home and concluded that the cash was marital property. The final ED order distributed \$178,667 of that cash to wife. On appeal, husband argued that the trial court was required to identify liquid assets from which he could pay the amount before ordering him to pay the cash to wife. The court of appeals held that while such findings are required to support a distributive award, they are not required when the court is ordering an in-kind distribution of cash that is marital property.

Spousal Agreements

Cases Decided and Legislation Enacted Between June 4, 2014 and Sept. 26, 2014

Statute of limitations

- Statute of limitation on plaintiff's claim that separation agreement was void due to fraud, duress and undue influence of the defendant was three years because the claim was an action in tort.
- Statute of limitation on plaintiff's claim for breach of contract that was a sealed instrument was ten years.
- While a counterclaim for fraud filed in response to a claim for breach of contract that is a sealed instrument is subject to the same ten year statute of limitation, the limitation for fraud is three years when not filed as a counterclaim to a breach of contract claim.

Crogan v. Crogan, _ S.E.2d _ (N.C. App., September 16, 2014). Plaintiff filed action seeking a declaratory judgment as to the validity of a separation agreement executed by the parties in 2004. Plaintiff claimed the agreement should be declared void because of fraud, duress and undue influence by the defendant and claimed that the defendant's failure to disclose assets at the time the contract was executed constituted a breach of the provision in the contract stating that both parties had fully disclosed all assets. Trial court granted defendant's motion for summary judgment, concluding that the statute of limitation had run on all of plaintiff's claims and declaring that the separation agreement was valid and enforceable. The trial court held that a three year statute of limitation applied to both the claims for fraud, duress and undue influence and the claim for breach of contract. The court of appeals agreed that plaintiff's tort claims for fraud, duress and undue influence were barred by the three year limitation period, but held that a ten year limitation period applies to the breach of contract claim because the contract was executed under seal. The court of appeals acknowledged that when fraud is raised as a counterclaim in response to a breach of contract action filed on a contract subject to the ten year limitation period, the fraud counterclaim also has a ten year limitation period. However, in this case, the fraud claim was plaintiff's cause of action based in tort and was not filed as a counterclaim to a breach of contract claim. As the claims in tort were based on allegations that she was coerced into signing the agreement, the statute began to run in 2004, when the contract was signed. The statute had run by the time she filed this action in 2012. However, the breach of contract claim began to run, at the earliest, at the time of execution of the contract. Plaintiff filed this action in 2012, within the 10 year limitation period.

