Family Law Update
Cases Decided and Legislation Enacted Between June 5, 2012 and September 18, 2012

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Child Support

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Incompetent Parent

District court had jurisdiction to set child support order for parent who had been adjudicated incompetent by the Clerk of Superior Court and appointed a guardian of the estate.

Clements v. Clements, _N.C. App._, 725 S.E.2d 373 (April 3, 2012). Child support action was filed in district court. While that action was pending, Clerk of Superior Court adjudicated mother to be incompetent and appointed a guardian of the person and of the estate. In district court, the trial court appointed a Rule 17 GAL for defendant mother and denied the mother's motion to dismiss the child support action that was based on her argument that the Clerk of Superior Court had exclusive jurisdiction to order payment by the guardian of the mother's estate. When mother appealed the trial court's denial of her motion to dismiss, the court of appeals first ruled that the appeal, although interlocutory because the issue of child support was still pending before the district court, affected a substantial right. The court of appeals then held that the district court had jurisdiction to adjudicate child support because the district court action had been initiated before the incompetency proceeding was initiated before the clerk. According to the court of appeals, the district court and the clerk have concurrent jurisdiction to determine the child support obligation of an incompetent parent.

Ability to pay

- Support order remanded because it did not contain sufficient findings of fact to show defendant had the ability to pay support as ordered by the court.
- Contempt order also remanded because it did not contain sufficient findings of fact to show defendant had ability to pay.

Durham DSS ex rel. Wilkerson v. Danisi, _N.C.App._, 729 S.E.2d 731, unpublished (August 7, 2012). Defendant filed motion to modify support based on his loss of employment. Trial court found the job loss was a substantial change in circumstances and ordered defendant to return to court at a later date with proof he was searching for a job. When defendant returned to court without that proof, the trial court entered an order of support in the same amount as the original order. The court of appeals held that the trial court erred in not making findings that defendant had the ability to pay the amount ordered. In addition, plaintiff filed a motion for a show cause order, stating only that defendant had failed to pay support as ordered and that "defendant never provided any information of his inability to pay." The trial court held defendant in contempt "because he had no just cause for not complying with the prior court order." The court of appeals held that the contempt order also was insufficient in that it did not contain findings that defendant had the present ability to comply with the order. In both situations, the court of appeals held that the orders must contain findings to show defendant has the ability to pay, or findings to support imputing income based on evidence of defendant's bad faith disregard of his support obligation.

Using Worksheet B

- Trial judge did not err in using Worksheet A to set support rather than Worksheet B, even though father had children in his custody more than 123 nights each year.
- Worksheet B is used only when evidence shows there is a "true sharing of expenses" between the parents.

Cabbs v. Cabbs, unpublished, _N.C.App. _, 729 S.E.2d. 731 (July 17, 2012). Custody order gave dad visitation every other weekend, every Thursday, up to three weeks in the summer, and alternating holidays, for a total number of overnights between 130 and 140. On a motion to modify support, trial court found a substantial change in circumstances and set support using Worksheet A. The trial court order contained findings that "mother clearly assumes responsibility for the bulk of the children's expenses" and the trial court therefore concluded Worksheet B was "not appropriate to this situation." Father argued on appeal that the trial court was required to use Worksheet B because of the number of overnights and because he paid most expenses for the children when they were in his care. The court of appeals rejected his argument, citing the language in the guidelines as instructions for Worksheet B and citing the decision in Maney v. Maney, 126 NC App 429 (1997). According to the court, Worksheet B only is used when parents actually share all expenses related to the children, regardless of the actual number of overnights with each parent.

Legislation

Termination of support when child attends a cooperative high school program
S.L. 2012-20, sec. 2. Amends G.S. 50-13.4(c) to provide that payments ordered for the support of a child enrolled in a cooperative innovative high school program authorized under Part 9 of Article 16 of G.S. Chapter 115C shall terminate when the child completes his or her fourth year of enrollment or when the child reaches the age of 18, whichever occurs later. Amendment applies to actions or motions filed on or after October 1, 2012.

Equitable Distribution

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Rule 59 motion for new trial

- Trial judge had no authority to order a new trial in a case tried by another judge, even though the other judge had recused himself from the case following completion of the trial.
- Trial judge erred in granting a new trial where party requesting new trial failed to show any prejudice resulting from the alleged misconduct by the prevailing party.

Sisk v. Sisk, _N.C.App._, 729 S.E.2d. 68 (July 17, 2012). Equitable distribution case was tried in June and July 2008. In July 2010, judgment was entered by the trial court. Plaintiff filed a motion for a new trial and a motion requesting that the trial judge recuse himself from further hearings in the matter. The motions were based on plaintiff's allegations that the trial judge used a proposed order submitted by defendant as the basis for the judgment entered even though the trial judge had not asked either party to submit a proposed order. The trial judge recused himself and another judge heard and granted plaintiff's motion for a new trial. Defendant appealed and the court of appeals held that the second judge erred in ordering a new trial because only the trial judge has authority to grant a Rule 59 motion. In addition, the court of appeals held that the request for a new trial should not have been granted because plaintiff had failed to prove grounds for a new trial and had not identified any prejudice resulting from the alleged misconduct of defendant's counsel. According to the court of appeals, there was no misconduct where the defendant did not submit the proposed order ex parte and the trial judge heard from both parties before entering the final equitable distribution judgment. However, the court of appeals did admonish the trial judge for the two-year delay in entry of the judgment, stating "our State Constitution provides 'right and justice shall be administered without favor, denial, or delay.'".

Contempt

- Unless a statute specifically provides for contempt power by the clerk of court, the clerk does not have authority to issue a show cause order for contempt.
- Where clerk issued show cause for contempt for alleged violation of equitable distribution order, the contempt actually was initiated by motion rather than by show cause. Therefore, the burden of proof during the contempt hearing did not shift to the alleged contemnor.
- Error was waived on appeal due to defendant's failure to object to the burden shift at the trial court level.

Moss v. Moss, _N.C.App._, 730 S.E.2d. 203 (August 7, 2012). Equitable distribution order was entered awarding one car and its associated debt to each party. The order also contained a hold harmless provision to protect the parties if one failed to pay one of the associated debts. One car was repossessed and a deficiency remained that defendant was responsible for paying pursuant to the judgment. Plaintiff filed a motion for contempt and a clerk of court issued a show cause order. During the contempt hearing, the trial court put the burden on defendant to show why she should not be held in contempt for failure to pay the deficiency. Defendant appealed the finding of contempt, arguing that the burden should not have been shifted to her because the clerk of court was not authorized to issue the show cause order. The court of appeals agreed and held that Chapter 5A does not allow a clerk to issue a show cause order unless the clerk is acting

pursuant to a specific statute authorizing the clerk to exercise contempt powers. As the clerk was not acting pursuant to such a statute in this case, the show cause order entered in this case was not valid. Therefore, according to the court of appeals, the contempt hearing was initiated by the motion filed by defendant. When contempt is initiated by motion rather than by a show cause order, the burden of proof in the contempt hearing does not shift to the alleged contemnor. While the trial court in this case inappropriately shifted the burden, the court of appeals held that defendant waived the right to object to this error on appeal by failing to object at the trial court level.

Setting aside pre-trial stipulations; delay in entry of judgment

- Trial judge erred by setting aside stipulations in the pretrial order without giving parties notice and an opportunity to be heard, and an opportunity to present evidence on issues that had been covered by the stipulations.
- Delay of 18 months between trial and entry of judgment was prejudicial and required new trial.

Plomaritis v. Plomaritis, _N.C.App._, 730 S.E.2d. 784 (July 17, 2012). Equitable distribution action was filed in 2003. The trial was held in 2006 and judgment was entered in 2008. Before trial, the parties entered into a pretrial order containing several stipulations regarding the classification and distribution of assets. Before the trial judge entered the final order, the judge entered an order sitting aside the stipulations in the pretrial order after concluding that following the stipulations would result in an unjust judgment. However, the judge did not give the parties notice or an opportunity to be heard before setting aside the stipulations. On appeal, defendant argued that the trial judge erred in sitting aside the stipulations and argued that the 18 month delay between trial and entry of judgment resulted in prejudice to him due to changes occurring to the property and the parties during that time period. The court of appeals agreed with both contentions. According to the court of appeals, the trial court has the authority to consider setting aside stipulations on the court's own motion and can set them aside when necessary to prevent manifest injustice. However, the court cannot set them aside without giving parties notice and an opportunity to present evidence on issues that had been covered by the stipulations. In addition, the court held that the 18 month delay also was cause for a new trial.

Classification of disability payment

- Disability payments are classified by the analytic approach, meaning they are classified by determining what the payments are intended to replace.
- Payments will be marital to the extent they compensate economic loss to the marriage and separate to the extent they replace loss of future earning capacity or non-economic losses such as pain and suffering or personal disability.
- Judgment classifying "line of duty disability benefits" awarded to former NFL football player was remanded for additional findings about "the nature of the wages being replaced"
- True disability payments are separate property.
- Delay of twenty-one months in entry of judgment following trial did not require new trial where complaining party showed no prejudice resulting from the delay.

Wright v. Wright, _N.C.App._, 730 S.E.2d. 218 (August 7, 2012). Trial court equitable distribution judgment classified a portion of defendant's "line of duty disability payments" as partially marital. Defendant received the payments upon his retirement from professional football due to injuries he sustained while playing for the NFL. The trial court reasoned that the payments

were more in the nature of deferred compensation than disability. The court of appeals held that disability payments must be classified according to what the payments are intended to replace. To the extent they replace lost wages or other economic loss to the marriage, the funds will be marital. To the extent they replace the future earnings or personal non-economic loss of the injured spouse, the funds will be separate property. The court remanded the case to the trial court for additional findings as to the nature of the line of duty payments. The court of appeals reversed the trial court's classification of a portion of defendant's "total permanent disability benefits" as marital property. The court of appeals held that evidence showed these benefits were awarded to defendant based on the determination that he is unable to hold or sustain any type of future employment. Finally, the court of appeals rejected defendant's contention that the twenty-one month delay between the trial and entry of judgment did not require a new trial because defendant failed to show any prejudice to him resulting from the delay.

Nunc pro tunc; orders after final judgment

- Trial court had no subject matter jurisdiction to enter an order in an equitable distribution case after the equitable distribution claim had been resolved by final judgment and no subsequent claim or motion had been filed.
- Use of *nunc pro tunc* in an effort to make the order relate back to a time before the case had been resolved by final judgment was improper.
- *Nunc pro tunc* orders are allowed only when a judgment actually was entered on an earlier date but not reflected on the court record due to accident or mistake of the clerk and then only when entry of the order will not result in prejudice to any party.
- Where order actually had not been entered in 2007, trial court had no authority to *nunc pro tunc* an order signed on 2010 back to 2007.

Whitworth v. Whitworth, _N.C.App._, _S.E.2d._ (September 4, 2012). Wife filed equitable distribution action against husband in 2007. The two were the sole shareholders of a corporation, Window World, Inc. and wife claimed the corporation was marital property. Shortly after the claim was filed, Window World, Inc. filed a motion to intervene into the equitable distribution case. In August 2007, the court held a hearing on the motion to intervene and the trial judge stated that he was willing to grant the motion to intervene and instructed the attorney for the corporation to draft an order allowing the intervention. Before the order allowing intervention was entered, the parties, including the corporation, entered into a consent judgment settling all issues relating to the corporation. In 2008, another consent judgment was entered settling all remaining issues in the equitable distribution matter. The 2008 order did not address the motion to intervene. In 2010, a dispute arose involving the estate of the son of the parties to the ED case. The estate matter was filed by former wife in superior court against both the estate of her son and against Window World. Before defendant Window World filed an answer in the superior court matter, attorneys for the company appeared ex parte before a district court judge requesting the entry of the order allowing intervention in the equitable distribution case. The district court judge signed the order allowing intervention on August 12, 2010 but designated that the order was entered *nunc pro tunc* to August 14, 2007. Thereafter, Window World filed an answer in the superior court action. That answer contained defenses to plaintiff's claims which relied upon Window World being a party to the earlier equitable distribution case. When former wife found out about the intervention order, she filed a Rule 60(b) motion asking that the district court judge set aside the intervention order. When the trial judge denied her motion, she appealed.

The court of appeals reversed the trial court denial of the Rule 60(b) motion, concluding that the trial court had no subject matter jurisdiction to enter the intervention order in the equitable distribution case after the case had been resolved by a final judgment and had no authority to use *nunc pro tunc* in this situation.

According to the court of appeals, use of *nunc pro tunc* is very limited. The court stated that, "before a court order or judgment may be ordered *numc pro tunc* to take effect on a certain prior date, there must first be an order or judgment actually decreed or signed on that prior date. If such decreed or signed order or judgment is then not entered due to accident, mistake or neglect of the clerk, and provided no prejudice has arisen, the order or judgment may be appropriately entered at a later date *nunc pro tunc* to the date when it was decreed or signed."

In this case, the judge hearing the motion to intervene had indicated in court that he was willing to sign an order allowing intervention when that order was prepared by the attorney for the intervenor. According to the court of appeals, that "non-specific" statement by the trial judge "was not a sufficient rendering to support entry three years later of a detailed written order *nunc pro tunc*". *Nunc pro tunc* cannot be used to create "an order with findings of fact and conclusions of law that had not previously existed."

As the intervention order did not relate back to 2007, it was entered after the final judgment in the equitable distribution case. The court of appeals held that the subject matter jurisdiction of the court terminated upon the final disposition of the matter before the court. Final disposition is defined as "such a conclusive determination of the subject matter that after the award, judgment, decision is made, nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation can arise thereon." Since no post-judgment motion had been filed in this case, no jurisdictional basis existed for the court to enter the intervention order.

Distribution; postseparation payments; tax consequences

- There is no requirement that a spouse be given dollar-for-dollar credit for voluntarily giving separate funds to the other spouse after the date of separation. Fact that husband gave wife money from his separate investment accounts was a distribution factor only.
- Distributive award will be upheld if record shows party ordered to pay has liquid assets sufficient to pay the award.
- The ability to refinance a mortgage attached to real property is a liquid asset for the purpose of determining whether spouse has assets from which to pay a distributive award.
- While trial court should consider postseparation payments made by one spouse for "routine maintenance" of marital property, the trial court is not required to find a specific value for those payments.
- Evidence offered as to the potential tax consequences of the sale of marital property does not need to be considered by the trial court as a distribution factor if the trial court determines the sale is not likely to occur as a result of the distribution or in the near future.

Peltzer v. Peltzer,_N.C. App._, _S.E.2d._ (September 18, 2012). Defendant raised several issues relating to equitable distribution judgment entered by the court. First, defendant argued trial court was required to give him "credit" for payments from his separate property that he voluntarily paid for his wife's educational and other expenses after the date of separation. The court of appeals rejected this argument, holding the trial court had discretion to give "dollar-for-

dollar credit" for these postseparation payments or treat them as a distribution factor. As the trial court considered the payments as a distribution factor, there was no error.

Second, defendant argued that the judgment did not contain a specific finding indicating that he had sufficient liquid assets to pay the $220,000 distributive award ordered by the trial court. The court of appeals held that the trial court does not need to make such a specific finding "if the party's ability to pay the distributive award with liquid assets can be ascertained from the record." In addition, the court held that "money derived from refinancing the mortgage on the marital home is a source of liquid funds available to a defendant." The court of appeals held that the record in this case indicated defendant could satisfy the award out of his monthly disposable income (the trial court ordered the distributive award to be paid by 18 monthly payments in the amount of $2000 each) and by refinancing the marital residence.

Third, defendant argued the trial court had failed to properly consider as a distributional factor postseparation payments he made towards the mortgage on the marital residence and for "routine maintenance" associated with the residence such as lawn care, extermination services, and utility payments. The court of appeals disagreed, holding that the trial court appropriately included findings about the amount of the payments made by defendant toward the mortgage and indicating defendant paid the maintenance payments. The court of appeals held that the trial court was not required to place a specific value on the amounts paid for the routine maintenance expenses.

Fourth, defendant argued the trial court was required to consider evidence presented by him concerning the tax consequences that would result should he sell the shares of stock in his medical practice. The parties stipulated that the stock was marital but disagreed over value. Defendant's expert testified at length about the tax consequences that would result should the stock be sold but the trial court did not give these potential consequences weight in distribution after determining that a sale of the stock was not likely. The court of appeals held that the trial court complied with GS 50-20(c)(11), which states that the court can consider potential tax consequences that would occur upon the sale of marital property as a factor in distribution if a party offers evidence of those potential consequences. That statute also provides that the trial court can consider the likelihood such a sale actually will occur in determining whether to consider the tax consequences as a factor in distribution. In this case, the trial court appropriately made findings on the evidence presented but also concluded that a sale was very unlikely to happen.

Custody

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Third party custody; waiver of parental rights

Trial judge erred in concluding father had acted inconsistent with his protected status by allowing child to live with grandmother where there was no evidence father intended to create a parent/child relationship between the grandmother and the child and where father complied with all terms of the existing child custody order.

Sides v. Ikner, _N.C.App._, 730 S.E.2d. 844 (August 21, 2012). Custody order was entered between mom and dad in 2007 granting mom primary physical custody and dad secondary physical custody every other weekend and holidays. Since 2004, mom and child lived with maternal grandmother and grandmother helped with care of the minor child. In 2009, mom joined the Air Force and executed an "Educational Power of Attorney" in favor of grandmother. Mom left the child with grandmother when she was training out of state. Dad continued to exercise all visitation provided by the court order and paid all child support. In 2010, grandmother filed a motion to intervene in the custody action, along with a motion to modify custody asking that she be granted custody rights with regard to the minor child. Grandmother alleged, and the trial court found, that father waived his constitutional right to exclusive custody of the minor child by allowing the child to live with grandmother and not seeking to obtain full custody himself when mother left the home of grandmother. The court of appeals reversed the trial court conclusion, holding that while father did consent to the child residing with grandmother for an indefinite period of time, there was no evidence that he intended to permanently cede a portion of his exclusive parental rights to grandmother or to allow grandmother to take on a permanent parent-like relationship with the child. According to the court of appeals, father showed his intent to maintain his parental rights in part by exercising all custodial rights granted to him by the custody order.

Temporary order

- Custody order was a temporary order even though it was not entered without prejudice to either party and did not contain a clear reconvening date, where the trial court order did not determine all issues relating to custody.

Sood v. Sood, _N.C. App._, _S.E.2d._ (September 18, 2012). Father attempted to appeal custody order. The court of appeals dismissed the appeal after concluding the order was a temporary order that did not affect a substantial right. According to the court of appeals, the order was temporary even though it did not specify that it was entered without prejudice to either party and did not set a specific time for the parties to return to court for a final custody trial. The order was temporary because it clearly left issues relating to custody unresolved. The order stated that the court needed information about the mental conditions of the parties and ordered evaluations. In addition, the order specified holiday visitation for the several months following entry of the order but did not specify a schedule for the indefinite future.

Legislation

S.L. 2012-146, sec. 10. For child custody and visitation orders entered on or after December 1, 2012, the act amends G.S. 50-13.2 to add new subsection (b2) to specify that a court entering an order for child custody or visitation may include in that order a requirement that either or both parents, or any other person seeking custody or visitation of a child, abstain from consuming alcohol. In addition, the amendment allows the court to require a party to submit to a continuous alcohol monitoring system as a method of ensuring compliance with the order to abstain from alcohol use. The monitoring system must be of a type approved by the Division of Adult Correction of the Department of Public Safety, and the custody or visitation order must require the monitoring company to report any violation of the court order to the court and to the parties. The amendment makes no provision for the payment of the costs associated with the monitoring system.

Divorce and Annulment

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Annulment; proving bigamous marriage

- When the existence of a second marriage is established, the second marriage is presumed valid until the attacking party proves that it is invalid.
- The only void marriage is a bigamous marriage.
- While there also is a presumption of the continued validity of a first marriage, this presumption yields to the presumption of the validity of the second marriage.
- Where husband failed to prove wife had entered into a valid first marriage, trial court did not err in dismissing his claim seeking to annul his marriage on the grounds of bigamy.

Mussa v. Palmer-Mussa, _N.C._, _S.E.2d._ (August 24, 2012), reversing _N.C.A.._, 719 S.E.2d 192 (2011). Husband filed action seeking to annul his marriage on the ground that it was bigamous. He claimed his wife did not obtain a divorce from her first husband before she married plaintiff. Evidence showed that the wife had engaged in a ceremony with another man several years before she married plaintiff. The ceremony was not performed by a magistrate or an ordained minister, and the couple did not obtain a marriage license. She lived with the other man for a short while and then separated from him. The trial court dismissed the annulment claim after concluding that plaintiff failed to prove his wife and the other man had been validly married. The court of appeals reversed the trial court, concluding that while the wife's first marriage was voidable because it had not been officiated by either a magistrate or an ordained minister, it was not void. Because it was voidable and not void, wife was obligated to divorce or annul her first marriage in order to end the marriage. As she did not obtain a divorce or an annulment from her first husband, the court of appeals held that her second marriage to plaintiff was bigamous and therefore void.

The supreme court reversed the court of appeals and affirmed the trial court. The supreme court held that the court of appeals had erred in concluding that the dispositive issue was whether the first marriage was void or voidable. Instead, the supreme court held that once the validity of the second marriage was established, the plaintiff had the burden of proving that his wife was lawfully married to another man at the time she married plaintiff. The supreme court agreed with the trial court's conclusion that the wife and the other man had never been married because the ceremony was not performed by someone authorized to perform marriages and because the two did not obtain a marriage license. Because plaintiff could not show that the ceremony complied with the requirements of GS 51-1, the plaintiff failed to meet his burden of showing his wife was married at the time she married plaintiff.

Domestic Violence (and 50C)

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Legislation

Domestic Violence Civil Protective Orders

S.L. 2012-20, sec. 1. Amends G.S. 50B-2(c)(5) to provide that a continuance of a hearing following the issuance of an ex parte domestic violence protective order shall be limited to one extension of no more than 10 days unless all parties consent or good cause is shown. In addition, the amendment provides that the hearing on the return of the ex parte order shall have priority on the court calendar. The act applies to actions or motions filed on or after October 1, 2012.

Civil No-Contact Orders

S.L. 2012-19. Amends G.S. 50C-9 to provide that, if a defendant is not present in court when a civil no-contact order is entered, the order may be served upon the defendant through any method authorized by Rule 4 of the Rules of Civil Procedure. Until this amendment, the statute required that the order be served only by the sheriff. The act was effective June 7, 2012.