

Family Law

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RECENT FAMILY LAW CASES (OCTOBER 1, 2001 - MARCH 1, 2002)

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Custody

Constitutional rights of parents

Speagle v. Seitz, 354 N.C. 525, 557 S.E.2d 83(2001), reversing 141 N.C. App. 534, 541 S.E.2d 188(2000)

Holding #1. Trial court's findings were sufficient to support the conclusion that defendant mother had waived her constitutional right to custody. Therefore, the trial court properly applied the best interest of the child standard to determine custody in case between natural mother and paternal grandparents.

Discussion. The supreme court held that the trial court's findings of fact concerning defendant mother's past conduct and past actions were sufficient to support the conclusion that she had waived her constitutional right to custody even though there was no evidence that the mother was engaging in such conduct at the time of the hearing.

The trial court made findings that, for a period of time ending approximately three years before the custody trial, defendant mother worked as a topless dancer and changed residences frequently. The trial court found that while defendant mother worked late into the night, the minor child was left in the care of a woman who had been warned by DSS that she kept too many children in her home. Based on these findings, along with findings about defendant mother's sexual relationship with a man other than the father of the child (a man who eventually killed the father of the child), the trial court concluded that defendant's "lifestyle and romantic involvements" resulted in her "neglect and separation from the minor child."

The court of appeals held that it was error for the trial court to base the conclusion that mother had waived her constitutional right to custody on the past conduct of the mother. Trial court findings indicated that, during the three years immediately preceding the custody trial, the mother remarried and established what appeared to be a more stable home life. But, the

supreme court disagreed with the court of appeals, stating that “any past circumstance or conduct which could impact either the present or the future of the child is relevant” to the determination of whether a parent has waived his/her constitutional right to custody.

Holding #2. In determining whether mother had engaged in conduct inconsistent with her protected status as a parent, trial court erred in excluding evidence of the mother’s participation in the murder of the father of the children, even though she was acquitted of criminal charges related to the murder.

Discussion. Although the supreme court upheld the judgment of the trial court, the court decided to address plaintiff grandparents’ argument that the trial court should have considered evidence of defendant mother’s involvement in the death of the father of the children. A man with whom defendant mother had been romantically involved had shot the father. The man thereafter committed suicide, and the defendant mother was criminally charged with participating in the planning and execution of the killing of the child’s father. Following a six-week trial, defendant mother was acquitted of all charges related to the murder. The judge in the custody trial refused to allow the introduction of evidence of mother’s involvement in the killing. The court of appeals did not consider this issue.

The supreme court, however, agreed with the grandparents and held that evidence of defendant mother’s participation in the murder was relevant and “paramount” in the trial court’s consideration of custody, notwithstanding defendant’s acquittal in the criminal trial. According to the court, the lower standard of proof in the custody trial might permit the trial court to find that mother was involved in the murder. This error by the trial court did not require remand, however, because the findings by the trial court concerning other conduct of the mother were sufficient alone to support the conclusion that mother had waived her constitutional right to custody.

Seyboth v. Seyboth, 554 S.E.2d 378 (N.C. App., Nov. 6, 2001)

Holding. The trial court erred in applying the best interest of the child test in case between a parent and a step-parent without first concluding that the mother of the child had waived her constitutional right to care, custody and control of her child. Award of visitation to stepfather was vacated and the case was remanded to the trial court to allow parties the opportunity to

present evidence of mother’s waiver of her constitutional rights.

Discussion. Court of appeals held that the constitutional protection afforded to natural parents, as articulated in *Petersen v. Rogers*, 337 N.C. 397 (1994) and *Price v. Howard*, 346 N.C. 68 (1997), applies in cases between stepparents and natural parents. The court held that the step-father in this case had standing to seek custody or visitation pursuant to G.S. 50-13.1 and pursuant to the case of *Ellison vs. Ramos*, 130 N.C. App. 389 (1998)(to have standing, person must be more than a “stranger” to the child). However, a stepparent also has the burden of proving that the natural parent has waived her rights by being unfit, neglecting the welfare of the child, or by other conduct inconsistent with her protected status as a parent. The trial court cannot consider whether visitation with the stepfather is in the best interest of the child unless the court first concludes that the mother has waived her constitutional right to custody.

Modification

Carlton v. Carlton, 354 N.C. 561, 557 S.E.2d 529(2001), reversing 145 N.C. App.252, 549 S.E.2d 916 (2001)

Holding: Trial court’s findings regarding 1) the father’s move to Hawaii and 2) the mother’s abduction of the child for a period of 2 months were sufficient to support the conclusion that there had been a substantial change of circumstances affecting the welfare of the child. After properly concluding that there had been a substantial change of circumstances affecting the welfare of the child, the trial court had the authority to modify the custody order in accordance with the best interest of the child standard.

Discussion: The court of appeals held that the trial court erred in modifying an order that granted joint physical custody to both parents. The trial court concluded that there had been a substantial change of circumstances after finding that the mother had absconded with the child for a period of two months and that the father had relocated from North Carolina to Hawaii. The trial court then concluded that it would be in the child’s best interest to modify the custody order to grant primary physical custody to the father. The court of appeals held that the trial court did not make sufficient findings to support the conclusion that either of those changes affected the welfare of the child. The supreme court adopted the dissent in the court of appeals to hold that the findings of the trial court were sufficient. Regarding the mother’s conduct

in concealing the child from the father for 2 months, the trial court made findings that the child missed a significant amount of school as a result of the mother's conduct and that the father and the child's teachers had to help the child make up missed school work. Regarding the father's relocation to Hawaii, the trial court incorporated into the order a psychiatric assessment performed on the child for the purpose of determining the impact of the move to Hawaii on the child.

Child Support

Application of guidelines

Hodges v. Hodges, 556 S.E.2d 7 (N.C. App., Dec. 4, 2001)

Holding #1. Trial court did not err in concluding that a \$5,000 payment by defendant father to plaintiff mother before the birth of the child was for support of the mother and not partial payment of medical expenses related to the birth of the child.

Discussion. The trial court ordered defendant father to pay one-half of plaintiff mother's uninsured medical expenses incurred during the birth and pregnancy of the minor child. Defendant father argued that the trial court erred in failing to find that a \$5,000 payment made by him to plaintiff mother shortly after the birth of the child should be credited toward his share of the medical expenses. Court of appeals held that there was evidence in the record to support the trial court's conclusion that the \$5,000 payment was in the nature of support to plaintiff mother and not reimbursement for uninsured medical expenses. The evidence included plaintiff's testimony that plaintiff and defendant made an agreement before the birth of the child that defendant would pay plaintiff the money to "keep her afloat" and to provide her with money for living expenses.

Holding #2. Trial court erred in failing to deduct from defendant's gross income the amount paid by defendant for medical insurance for other children of the defendant.

Discussion. Defendant paid medical insurance premiums for other children pursuant to voluntary support agreements entered before the birth of the child at issue in this case. The trial court did not deduct the premiums from defendant's gross income in determining his child support obligation pursuant to the guidelines, and the court of appeals held this to be error. The court of appeals held that all payments made pursuant to pre-existing court orders or consent

agreements must be deducted from an obligor's gross income when applying the guidelines.

Holding #3. Trial court also erred in imputing income to defendant without first concluding that defendant deliberately depressed his income.

Discussion. Defendant testified that he had worked a second job in 1999 but that he was no longer working and earning income from the second job at the time of the trial. Court of appeals held that the trial court erred in including the amount earned in 1999 from the second job in determining defendant's gross income. The court held that a trial court must determine the guideline amount of support based upon a party's gross income "at the time the order is made." A court cannot impute income or use earning capacity of a party without first concluding that the party has deliberately depressed his income.

Holding #4. Trial court did not err in failing to ensure that the child support order left the obligor with "sufficient income to maintain a minimum standard of living."

Discussion. The court of appeals held that application of the guidelines is presumed to leave an obligor with sufficient income to "maintain a standard of living based on the 1997 federal poverty level for one person." If a party contends that application of the guidelines will not leave him with sufficient income to maintain a minimum standard of living, the appropriate procedure is to request that the trial court deviate from the guidelines. Without a request for deviation, the trial court is not required to consider the impact of the child support order on the obligor's standard of living.

Ex. rel. Brenda Miller v. Hinton, 556 S.E.2d 634 (N.C. App., Dec. 18, 2001)

Holding. Trial court erred in ordering that prospective child support payments begin at a time other than the filing of the complaint without making appropriate findings to support deviation from the guidelines.

Discussion. Trial court ordered that obligor's support payments begin one month before the effective date of the order and denied plaintiff's request that support be paid as of the filing date of the complaint. The court of appeals held that there is a presumption that prospective child support payments begin at the time of the filing of the complaint. Therefore, according to the court of appeals, support must be made payable as of the filing date unless the trial court makes findings sufficient to support a deviation from the guidelines. In this case, the trial court failed to make findings as to why "beginning the prospective

child support payments on the date the complaint was filed would be unjust or inappropriate.”

Paternity

Rice v. Rice, 555 S.E.2d 924 (N.C. App., Dec. 4, 2001)

Holding. Trial court did not err in granting summary judgment to defendant mother on plaintiff father’s motion for paternity testing. The parties’ divorce judgment, which incorporated a separation agreement wherein plaintiff and defendant admitted that the three children were born of the marriage, operated as res judicata as to the issue of paternity.

Discussion. Two and one-half years after the parties were divorced, plaintiff father filed a motion for paternity testing. The divorce judgment incorporated a separation agreement signed by the parties that provided for custody, visitation and child support relating to three children “born to the marriage”. Plaintiff father argued that the divorce judgment should not operate as res judicata to his request for paternity testing because the issue of paternity was not actually litigated in the divorce action. The court of appeals rejected his argument and held that the judgment “judicially established the rights and obligations of the parties, and determined all issues of paternity.” The plaintiff father also filed a motion to set aside the divorce judgment and incorporated agreement pursuant to Rule 60(b) of the Rules of Civil Procedure. He argued on appeal that the trial court erred in denying his Rule 60 motion. However, the court of appeals did not address the propriety of the Rule 60(b) motion in this context after concluding that plaintiff had abandoned the issue by failing to assign specific error on appeal to the trial court’s denial of that motion.

Jeffries v. Moore and Moore, N.C. App. (Feb. 5, 2002)

Holding. Trial court erred in dismissing plaintiff’s complaint for custody and request for order compelling DNA testing after concluding that plaintiff had no standing to challenge the paternity of defendant husband where child was born during marriage of defendant mother and defendant husband.

Discussion. The two defendants are husband and wife. Defendant husband was named as the father on the birth certificate of the minor child. However, the trial court found that plaintiff was the natural father of the minor child based upon evidence that plaintiff and

defendant mother engaged in frequent sexual activity before and at the time the child at issue was conceived and upon the trial court’s observation that the minor child has racial characteristics similar to plaintiff and inconsistent with both defendants (plaintiff is African-American, both defendants are Caucasian, and the child evidences African-American racial characteristics). The trial court also concluded that it would be in the best interest of the child to have visitation with plaintiff. However, the trial court held that plaintiff had no standing to contest the paternity of a child born in wedlock due to the decision in *Johnson v. Johnson*, 343 N.C. 114 (1996). The court of appeals ruled that the decision in *Johnson* is not applicable to the case at hand, and remanded the case to the trial court for entry of a visitation schedule.

According to the court of appeals, the supreme court in *Johnson* held that a putative father has no standing to force the husband of a mother of a child born during wedlock to submit to blood tests pursuant to G.S. 8-50.1(b). The court of appeals held that the *Johnson* opinion does not prohibit a court from determining that a putative father has rebutted the presumption that the husband is the father of the child by means other than a blood test ordered pursuant to G.S. 8-50.1. In this case, plaintiff rebutted the presumption by evidence of his sexual involvement with the mother at the time of conception and with evidence of racial differences between the presumed father, the mother and the child.

Ex. rel Bright v. Flaskrud, N.C. App. (Feb. 19, 2002)

Holding. Trial court erred in granting defendant’s request for blood tests to determine paternity where defendant had signed an acknowledgment of paternity and a voluntary support agreement.

Discussion. Following the birth of the child, mother signed an affirmation of paternity and defendant signed an acknowledgment of paternity. In addition, a voluntary support agreement and order was signed by defendant and entered by the trial court. Approximately one year later, defendant filed a motion pursuant to Rule 60(b) requesting that the trial court set aside the acknowledgment of paternity and the voluntary support agreement, and requesting blood tests pursuant to G.S. 8-50.1. The trial court granted defendant’s motion for blood tests before addressing the Rule 60 motion. The court of appeals held that the acknowledgement and the voluntary support agreement are res judicata as to the issue of paternity. According to the court of appeals, until the acknowledgement and support agreement are set aside pursuant to Rule 60,

paternity is not at issue and the trial court has no authority to order blood tests pursuant to G.S. 8-50.1.

Contempt

Reynolds v. Reynolds, 557 S.E.2d 126 (N.C. App., Dec. 18, 2001)

Holding #1. Trial court erred in designating its order as one of criminal contempt rather than civil contempt.

Discussion. Trial court findings indicated that defendant willfully failed to pay his child support obligation on repeated occasions from 1993 through 1999. On each of those occasions, defendant failed to pay support until a notice to appear and show cause for contempt was issued. Defendant would then pay all arrears prior to scheduled contempt hearings. The trial court found that defendant had no "legitimate excuse for his non-payment of support on repeated occasions," and held defendant in criminal contempt. The court ordered that defendant be confined to jail for 30 days, with incarceration "suspended" upon the condition that defendant comply with certain conditions. The conditions included paying interest on late support payments, paying plaintiff's attorney fees, and making timely payments of his future monthly child support obligation.

The court of appeals (with one judge dissenting) held the trial court order was an order of civil contempt rather than one of criminal contempt. The court held that determination of whether an order is civil or criminal in nature depends on the character of the relief ordered. To be criminal contempt, the relief must be incarceration for a definite period of time "without possibility of avoidance by the contemnor's performance of an act required by the court." However, if imprisonment and all "disabilities" are avoidable by compliance with the conditions set by the court, then the order is an order to compel performance – i.e. civil contempt – rather than an order to punish past behavior, i.e. criminal contempt. In this case, the appellate court ruled that the fact that defendant could avoid imprisonment altogether by compliance with the conditions of the "suspended" sentence made the order one of civil contempt.

Interestingly, the court also held that contempt is criminal in nature if incarceration is imposed and the sentence is suspended for a term of supervised or unsupervised probation pursuant to G.S. 15A-1341(b). The court reasoned that there are "disabilities" arising from probation that cannot be avoided by the defendant.

Holding #2. Trial court erred in holding defendant in civil contempt where defendant complied with the support order after the motion to show cause but before the contempt hearing.

Discussion. After concluding that the trial court's order was one of civil rather than criminal contempt, the court of appeals held that civil contempt is not available when the obligor pays all arrears prior to the contempt hearing. Because civil contempt is intended to compel performance with a court order, a person who has complied with a court order by the time of the contempt hearing cannot be found to be in civil contempt of court. Therefore, although the trial court found that defendant willfully failed to comply with the support order until the issuance of a motion to show cause, the court of appeals held that it was error for the trial court to hold defendant in civil contempt.

Holding #3. Trial court's order for attorney fees in the contempt action was appropriate even though plaintiff did not prevail on the contempt charge.

Discussion. The court of appeals held that attorney fees generally are not available in contempt proceedings unless the moving party prevails. In this case, the court of appeals held that the trial court erred in holding defendant in civil contempt but nevertheless upheld the trial court's award of attorney fees to plaintiff for the contempt proceeding. The court of appeals held that an award of fees in a contempt proceeding is appropriate where the motion for contempt fails due to the defendant's compliance with the court order after the issuance of the motion to show cause.

Holding #4. The trial court did not err in requiring defendant to post security in the amount of \$75,000 to secure future payment of child support.

Discussion. G.S. 50-13.4(f)(1) gives the trial court authority to require an obligor to post a cash bond or give other security to secure future payment of support.

Holding #5. Trial court's order for attorney fees in the underlying custody and support action was supported by appropriate findings of fact.

Discussion. The trial court also ordered defendant to pay \$55,000 to plaintiff for attorney fees incurred in the underlying custody and support action. The court of appeals rejected defendant's contention that the fees were improper because the trial court did not find that he had failed to pay adequate support before the institution of the action and because the amount of the fee was not reasonable. The court of appeals held that when the underlying complaint requests custody and support, the trial court is not required to find that defendant had failed to pay adequate support in order to award fees. Such a finding is necessary only when the underlying action is for support only. See G.S. 50-

13.6. In addition, the court of appeals held that the trial court made sufficient findings regarding the “nature and scope of the legal services rendered and the time and skill required” to prosecute the action, the “skill and expertise of plaintiff’s counsel,” and the need of plaintiff to have counsel of sufficient caliber to meet defendant and his counsel on equal footing, to support the trial court’s conclusion that the fee awarded was reasonable.

Equitable Distribution

Dismissal of claim

Wilder v. Wilder, 553 S.E.2d 425 (N.C. App., Oct. 16, 2001)

Holding. Trial court erred in dismissing plaintiff’s claim for equitable distribution pursuant to Rule 41(b) for failure to prosecute without making findings as to whether lesser sanctions were appropriate.

Discussion. Plaintiff filed a claim for equitable distribution in September 1987. Judgment for absolute divorce of the parties was entered in 1990. In May 2000, the trial court granted defendant’s motion to dismiss plaintiff’s claim for equitable distribution after finding that plaintiff’s failure to prosecute the equitable distribution had resulted in material prejudice to the defendant. The court of appeals held that before dismissing a claim pursuant to Rule 41(b) for failure to prosecute, the trial court must make findings as to the following three factors: 1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; 2) the amount of prejudice, if any, to the defendant; and 3) the reason, if one exists, that sanctions short of dismissal would not suffice.

Consideration of tax consequences

Crowder v. Crowder, 556 S.E.2d 639 (N.C. App., Dec. 18, 2001)

Holding #1. Trial court erred in deducting prospective sales commissions, wind up fees, and income taxes in arriving at the value of a logging company when there was no indication that the distribution required that the logging company be sold or that a sale was otherwise imminent.

Discussion. On remand following an appeal of the original order of equitable distribution, the trial court calculated the date of separation value of a logging

company by finding “book value equity” and deducting 1) estimated sales commission if the logging company were sold in the future, 2) estimated “wind up costs” if the logging company were sold in the future, and 3) estimated income taxes if the logging company were sold in the future. The court of appeals held that valuation of an asset should consider tax consequences and other costs associated with the sale of a business only if the sale is “imminent and inevitable.” In this case, there was no evidence that defendant planned to sell the business nor was sale required by the order of equitable distribution.

Holding #2. Trial court did not err in finding a value of a logging company on remand following appeal that was different than the value found in the original judgment.

Discussion. On appeal of the first order of equitable distribution, the court of appeals issued a “blanket reversal” of the original order. The first decision by the court of appeals did not explicitly affirm or uphold any part of the original order of the trial court, but instructed the trial court to determine on remand the total net value of the marital estate. Therefore, according to the court of appeals, the trial court on remand was authorized to reconsider the value of the logging company even though the first appeal did not find error in the original valuation of the company.

Dolan v. Dolan, 558 S.E.2d 218 (N.C. App., Jan. 2, 2002)

Holding #1. Trial court erred in considering, as a distribution factor, the tax consequences each party would incur if rental property distributed to each were sold.

Discussion. The trial court found the date of separation value of several parcels of marital rental property and distributed some parcels to plaintiff and some parcels to defendant. The trial court also considered, as a distribution factor, the tax consequences each party would incur if the rental properties were sold at the date of separation value. The court of appeals held that it was error for the trial court to consider the tax consequences because sale of the properties was not required by the order of distribution. The court of appeals called the tax consequences “hypothetical and speculative” and held that long-standing case law in North Carolina prohibits trial courts from considering tax consequences unless the taxes would be “a direct result of the distribution.” Judge Wynn dissented and “certified” the issue to the supreme court for review.

Holding #2. Trial court erred in failing to make findings that the court considered as a distribution factor the fact that plaintiff received rental income from marital property after the date of separation and before the date of the equitable distribution trial.

Discussion. The trial court made findings that plaintiff collected income from marital rental property after the date of separation and that plaintiff maintained the rental property during separation. As this was a case filed before the creation of divisible property in 1997, the court of appeals held that the receipt of income from marital property after the date of separation and the maintenance of marital property after separation are both distribution factors. While the trial court made findings about the income and maintenance, the court of appeals held that the findings were not sufficient to show that the trial court considered them as distribution factors.

Tracing separate property

Classification and distribution of stock options

“Catch-all” distribution factor (c)(12)

Fountain v. Fountain, 559 S.E.2d 25 (N.C. App., Feb. 5, 2002)

Holding #1. Trial court did not err in classifying a note receivable acquired during the marriage as the separate property of plaintiff after concluding that plaintiff had met his burden of proving that the note was taken in exchange for separate property.

Discussion. On the date of separation, plaintiff owned a note receivable that had been taken in exchange for a Cessna airplane. Because plaintiff acquired the note during the marriage and before the date of separation, it was presumed marital. Therefore, plaintiff had the burden of proving that the note was his separate property. The trial court concluded that he met this burden by showing that the note was acquired in exchange for separate property, and the court of appeals agreed. Plaintiff was able to trace the note back to another airplane purchased by plaintiff prior to the marriage. The plane owned by plaintiff before the marriage was leased to plaintiff’s employer during the marriage. The lease payments were deposited into a joint account and were used to pay all expenses related to that first plane. The court of appeals held that as income from separate property (the plane), the lease payments were separate property. The lease payments remained separate property even though the funds were

deposited into a joint account, but defendant had the burden of proving that no marital funds were commingled with the separate funds and used to pay expenses related to the plane. The court held that plaintiff met this burden by producing evidence of all transactions occurring within this account throughout the relevant time period. The bank records established, to the satisfaction of the trial court, that only separate funds were used to pay expenses related to the plane. The first plane was then traded for the Cessna. As property acquired in exchange for separate property, the court of appeals held that the Cessna was separate property. Again, plaintiff was able to show that no marital funds were used to pay for the Cessna or for the maintenance of the plane during the marriage. As the note owned on the date of separation was acquired in direct exchange for the Cessna, it was appropriately classified as the separate property of plaintiff.

Holding #2. Trial court did not err in classifying funds in a bank account as the separate property of plaintiff after concluding that the funds were income from separate property.

Discussion. Defendant established at trial that funds in a bank account on the date of separation had been received during the marriage. The court of appeals held that she therefore met her preliminary burden of proving the funds to be marital. The burden then switched to defendant to show the funds were separate property. The court of appeals held that defendant met this burden by showing that all of the funds in the account were proceeds from the note receivable discussed above. As income from separate property (the note receivable), the funds were properly classified as separate property.

Holding #3. Trial court did not err in finding no marital interest in a Piggly Wiggly grocery store owned by plaintiff prior to the marriage after concluding that the appreciation in the value of the business during the marriage was passive appreciation.

Discussion. Plaintiff acquired a 75% ownership interest in a Piggly Wiggly store prior to marriage. Evidence at trial showed that the store appreciated in value during the marriage. The trial court concluded, and the court of appeals agreed, that the increase in value was not due to any marital effort from plaintiff because plaintiff “had no involvement in the operation of the business.” Plaintiff did contribute funds used to pay for renovations to the store building, but plaintiff was able to prove that all funds contributed were his separate funds. As the appreciation was not the result of marital effort, the court of appeals held that the trial court correctly concluded that there was no marital interest in the store.

Holding #4. Stock options are classified in the same manner as pensions and other deferred compensation

Discussion. Plaintiff owned 480,000 stock options on the date of separation. Although there was no issue on appeal regarding the trial court's classification of the stock options as marital property, the court of appeals nevertheless discussed classification of stock options in general. The court held that stock options are a salary substitute or a deferred compensation benefit, and "like retirement benefits." If the options are received during the marriage and before the date of separation and acquired as the result of the efforts of either spouse during the marriage and before the date of separation, they are classified as marital property. This is true whether the option is vested or nonvested as of the date of separation. If the options are acquired as the result of marital effort and are received after separation but before the date of distribution, the options are divisible property. If, however, the options are not acquired in consideration for services rendered during the marriage and before the date of separation, the options are neither marital nor divisible property.

Holding #5. Trial court did not err in refusing to use the "Black-Scholes Model" to value the stock options.

Discussion. The trial court rejected expert testimony as to the value of the options based upon application of the "Black-Sholes Model." The trial court instead adopted the "intrinsic value" method to value the options as of the date of separation. The court of appeals held that when there is no single best approach to valuing an asset, the trial court has discretion to use any "sound valuation method, based on competent evidence." The court of appeals held that both the Black-Sholes and the intrinsic value methods are acceptable methods of valuing stock options.

Holding #6. Trial court did not err in distributing the stock options by the immediate offset method, meaning that the options were distributed to plaintiff and defendant received a larger portion of other assets.

Discussion. The court of appeals held that, because stock options are deferred compensation benefits, they must be distributed in accordance with 50-20.1 (the pension statute). According to that statute, unless the parties agree on a distribution method, the court must use deferred distribution. Deferred distribution is accomplished by ordering that a prorated portion of the benefits be distributed to the non-owning spouse when and if the owning spouse receives the benefit in the future. However, if the options are vested, the trial court also has the discretion to use the immediate offset method of distribution. The court of appeals held that the options in this case were vested

on the date of separation because plaintiff had the right to exercise the options and the right to exercise could not be cancelled. Therefore, the trial court had the discretion to distribute the options by awarding them to plaintiff and distributing other marital assets to defendant in an amount sufficient to offset her share of the value of the options.

Holding #7. Trial court erred in considering defendant's plastic surgeries and her decision to live in Maryland rather than in NC with plaintiff as distribution factors.

Discussion. The trial court considered as distribution factors: 1) defendant's breast implants, liposuction, and cosmetic nose surgeries performed before the date of separation; and 2) defendant's decision to live in Maryland and the cost incurred by plaintiff in frequently traveling to Maryland to visit defendant in an effort to "keep the marriage afloat." The trial court found these facts to be factors pursuant to G.S. 50-20(c)(12), the "catch-all" distribution factor. The court of appeals held that only those factors relating to the economic condition of the marriage are appropriate considerations under (c)(12). Therefore, expenditures of marital funds for non-marital purposes by either spouse in anticipation of separation would be appropriate considerations. However, in this case, the court of appeals held that the surgeries were not performed in anticipation of separation, and there was no evidence that defendant moved to Maryland in anticipation of separation. The court noted that defendant's decision to live in Maryland might have contributed to the eventual break down of the marriage. However, marital fault of a non-economic nature is not an appropriate consideration under factor (c)(12).

Postseparation payment of marital debt

Divisible property

Hay v. Hay, N.C. App. (Feb. 19, 2002)

Holding #1. Trial court did not err in treating defendant's postseparation payment of the mortgage on the marital residence as a distribution factor rather than giving defendant a dollar-for-dollar credit.

Discussion. Defendant was ordered to pay the mortgage on the marital home during the pendency of the ED action. The trial court treated defendant's payments as a distribution factor and refused to give defendant a dollar-for-dollar credit for these payments in the final judgment. The court of appeals held that the trial court has discretion to determine the

appropriate treatment of the postseparation payment of marital debt. While a trial court may give credit for the total amount of the payments, the court also may choose to treat the payments as a distribution factor pursuant to G.S. 50-20(c)(11a) or (12).

Holding #2. Defendant’s postseparation payment of marital debt did not create divisible property.

Discussion. The court of appeals rejected defendant’s arguments that his postseparation payments resulted in divisible property that should have been distributed between the parties. Defendant argued that his payments on the mortgage resulted in appreciation of the marital residence and that the appreciation was divisible property pursuant to G.S. 50-20(b)(4)(a). The court of appeals held that only that postseparation appreciation of marital property that is not the result of the efforts of either spouse after the date of separation is divisible property pursuant to the statute. Because any appreciation in this case occurred as the result of defendant’s efforts (the payment of the mortgage), the appreciation could not be classified as divisible property. Similarly, the court of appeals held that the payments did not constitute divisible property pursuant to G.S. 50-20(b)(4)(d) which defines “increases in marital debt and financing charges and interest related to marital debt” as divisible property. The court of appeals stated only that this provision was not relevant to the case at hand because defendant’s postseparation payments did not “increase the marital debt, finance charges, or interest on the marital debt.”

Holding #3. Trial court did not err in valuing and distributing all marital property and separately valuing and distributing all marital debt, rather than valuing and distributing the “net marital estate.”

Discussion. The court of appeals rejected defendant’s argument that the trial court erred by not

classifying, valuing and distributing marital debt “along with” the marital property. The court of appeals held that the trial court acted within its discretion when it decided to classify, value and distribute marital property and then to classify, value and distribute marital debt. The trial court distributed the majority of the marital debt to defendant and then considered the fact that defendant had paid most of the debts during separation as a distribution factor.

Divorce from Bed and Board

Right to appeal

Washington v. Washington, 557 S.E.2d 648 (N.C. App., Dec. 28, 2001).

Holding. Even though the entry of a divorce from bed and board (DBB) is a final judgment, an appeal is interlocutory if the complaint requesting the DBB also raised issues of alimony, custody and child support that were not finally resolved by the trial court.

Discussion. The trial court granted both defendant’s and plaintiff’s request for a divorce from bed and board. Both parties also requested child custody and support, and defendant requested postseparation support and alimony as well. The trial court heard and decided the requests for DBB without reaching the other issues raised by the pleadings. Defendant appealed the trial court’s entry of DBB for plaintiff, but the court of appeals dismissed the appeal as interlocutory. Although the entry of DBB was a final judgment, an appeal is interlocutory and subject to dismissal if the order “is not a final judicial determination of all the claims raised in the pleadings.”

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