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Chapter 2
Postseparation Support and Alimony

In cooperation with the School of Government, The University of North Carolina at Chapel Hill
by Cheryl D. Howell and Jan S. Simmons

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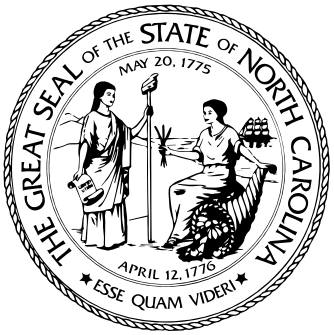

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Chapter 2: **Postseparation Support and Alimony**

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I. Jurisdiction

A. Subject Matter Jurisdiction

1. District and superior courts have original concurrent jurisdiction. [G.S. 7A-240; 7A-242.] The district court is the proper court for alimony proceedings. [G.S. 7A-244; *Peoples v. Peoples*, 8 N.C. App. 136, 174 S.E.2d 2 (1970).]
2. The court of appeals has held that a trial court lacks subject matter jurisdiction over a spouse's claim for postseparation support if the parties have not physically separated, noting that G.S. 50-16.2A "clearly presupposes that the parties have already separated." [*Baumann-Chacon v. Baumann*, 212 N.C. App. 137, 147, 710 S.E.2d 431, 437 (2011) (not addressing alimony because plaintiff appealed only the dismissal of claim for postseparation support).]
3. Subject matter jurisdiction cannot be conferred upon a court by consent, waiver, or estoppel, and failure to demur or object to jurisdiction is immaterial. [*Stark v. Ratashara*, 177 N.C. App. 449, 628 S.E.2d 471 (court of appeals dismissed case based on lack of subject matter jurisdiction where alimony claim was filed after judgment of divorce; court of appeals addressed issue even though parties did not raise issue of subject matter jurisdiction in the trial court), *review denied*, 360 N.C. 536, 633 S.E.2d 826 (2006).]
4. Prior dismissal of an action for registration of a British order for spousal support for lack of subject matter jurisdiction was not a judgment on the merits; neither res judicata nor collateral estoppel applied to bar a subsequent action for registration and enforcement under the Uniform Interstate Family Support Act (UIFSA). [*Foreman v. Foreman*, 144 N.C. App. 582, 550 S.E.2d 792 (previous dismissal of plaintiff's action for registration based on the Uniform Reciprocal Enforcement of Support Act (URESA) was not a judgment on the merits of plaintiff's claims), *review denied*, 354 N.C. 68, 553 S.E.2d 38 (2001).]
5. A North Carolina trial court had subject matter jurisdiction to register a British spousal support order under UIFSA because England has reciprocity with North Carolina in issues of support and thus is treated as a "State" under G.S. 52C-1-101(19) for purposes of UIFSA. [*Foreman v. Foreman*, 144 N.C. App. 582, 550 S.E.2d 792, *review denied*, 354 N.C. 68, 553 S.E.2d 38 (2001).] NOTE: Definitions for "foreign country" and "issuing foreign country" were added to UIFSA by S.L. 2015-117, § 1, effective June 24, 2015. *See* G.S. 52C-1-101(3a) and -101(8a).
6. A district court had subject matter jurisdiction to enter an order for postseparation support during pendency of wife's personal injury action in superior court arising out of an accident that left her paralyzed from the neck down. [*Washington v. Mahbuba*, 222 N.C. App. 319, 729 S.E.2d 731 (2012) (**unpublished**).]

B. Personal Jurisdiction

1. Generally.
   a. Action for alimony is an in personam action. [*Surratt v. Surratt*, 263 N.C. 466, 139 S.E.2d 720 (1965).] A court must have personal jurisdiction over a party before it can order that party to pay alimony.
   b. When a nonresident defendant challenges the court's exercise of jurisdiction, the burden is upon the plaintiff to establish by a preponderance of the evidence that personal jurisdiction exists. [*Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001) (action seeking, among other things, alimony, postseparation support, and equitable distribution).]
   c. Personal jurisdiction acquired by a tribunal in North Carolina in a proceeding under G.S. Chapter 52C relating to a support order continues as long as the North Carolina tribunal has continuing, exclusive jurisdiction to modify its order or continuing jurisdiction to enforce its order as provided by G.S. 52C-2-205, -206, and -211. [G.S. 52C-2-202, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] A "support order" includes a judgment, decree, order, decision, or directive, whether temporary, final, or subject to modification, issued in a state or a foreign country for the benefit of a spouse or former spouse providing for monetary support, health care, arrearages, retroactive support, or reimbursement for financial assistance provided to an individual obligee in place of child support. [G.S. 52C-1-101(21), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]
2. Two-part inquiry to determine personal jurisdiction over a nonresident.
   a. When a nonresident defendant challenges the court's exercise of personal jurisdiction, the court must undertake a two-part inquiry:
      i. The court must first determine whether North Carolina law provides a statutory basis for the assertion of personal jurisdiction, i.e., "long-arm jurisdiction." [*Speedway Motorsports Int'l Ltd. v. Bronwen Energy Trading Ltd.*, 209 N.C. App. 474, 707 S.E.2d 385 (2011), *review denied*, 365 N.C. 542, 720 S.E.2d 669 (2012).]
      ii. If the court concludes that there is a statutory basis for jurisdiction, it next must consider whether the exercise of personal jurisdiction complies with the due process requirements of the Fourteenth Amendment, i.e., "minimum contacts" analysis. [*See Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001).]
   b. Because North Carolina's long-arm statute extends personal jurisdiction to the limits permitted by due process, in some appellate opinions, the two-part inquiry has been merged into one question: whether the exercise of jurisdiction comports with due process. [*See Lang v. Lang*, 157 N.C. App. 703, 579 S.E.2d 919 (2003); *Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001).] Note, however, that in *Speedway Motorsports International Ltd. v. Bronwen Energy Trading Ltd.*, 209 N.C. App. 474, 487, 707 S.E.2d 385, 394 (2011) (citing *Brown v. Ellis*, 363 N.C. 360, 678 S.E.2d 222 (2009)), *review denied*, 365 N.C. 542, 720 S.E.2d 669 (2012), the court of appeals rejected the practice of collapsing the long-arm statute analysis into the minimum contacts analysis in favor of "two separate steps of analysis."

c. Factors to consider when determining whether defendant has sufficient minimum contacts with North Carolina:

i. Quantity of defendant's contacts with the state;

ii. The nature and quality of those contacts;

iii. The source and connection of the cause of action to the contacts;

iv. The interest of North Carolina in litigating the matter;

v. The convenience of the parties; and

vi. The interests of, and fairness to, the parties. [*Hamilton v. Johnson*, 228 N.C. App. 372, 747 S.E.2d 158 (2013) (first five factors); *Shaner v. Shaner*, 216 N.C. App. 409, 717 S.E.2d 66 (2011), and *Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001) (both citing *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 541 S.E2d 733 (2001)).]

d. Whether a party has sufficient contacts is a factual determination made on a case-by-case basis. [*Shaner v. Shaner*, 216 N.C. App. 409, 717 S.E.2d 66 (2011) (citing *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 541 S.E.2d 733 (2001)).]

e. Service on defendant within the state. [G.S. 52C-2-201(a)(1); 1-75.4(1)a.]

i. It is not necessary to apply the minimum contacts test of due process set forth in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945), and later cases when the defendant is personally served in the forum state. [*Lockert v. Breedlove*, 321 N.C. 66, 361 S.E.2d 581 (1987); *Jenkins v. Jenkins*, 89 N.C. App. 705, 367 S.E.2d 4 (1988) (court need not determine minimum contacts where nonresident defendant was served with process while temporarily in North Carolina for a brief visit related to his employment).]

f. Consent to personal jurisdiction. [G.S. 52C-2-201(a)(2), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (an individual may submit to jurisdiction by consent in a record, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction). See Section I.B.3.c.i, below, for definition of "record".]

i. Where a nonresident defendant has consented to the jurisdiction of the court, the two-part inquiry to determine personal jurisdiction over a nonresident need not be conducted. [*Montgomery v. Montgomery*, 110 N.C. App. 234, 429 S.E.2d 438 (1993).]

ii. A consent agreement in which the parents agreed that future legal actions regarding their children would be brought where the children reside was a valid consent to the exercise of long-arm personal jurisdiction over the nonresident defendant and waived the minimum contacts/due process analysis usually required in the two-step inquiry. [*Montgomery v. Montgomery*, 110 N.C. App. 234, 429 S.E.2d 438 (1993) (consent agreement acted as a waiver of the requirements usually necessary to invoke personal jurisdiction).]

3. Statutory basis for personal jurisdiction. A North Carolina tribunal has the statutory authority ("long-arm" jurisdiction) to assert personal jurisdiction over a resident or

nonresident spouse who is a defendant in a civil action seeking to establish or enforce a support order for a spouse or former spouse:

a. If the defendant is personally served with a summons and complaint within the state. [G.S. 52C-2-201(a)(1); 1-75.4(1)a. See Section I.B.2.e, above, on service within state negating need for minimum contacts inquiry.]

b. If the defendant is domiciled in the state at the time he is served with process. [G.S. 1-75.4(1)b.]

c. If the defendant submits to jurisdiction by consent in a record, by entering a general appearance in the action, or by filing a responsive document that has the effect of waiving her right to contest personal jurisdiction. [G.S. 52C-2-201(a)(2), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; 1-75.7(1) (general appearance). See Section I.B.2.f, above, on consent to jurisdiction negating need for two-part inquiry.]

    i. "Record" is defined as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." [G.S. 52C-1-101(13c), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

d. If the defendant is engaged in substantial activity within the state at the time he is served with process. [G.S. 1-75.4(1)d.]

e. For injury to person or property arising from an act or omission by defendant within the state. [G.S. 1-75.4(3).]

    i. Under prior law, an action for alimony on the ground of abandonment was a claim of "injury to person or property" under G.S. 1-75.4(3). [*Sherwood v. Sherwood*, 29 N.C. App. 112, 223 S.E.2d 509 (1976) (former G.S. 50-16.2 provided for permanent alimony based on abandonment); *Robinson v. Robinson*, 56 N.C. App. 737, 289 S.E.2d 612 (1982).]

f. A local contract arising out of a promise, made anywhere to plaintiff by defendant, to deliver or receive within this state things of value. [G.S. 1-75.4(5)c.]

    i. A separation agreement executed within this state, which required defendant to pay wife alimony, provided basis for asserting long-arm jurisdiction over nonresident defendant; separation agreement was a local contract and the support payments were a "thing of value" that were sent or delivered into this state. [*Pope v. Pope*, 38 N.C. App. 328, 248 S.E.2d 260 (1978).]

g. If things of value have been shipped from this state by the plaintiff to the defendant on her order or direction. [G.S. 1-75.4(5)d.]

    i. Alimony is a "thing of value" under G.S. 1-75.4(5)d. [*Schofield v. Schofield*, 78 N.C. App. 657, 338 S.E.2d 132 (1986) (North Carolina plaintiff sent alimony payments to out-of-state defendant).]

h. When the alimony claim arises out of the marital relationship within the state, notwithstanding subsequent departure from the state, if the other party to the marital relationship continues to reside in the state. [G.S. 1-75.4(12).]

    i. Jurisdiction proper under G.S. 1-75.4(12) when the parties were married in North Carolina, plaintiff continued to reside here, and the action arose under G.S. Chapter 50 and sought resolution solely of issues pertaining to the

dissolution of parties' marriage. [*Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001) (rejecting defendant's argument that the action did not arise out of the marital relationship when the parties never established a permanent home in North Carolina and defendant had never owned property here).]

i. If there is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction. [G.S. 52C-2-201(a)(8).]

i. G.S. 52C-2-201(8) (now (a)(8)) permits the assertion of long-arm jurisdiction over a nonresident defendant in an action for spousal support. [*Butler v. Butler*, 152 N.C. App. 74, 566 S.E.2d 707 (2002) (citing Official Comment, G.S. 52C-2-201).] Official Comment (2015), *Applicability of Long-Arm Jurisdiction to Spousal Support*, continues to recognize 52C-2-201(a)(8) as applicable to an action for spousal support asserting long-arm jurisdiction over a nonresident.

4. Compliance with due process standards.

a. Due process requires that defendant have minimum contacts with the state. [*Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001).]

b. A summary of the aspects of a defendant's situation that have proven useful in an analysis of "minimum contacts" with a jurisdiction include:

i. The quantity of defendant's contacts with the state;

ii. The nature and quality of those contacts;

iii. The source and connection of the cause of action to the contacts;

iv. The interest of the forum state;

v. The convenience of the parties; and

vi. The interests of, and fairness to, the parties. [*Hamilton v. Johnson*, 228 N.C. App. 372, 747 S.E.2d 158 (2013) (first five factors); *Shaner v. Shaner*, 216 N.C. App. 409, 717 S.E.2d 66 (2011), and *Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001) (both citing *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 541 S.E.2d 733 (2001)).]

c. Cases finding minimum contacts requirement met.

i. Defendant's contacts "clearly exceeded" the minimum contacts required for personal jurisdiction when he purchased a marital residence in North Carolina, made monthly visits for two years while still married, maintained a membership in a local social and sporting association, and used an equity line of credit secured by the North Carolina marital residence for business purposes. [*Butler v. Butler*, 152 N.C. App. 74, 566 S.E.2d 707 (2002) (claims for spousal support, child support, and equitable distribution).]

ii. Defendant's contacts sufficient when, despite the parties' continuous travel, defendant intentionally developed an assortment of financial, legal, and personal connections within North Carolina to manage his affairs, which defendant sustained over a period of years and which appeared intended to inure to his benefit. [*Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001) (parties married in Durham; while parties were overseas, defendant used Durham address to receive important mail, including federal income tax documents; defendant's

salary was directly deposited into an account in Durham; defendant had a North Carolina driver's license; defendant executed and filed in Durham a power of attorney, pursuant to which attorney-in-fact conducted business for parties; defendant made a will naming Durham residents as executors; defendant hired Durham accountant to receive and pay bills on his behalf; and parties opened an investment account in North Carolina; court noted unusual history of the parties, characterized by frequent moves from one foreign country to another and their failure to establish a permanent home anywhere in the U.S. or abroad).]

iii. Where parties were married in North Carolina and resided as husband and wife in this state and husband's alleged abandonment of wife was an act occurring within the state, "minimum contacts" test satisfied. [*Robinson v. Robinson*, 56 N.C. App. 737, 289 S.E.2d 612 (1982) (plaintiff wife sought divorce from bed and board and alimony).]

iv. Minimum contacts test met when defendant resided with wife in the state, abandoned her in the state, and fled the state following willful misconduct. [*Sherwood v. Sherwood*, 29 N.C. App. 112, 223 S.E.2d 509 (1976) (action for alimony based on former G.S. 50-16.2, which provided for permanent alimony based on abandonment).]

v. In the "unusual" situation where the couple moved frequently throughout the marriage and never established a residence in any other state or country, defendant had sufficient contacts with North Carolina to support the exercise of personal jurisdiction for alimony, child support, and equitable distribution even though he never resided in North Carolina. [*Bradley v. Bradley*, 806 S.E.2d 58, 73, 70 (N.C. Ct. App. 2017) (parties married in North Carolina, defendant directed certain mail to be delivered to his parents' house in North Carolina during the marriage, defendant directed father-in-law to secure a storage unit and stored marital and separate property in North Carolina, and defendant "orchestrated events" so wife and child would live in North Carolina after parties separated).]

d. Cases finding minimum contacts requirement not met.

i. Fact that child had lived since birth with mother in North Carolina, defendant had visited child three times in North Carolina, and defendant's corporate bank statements listed a Charlotte address found insufficient to justify in personam jurisdiction. [*Hamilton v. Johnson*, 228 N.C. App. 372, 747 S.E.2d 158 (2013).]

ii. Fact that defendant resided in North Carolina for a period of four months several years before the alimony action was filed in North Carolina, and made only brief visits thereafter, was not sufficient to support exercise of jurisdiction over defendant. [*Shaner v. Shaner*, 216 N.C. App. 409, 717 S.E.2d 66 (2011).]

iii. Plaintiff's allegation that defendant abandoned her in this state was not sufficient without allegations as to a nexus between defendant's misconduct and this state, such as parties were married or shared a marital domicile in this state or that defendant had conducted activities here, owned property here, or otherwise had invoked the protection of North Carolina laws. [*Tompkins v. Tompkins*, 98 N.C. App. 299, 304, 390 S.E.2d 766, 769 (1990) (even if the marital relationship

was still in existence when action for alimony was brought, this "cannot of itself constitute sufficient contacts to establish personal jurisdiction").]

iv. Defendant did not have minimum contacts with North Carolina where parties were not married or divorced in this state and did not share a matrimonial domicile here; the complaint was filed almost a year after defendant had moved out of state; and there was nothing in the record to indicate that defendant had conducted business or other activities in the state since she left, had owned property here, or had in any way invoked the protection of the laws of North Carolina. [*Schofield v. Schofield*, 78 N.C. App. 657, 338 S.E.2d 132 (1986) (motion to modify or terminate alimony).]

C. Venue

1. Action for alimony must be brought in the county in which one of the parties resides at the commencement of the action, subject to right of the court to transfer venue in accordance with G.S. 1-83 or other statute. [G.S. 1-82; 50-3.]

   a. A court may not change venue *sua sponte* under G.S. 1-83, whether under 1-83(1) or (2), when no defendant had answered or objected to venue. [*Zetino-Cruz v. Benitez-Zetino*, 791 S.E.2d 100 (N.C. Ct. App. 2016) (trial court's authority to change venue under G.S. 1-83(1) or (2) is triggered by a defendant's objection to venue). For more on this case, see Cheryl Howell, *No Sua Sponte Change of Venue Allowed*, UNC Sch. of Gov't: On the Civil Side Blog (Aug. 26, 2016), http://civil.sog.unc.edu/no-sua-sponte-change-of-venue-allowed.]

2. Removal of an action pursuant to G.S. 50-3.

   a. Defendant has the right to remove an action for alimony to defendant's county of residence, either before or after judgment, if:

      i. Both plaintiff and defendant were residents of North Carolina when action was filed;

      ii. Plaintiff stopped being a North Carolina resident after filing action in county of plaintiff's residence; and

      iii. Defendant does not reside in the county in which action was filed. [G.S. 50-3.]

   b. If defendant shows a right to remove pursuant to G.S. 50-3, the court must grant the change of venue. [G.S. 50-3; *Gardner v. Gardner*, 43 N.C. App. 678, 260 S.E.2d 116 (1979) (language of G.S. 50-3 is mandatory), *aff'd*, 300 N.C. 715, 268 S.E.2d 468 (1980); *Scheinert v. Scheinert,* 818 S.E.2d 114 (N.C. Ct. App. 2018) (change is mandatory); *Dechkovskaia v. Dechkovskaia*, 244 N.C. App. 26, 780 S.E.2d 175 (2015) (citing opinion of the North Carolina Supreme Court in *Gardner*) (G.S. 50-3 requires that if one spouse files an action for alimony or divorce in her county of residence and then leaves the state, upon proper motion, the trial court must order removal to the other spouse's county of residence; moreover, G.S. 50-3 requires removal of all properly joined claims filed in the same action, even after the case has been appealed and remanded).]

   c. Defendant can request a venue change pursuant to G.S. 50-3 after entry of a final order for alimony and before a motion in the cause for modification or enforcement

has been filed. [*Scheinert v. Scheinert,* 818 S.E.2d 114 (N.C. Ct. App. 2018) (defendant can file request to ensure that all future issues will be tried in county where defendant resides).]

3. Transfer of venue pursuant to G.S. 1-83.
   a. G.S. 1-83 provides in part that a court may change the place of trial when:
      i. The county in which the action is brought is not the proper one [G.S. 1-83(1) (venue is improper).] or
         (a) A party must request a change of venue based on improper venue before the time for answering expires [G.S. 1-83.] or before pleading if a further pleading is permitted. [G.S. 1A-1, Rule 12(b)(3); *Stokes v. Stokes,* 821 S.E.2d 161 (N.C.), *aff'g as modified* 811 S.E.2d 693 (N.C. Ct. App. 2018).]
      ii. The convenience of witnesses and the ends of justice would be promoted by the change. [G.S. 1-83(2) (venue is proper but may be changed for reasons listed in the statute).]
         (a) A party may file a motion to change venue for the convenience of the witnesses at any time before trial if the party can make the required showing. [*Stokes v. Stokes,* 821 S.E.2d 161 (N.C.), *aff'g as modified* 811 S.E.2d 693 (N.C. Ct. App. 2018).]
   b. Appeal of an order granting or denying a motion for change of venue pursuant to G.S. 1-83.
      i. An order granting or denying a motion to change venue based on improper venue pursuant to G.S. 1-83(1) affects a substantial right and is immediately appealable. [*Stokes v. Stokes,* 821 S.E.2d 161 (N.C.), *aff'g as modified* 811 S.E.2d 693 (N.C. Ct. App. 2018).]
      ii. An order granting or denying a discretionary transfer of venue based on convenience of witnesses pursuant to G.S. 1-83(2) does not affect a substantial right and is not subject to immediate appeal. [*Stokes v. Stokes,* 821 S.E.2d 161 (N.C.), *aff'g as modified* 811 S.E.2d 693 (N.C. Ct. App. 2018).]
4. Improper venue is subject to attack under G.S. 1A-1, Rule 12(b)(3). [*Little v. Little*, 12 N.C. App. 353, 183 S.E.2d 278 (1971) (stating the general rule that, in the absence of waiver or consent of the parties, express or implied, when a motion for change of venue as a matter of right has been properly made in apt time, the court is in error thereafter to enter any order affecting the rights of the parties, save the order of removal; trial court erred in ordering alimony pendent lite and attorney fees while Rule 12(b)(3) motion to change venue was pending).]
5. Venue provisions are not jurisdictional. Objection to venue is waived if not raised in writing in a timely manner. [*See Denson v. Denson*, 255 N.C. 703, 122 S.E.2d 507 (1961); *Smith v. Smith*, 56 N.C. App. 812, 290 S.E.2d 390 (1982) (citing *Denson*) (both cases considering venue under G.S. 50-3 in context of divorce action).]
6. Court obtaining jurisdiction is proper court for subsequent actions unless change of venue allowed or objection to venue is waived.
   a. Venue for modification of alimony order entered in Cumberland County was in that county and not Mecklenburg County, where modification action was brought. [*Lessard*

v. Lessard, 68 N.C. App. 760, 316 S.E.2d 96 (1984) (citing *Tate v. Tate*, 9 N.C. App. 681, 177 S.E.2d 455 (1970)); *Tate* (court first obtaining jurisdiction is the only proper court to hear an action for modification of a custody and child support order).]

b. The court of original venue may, in its discretion, grant a motion to change venue to a more appropriate county. [*Broyhill v. Broyhill*, 81 N.C. App. 147, 343 S.E.2d 605 (1986) (citing *Tate v. Tate*, 9 N.C. App. 681, 177 S.E.2d 455 (1970)) (court first obtaining jurisdiction properly transferred venue of action to modify child support).]

D. Application of Foreign Law That Results in a Violation of Constitutional Rights Prohibited

1. The application of foreign law in cases under G.S. Chapters 50 (Divorce and Alimony) and 50A (Uniform Child Custody Jurisdiction and Enforcement Act) is prohibited when it would violate a fundamental right of a person under the federal or state constitution. A motion to transfer a proceeding to a foreign venue must be denied when doing so would have the same effect. [See G.S. 1-87.14, 1-87.17, and other provisions in Article 7A in G.S. Chapter 1, *added by* S.L. 2013-416, effective Sept. 1, 2013, and applicable to proceedings, agreements, and contracts entered into on or after that date.]

II. Postseparation Support

A. Definition

1. Postseparation support means spousal support to be paid until the earlier of any of the following:
   a. The date specified in the order for postseparation support;
   b. The entry of an order awarding or denying alimony;
   c. The dismissal of the alimony claim;
   d. The entry of a judgment of absolute divorce if no claim of alimony is pending at the time of entry of the judgment of absolute divorce; or
   e. Termination of postseparation support as provided in G.S. 50-16.9(b).
   [G.S. 50-16.1A(4), *amended by* S.L. 2005-177, § 1, effective Oct. 1, 2005, and applicable to all postseparation support orders issued on or after that date; prior to that, spousal support was to be paid until the earlier of the date specified in the order of postseparation support or an order awarding or denying alimony.]
2. Postseparation support is "primarily designed to function as a means of securing temporary support for a dependent spouse in an expedited manner." [*Wells v. Wells*, 132 N.C. App. 401, 410, 512 S.E.2d 468, 474 (quoting Sally B. Sharp, *Step By Step: The Development of the Distributive Consequences of Divorce in North Carolina*, 76 N.C. L. Rev. 2017, 2090 (Sept. 1998)), *review denied*, 350 N.C. 599, 537 S.E.2d 495 (1999).]
3. For actions filed before Oct. 1, 1995, temporary alimony is called alimony pendente lite. G.S. 50-16.1 (*repealed by* S.L. 1995-319, § 1) defined alimony pendente lite as "alimony ordered to be paid pending the final judgment of divorce in an action for divorce, whether absolute or from bed and board, or in an action for annulment, or on the merits in an action for alimony without divorce."

B. Procedure for Postseparation Support (PSS)

1. Postseparation support may be ordered in an action for divorce, whether absolute or from bed and board, for annulment, or for alimony without divorce. [G.S. 50-16.1A(4).]
2. In an action brought pursuant to G.S. Chapter 50, either party may move for postseparation support. [G.S. 50-16.2A(a).]
3. A party requesting postseparation support shall set forth the factual basis for the relief requested in a verified pleading, verified motion, or affidavit. [G.S. 50-16.2A(a).]
4. The court may base its award of postseparation support on a verified pleading, affidavit, or other competent evidence. [G.S. 50-16.8; *Squires v. Squires*, 178 N.C. App. 251, 631 S.E.2d 156 (2006) (citing *Wells v. Wells*, 132 N.C. App. 401, 512 S.E.2d 468 (1999)) (noting that because postseparation support involves a relatively brief examination of the parties' needs and assets, the court may base its award on a verified pleading, affidavit, or other competent evidence).]
5. G.S. 50-16.8, setting forth the procedure for postseparation support, contains no specific requirement that the supporting spouse receive at least five days' notice of a hearing, as did the statute dealing with alimony pendente lite. However, the North Carolina Rules of Civil Procedure require that notice of hearing for all motions be served no later than five days before the time specified for the hearing. [G.S. 1A-1, Rule 6(d).]
6. The court shall set forth the reasons for its award or denial of postseparation support, and if making an award, the reasons for its amount, duration, and manner of payment. [G.S. 50-16.8; *Nicks v. Nicks*, 241 N.C. App. 487, 774 S.E.2d 365, 380 (2015) (trial court is to explain in "adequate factual findings" its reasons for granting or denying postseparation support (PSS); trial court erred when it dismissed at the alimony trial plaintiff's PSS claim without explaining its reasoning).] Regarding required findings and conclusions in orders for PSS and alimony, see Section III.G, below.
7. Unlike the law before 1995, present statutes do not authorize a court to order repayment of postseparation support if a claim for alimony is denied. S.L. 1995-319, § 1 repealed G.S. 50-16.11, which allowed a court to require a spouse to repay amounts received as alimony pendente lite prior to the denial of an award of permanent alimony if permanent alimony was denied because no grounds for granting alimony were found to exist. [*See Alvarez v. Alvarez*, 134 N.C. App. 321, 517 S.E.2d 420 (1999).]
8. In an action for alimony or postseparation support, if either or both of the parties have sought and obtained marital counseling from persons listed in the statute, the person or persons rendering counseling are not competent to testify in the action concerning information acquired while rendering the counseling. [G.S. 8-53.6.] For other privileges, see Sections III.A.4.b.vi, vii, and viii, below.
9. There is probably no right to a jury trial in an action for postseparation support. [*See Wells v. Wells*, 132 N.C. App. 401, 413, 512 S.E.2d 468, 475 (noting that language in G.S. 50-16.2A(d) "mandat[es] resolution of the factual circumstance of marital misconduct by the trial court at [postseparation support] hearings," while G.S. 50-16.3A(d) allows a jury trial on the issue of marital misconduct for alimony determination), *review denied*, 350 N.C. 599, 537 S.E.2d 495 (1999); *Rowe v. Rowe*, 131 N.C. App. 409, 507 S.E.2d 317 (1998) (a PSS order is a temporary measure; appeal from an order granting postseparation support is interlocutory and not generally subject to immediate appeal); 2 Lee's North

Carolina Family Law § 8.43 (5th ed. 1999) (stating that a claim for PSS is tried to the trial court without a jury).]

C. Entitlement to Postseparation Support (PSS)

1. A dependent spouse is entitled to an award of postseparation support if, after considering the factors set out in Section II.C.4, below, the court determines that the resources of the dependent spouse are not adequate to meet her reasonable needs and the supporting spouse has the ability to pay. [G.S. 50-16.2A(c).]
   a. The definitions of dependent spouse and supporting spouse are the same as in the context of alimony. See Sections III.A.2 and III.A.3, below.
   b. The legal principles that govern alimony awards "are equally applicable to awards of post-separation support." [*Collins v. Collins*, 243 N.C. App. 696, 701, 778 S.E.2d 854, 857 (2015) (quoting *Crocker v. Crocker*, 190 N.C. App. 165, 168, 660 S.E.2d 212, 214 (2008)).]
2. The court shall consider marital misconduct by a dependent spouse occurring before or on the date of separation in deciding whether to award postseparation support and in what amount, provided that if the court considers the marital misconduct of the dependent spouse, it must also consider any marital misconduct by the supporting spouse. [G.S. 50-16.2A(d). *See Wells v. Wells*, 132 N.C. App. 401, 512 S.E.2d 468 (noting that G.S. 50-16.2A(d) requires that the trial court resolve the factual circumstance of marital misconduct at PSS hearings, while G.S. 50-16.3A(d) allows a jury trial on the issue of marital misconduct for alimony determination), *review denied*, 350 N.C. 599, 537 S.E.2d 495 (1999).] A finding that the dependent spouse committed marital misconduct may be sufficient by itself to deny postseparation support. [*Sorey v. Sorey*, 233 N.C. App. 682, 757 S.E.2d 518 (2014) (citing *Evans v. Evans*, 169 N.C. App. 358, 610 S.E.2d 264 (2005)).]
3. While the court is required to consider only preseparation marital misconduct in deciding whether and in what amount to award postseparation support, the court may consider incidents of postseparation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred before the date of separation. [G.S. 50-16.2A(e).]
4. The court shall base an award of postseparation support on the financial needs of the parties, considering:
   a. The parties' accustomed standard of living;
      i. The portion of the trial court's order awarding postseparation support (PSS) sufficiently addressed the parties' accustomed standard of living when it included findings (1) as to the supporting spouse's gross yearly income for three of the four years before the PSS award was made and his current monthly needs and (2) as to the dependent spouse's net monthly income for the year before the PSS award was made and her current monthly needs "to live in the lifestyle to which she had become accustomed leading up to the date of separation." [*Collins v. Collins*, 243 N.C. App. 696, 702, 778 S.E.2d 854, 858 (2015) (standard of living was sufficiently addressed without specific findings regarding the parties' marital standard of living, such as their necessary and discretionary expenditures, type of home they lived in, or the types of activities or vacation they shared).]

b. The present employment income and other recurring earnings of each party from any source;

i. PSS order upheld when husband's income from employment had decreased to zero upon retirement but his tax returns for a three-year period showed substantial recurring earnings from interest, dividends, capital gains, and partnerships. [*Squires v. Squires*, 178 N.C. App. 251, 631 S.E.2d 156 (2006) (the court averaged the recurring earnings from tax returns to determine husband's annual and monthly income).]

ii. Trial court did not err in concluding that a lump sum payment from corporate employer to wife was not income to wife when payment was made in consideration of her early retirement from an employer in the process of merger. [*Ross v. Ross*, 193 N.C. App. 247, 666 S.E.2d 889 (2008) (**unpublished**) (citing *Glass v. Glass*, 131 N.C. App. 784, 509 S.E.2d 236 (1998)) (noting in footnote 1 that when a lump sum payment is not based on the length of a spouse's employment but is made, rather, in exchange for the spouse's waiver of certain rights, the payment is not included in the spouse's income for purposes of determining the amount and duration of an alimony award), *review dismissed*, 363 N.C. 656, 685 S.E.2d 105 (2009).]

c. The income-earning abilities of the parties;

i. See Section III.D.9.b, below, for a discussion of earning capacity.

d. The separate and marital debt service obligations of each party;

e. The expenses reasonably necessary to support each of the parties; and

f. Each party's respective legal obligations to support other persons. [G.S. 50-16.2A(b).]

D. Defenses

1. Waiver by contract generally.

a. Postseparation support, alimony, and attorney fees may be barred by an express provision of a valid separation agreement, premarital agreement, or marital contract made pursuant to G.S. 52-10(a1) so long as the agreement is performed. [G.S. 50-16.6(b), *amended by* S.L. 2013-140, § 2, effective June 19, 2013 (amendment added reference to G.S. 52-10(a1)); *Muchmore v. Trask*, 192 N.C. App. 635, 666 S.E.2d 667 (2008) (waiver of spousal support in a prenuptial agreement was valid and enforceable in North Carolina pursuant to California law), *review improvidently allowed*, 363 N.C. 742, 686 S.E.2d 151 (2009).]

2. Waiver by contract pursuant to G.S. 52-10(a1).

a. For contracts entered into on or after June 19, 2013, spouses who are separated but contemplating reconciliation may provide for support rights or for the waiver of support rights that will apply upon the occasion of any future separation. [G.S. 52-10(a1).] This statute does not authorize agreements regarding support rights and obligations while the parties live together as husband and wife. [*See In re Estate of Tucci*, 94 N.C. App. 428, 380 S.E.2d 782 (1989) (recognizing that the state supreme court in *Motley v. Motley*, 255 N.C. 190, 120 S.E.2d 422 (1961), established as public policy that married parties may not shirk their spousal duties of support and alimony

and yet live together as a married couple), *aff'd per curiam*, 326 N.C. 359, 388 S.E.2d 768 (1990).]

b. A contract between a husband and wife made, with or without a valuable consideration, during a period of separation to waive, release, or establish rights and obligations to postseparation support, alimony, or spousal support is valid and not inconsistent with public policy. [G.S. 52-10(a1), *added by* S.L. 2013-140, § 1, effective June 19, 2013.]

c. A provision waiving, releasing, or establishing rights and obligations to postseparation support, alimony, or spousal support shall remain valid following a period of reconciliation and subsequent separation if the contract is in writing, the provision waiving the rights or obligations is clearly stated in the contract, and the contract was acknowledged by both parties before a certifying officer. [G.S. 52-10(a1)(1)–(3), *added by* S.L. 2013-140, § 1, effective June 19, 2013.]

d. A release made pursuant to G.S. 52-10(a1) may be pleaded in bar of any action or proceeding for the recovery of the rights released. [G.S. 52-10(a1), *added by* S.L. 2013-140, § 1, effective June 19, 2013.]

e. See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

3. Marital misconduct.

a. Postseparation support is not barred automatically by illicit sexual behavior by the dependent spouse as was alimony pendente lite under pre-1995 law and as is alimony under G.S. 50-16.3A(a).

b. The judge shall consider any marital misconduct by the dependent spouse occurring prior to or on the date of separation in deciding whether to award postseparation support and in deciding the amount of postseparation support. [G.S. 50-16.2A(d). See Section III.A.4, below, for definition of "marital misconduct"; *cf. Sorey v. Sorey*, 233 N.C. App. 682, 757 S.E.2d 518 (2014) (citing *Evans v. Evans*, 169 N.C. App. 358, 610 S.E.2d 264 (2005)) (a finding that the dependent spouse committed marital misconduct may be sufficient by itself to deny postseparation support).]

c. When the judge considers acts of misconduct by the dependent spouse, the judge shall also consider any marital misconduct by the supporting spouse in deciding whether to award postseparation support and in deciding the amount of postseparation support. [G.S. 50-16.2A(d).]

d. The judge may consider incidents of marital misconduct occurring after the date of separation as corroborating evidence supporting other evidence that marital misconduct occurred before the date of separation. [G.S. 50-16.2A(e).]

E. Judgment or Order (PSS)

1. If postseparation support is ordered at the time a judgment of absolute divorce is entered, a claim of alimony must be pending when the divorce judgment is entered. [G.S. 50-16.1A(4), *amended by* S.L. 2005-177, § 1, effective Oct. 1, 2005, and applicable to all PSS orders issued on or after that date.]

2. For postseparation support, the trial court must make conclusions of law that:

a. The receiving spouse is a dependent spouse. [See G.S. 50-16.2A(c) and Section III.A.2, below.]

b. The payor spouse is the supporting spouse. [See G.S. 50-16.2A(c) and Section III.A.3, below.]

c. Based on consideration of the factors set out in G.S. 50-16.2A(b), the resources of the dependent spouse are not adequate to meet her reasonable needs and the supporting spouse has the ability to pay. [G.S. 50-16.2A(c).]

3. For postseparation support, the trial court must make findings of fact in support of all conclusions of law.

a. For findings sufficient to support a conclusion of dependency in the alimony context, see Section III.G.5.b, below. For findings to support a conclusion that the payor spouse is the supporting spouse in the alimony context, see Section III.G.5.c, below.

b. G.S. 1A-1, Rule 52(a) requires in all nonjury trials that the trial court find specially "those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached." [*Crocker v. Crocker*, 190 N.C. App. 165, 168, 660 S.E.2d 212, 214 (2008) (quoting *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982)) (noting that the general principles articulated in *Quick* in the context of an alimony award are generally applicable to awards of postseparation support).]

c. The court must set forth the reasons for its award or denial of postseparation support, and if making an award, the reasons for its amount, duration, and manner of payment. [G.S. 50-16.8.]

d. The amount and duration of postseparation support is based on consideration of factors set out in Section II.C.4, above. [G.S. 50-16.2A(b).] Findings must be made on each factor about which evidence is presented.

e. If evidence is presented about the marital misconduct of the dependent spouse, the court must consider that misconduct in deciding whether to award postseparation support and in deciding the amount of postseparation support. [G.S. 50-16.2A(d).] The court should indicate this consideration in its findings of fact.

f. If the court considers evidence of marital misconduct by the dependent spouse, it must also consider any marital misconduct by the supporting spouse in deciding whether to award postseparation support and in deciding the amount of postseparation support. [G.S. 50-16.2A(d).] The court should indicate this consideration in the findings of fact.

g. Findings in PSS order were insufficient because finding about husband's need for support merely recited his testimony and did not show that the court considered other statutory factors for postseparation support. [*Crocker v. Crocker*, 190 N.C. App. 165, 660 S.E.2d 212 (2008) (trial court also failed to make findings about the standard of living of the parties as a family unit).]

h. One unpublished opinion from the court of appeals has held that findings in a PSS order were sufficient even though the order lacked a finding as to the parties' accustomed standard of living. [*Ross v. Ross*, 193 N.C. App. 247, 666 S.E.2d 889 (2008) (**unpublished**) (not paginated on Westlaw) (quoting *Wells v. Wells*, 132 N.C. App. 401, 411, 512 S.E.2d 468, 474 (1999)) (court noting the "relative brevity" of the factors guiding postseparation support awards when compared with the extensive list of

sixteen factors governing alimony awards and that the process for a PSS award "contemplates a rather truncated examination of the parties' needs and assets"), *review dismissed*, 363 N.C. 656, 685 S.E.2d 105 (2009).]

i. A finding as to each party's income without findings as to expenses does not support a conclusion that a party is not a supporting spouse. [*Pawlus v. Wise-Pawlus*, 195 N.C. App. 325, 672 S.E.2d 782 (2009) (**unpublished**) (while a surplus of income over expenses is sufficient in and of itself to warrant a supporting spouse classification, a finding as to income alone is not sufficient).]

j. PSS order upheld when the court made no specific finding about husband's employment income or other recurring earnings but instead incorporated by reference into a finding the income figures from husband's tax returns for a three-year period. [*Squires v. Squires*, 178 N.C. App. 251, 631 S.E.2d 156 (2006).]

k. A court may incorporate by reference into the PSS order the party's financial standing affidavit as support for a finding on the party's expenses. [*Squires v. Squires*, 178 N.C. App. 251, 631 S.E.2d 156 (2006).]

l. A finding of bad faith must be supported by the evidence. [*See Childers v. Childers*, 167 N.C. App. 370, 605 S.E.2d 266 (2004) (**unpublished**) (defendant's motion to terminate postseparation support was denied based on finding that defendant appeared to be intentionally depressing his income to avoid paying postseparation support; this finding was supported by evidence that defendant had not applied for any job between the date he was terminated, November 2002, and the date of the hearing, March 2003, and that his only effort to receive unemployment benefits after severance pay ended was an Internet search to determine the amount he would be entitled to if he applied).]

4. Findings and conclusions in PSS order not binding at alimony hearing.

a. A trial court's findings and conclusions in an order for postseparation support are not binding at the alimony hearing. [*Langdon v. Langdon*, 183 N.C. App. 471, 644 S.E.2d 600 (2007) (citing *Wells v. Wells*, 132 N.C. App. 401, 512 S.E.2d 468 (1999)); *Megremis v. Megremis*, 179 N.C. App. 174, 633 S.E.2d 117 (2006) (citing *Wells*) (a trial court's rulings regarding postseparation support are neither conclusive nor binding in the alimony context); *Perkins v. Perkins*, 85 N.C. App. 660, 355 S.E.2d 848 (under prior law, findings in alimony pendente lite order irrelevant in final hearing), *review denied*, 320 N.C. 633, 360 S.E.2d 92 (1987), *superseded on other grounds by statute as stated in Wells*.]

b. The amount of alimony pendente lite to which the parties consent does not bind the trial court as to the amount of permanent alimony it must eventually award. [*Bookholt v. Bookholt*, 136 N.C. App. 247, 523 S.E.2d 729 (1999), *superseded on other grounds by statute as stated in Williamson v. Williamson*, 142 N.C. App. 702, 543 S.E.2d 897 (2001).]

c. PSS orders are temporary determinations and do not constitute final judgments. Therefore, factual findings made during a PSS hearing are not binding in subsequent proceedings. [*Wells v. Wells*, 132 N.C. App. 401, 512 S.E.2d 468 (wife was not collaterally estopped from asserting in hearing for permanent alimony that a separation agreement was invalid, even though PSS judge had ruled that the separation

agreement was a valid bar to postseparation support), *review denied*, 350 N.C. 599, 537 S.E.2d 495 (1999).]

d. For a case considering a general incorporation of findings from a PSS order, and other court documents, into an alimony order, see *Crocker v. Crocker*, 190 N.C. App. 165, 660 S.E.2d 212 (2008), discussed at Section III.G.2.d, below.

F. Duration of an Order for Postseparation Support (PSS)

1. Beginning of payments.
   a. A judge has discretion to begin payments at time PSS order is entered or at some other time, as long as order explains duration.
   b. Award of alimony pendente lite in the form of a lump sum payment covering the period from the date of the parties' separation until the date of the award was upheld. [*Gardner v. Gardner*, 40 N.C. App. 334, 252 S.E.2d 867, *review denied*, 297 N.C. 299, 254 S.E.2d 917 (1979).]
   c. The court may order postseparation support effective from the date of the separation if the facts warrant. [2 Lee's North Carolina Family Law § 8.30 (5th ed. 1999) (citing *Gardner v. Gardner*, 40 N.C. App. 334, 252 S.E.2d 867, *review denied*, 297 N.C. 299, 254 S.E.2d 917 (1979), and other cases).]
2. The statutory definition of postseparation support provides for four possible termination dates, whichever first occurs:
   a. The date specified in the order granting postseparation support. [G.S. 50-16.1A(4)a.]
   b. The date an order allowing or denying alimony is entered. [G.S. 50-16.1A(4)b. *See Langdon v. Langdon*, 183 N.C. App. 471, 644 S.E.2d 600 (2007) (an initial order for alimony terminates a preexisting order for postseparation support).]
      i. The statutory language that postseparation support (PSS) terminates upon entry of an order allowing or denying alimony "does not necessarily mean that an order awarding alimony cannot also provide for the payment of an already-pending claim for postseparation support when warranted." [*Nicks v. Nicks*, 241 N. C. App. 487, 508, 774 S.E.2d 365, 380 (2015) (a trial court has broad discretion to award PSS and to determine the date the award should take effect).]
      ii. Because a PSS order terminates upon entry of an alimony award, a trial court lacks jurisdiction to consider a contempt motion for failure to pay postseparation support while alimony order is on appeal. [*Harris v. Harris*, 173 N.C. App. 232, 617 S.E.2d 723 (2005) (**unpublished**).]
      iii. A PSS order terminated upon entry of an order for alimony does not continue in force while the alimony order is on appeal, even if the alimony order is vacated on appeal. [*Harris v. Harris*, 173 N.C. App. 232, 617 S.E.2d 723 (2005) (**unpublished**) (court of appeals vacated alimony order nineteen months after its entry; a supporting spouse cannot be subject to liability for both postseparation support and alimony during the pendency of an appeal and during remand).]
   c. The date an order is entered dismissing the alimony claim. [G.S. 50-16.1A(4)c. (applicable to all PSS orders issued on or after Oct. 1, 2005, pursuant to S.L. 2005-177, § 1).]

d. The date an order of absolute divorce is entered if no claim of alimony is pending on that date. [G.S. 50-16.1A(4)d. (applicable to all postseparation support orders issued on or after Oct. 1, 2005, pursuant to S.L. 2005-177, § 1).]

i. Before the 2005 amendments, postseparation support terminated either on the date specified in the order granting postseparation support or on the date of an order allowing or denying alimony, whichever first occurred. [*See* former G.S. 50-16.1A(4).]

ii. Cases decided under former G.S. 50-16.1A(4) held that a judgment of absolute divorce did not terminate an existing PSS order unless the support order so provided. [*Vittitoe v. Vittitoe*, 150 N.C. App. 400, 563 S.E.2d 281 (citing *Marsh v. Marsh*, 136 N.C. App. 663, 525 S.E.2d 476 (2000)) (obligation to pay postseparation support not terminated by entry of divorce judgment when PSS order provided that it would terminate upon the final determination of alimony and there was no order addressing alimony), *review denied*, 356 N.C. 314, 571 S.E.2d 218 (2002); *Marsh* (decided under former G.S. 50-16.1A(4), set out immediately above, in which the court of appeals held that postpostseparation support continued after divorce when the PSS order did not specify a termination date and there was no court order awarding or denying alimony).]

3. The statutory definition of postseparation support provides for termination upon the occurrence of any of the following events, as provided in G.S. 50-16.9(b): [G.S. 50-16.1A(4)e.]

a. Upon the death of either the supporting or the dependent spouse. [G.S. 50-16.9(b).]

i. But a vested postseparation support arrearage is not terminated by the dependent spouse's death. [*Badrock v. Pickard*, 185 N.C. App. 543, 648 S.E.2d 576 (**unpublished**) (fact that the trial court allowed defendant to make installment payments toward his arrearage did not alter the already vested nature of the arrearage), *review denied*, 362 N.C. 86, 655 S.E.2d 836 (2007).]

b. For court-ordered postseparation support, upon the remarriage or cohabitation of the dependent spouse. [G.S. 50-16.9(b).]

c. Upon the resumption of marital relations between parties who remain married to each other. [*See* G.S. 50-16.9(a); *Hester v. Hester*, 239 N.C. 97, 79 S.E.2d 248 (1953) (resumption of the marital relationship after an award of alimony pendente lite voids the award); *Baumann-Chacon v. Baumann*, 212 N.C. App. 137, 710 S.E.2d 431(2011) (citing *Hester* for this point).]

i. Reconciliation is to be determined in accordance with G.S. 52-10.2. [G.S. 50-16.9(a).]

ii. Isolated instances of sexual intercourse between the parties do not constitute resumption of marital relations. [G.S. 52-10.2.]

iii. **EXCEPTION:** For contracts entered into on or after June 19, 2013, spouses who are separated but contemplating reconciliation may provide for support rights or for the waiver of support rights that will apply upon the occasion of any future separation. [G.S. 52-10(a1), *added by* S.L. 2013-140, § 1, effective June 19, 2013.] This statute does not authorize agreements regarding support rights

and obligations while the parties live together as husband and wife. [*See In re Estate of Tucci*, 94 N.C. App. 428, 380 S.E.2d 782 (1989) (recognizing that the state supreme court in *Motley v. Motley*, 255 N.C. 190, 120 S.E.2d 422 (1961), established as public policy that married parties may not shirk their spousal duties of support and alimony and yet live together as a married couple), *aff'd per curiam*, 326 N.C. 359, 388 S.E.2d 768 (1990).] A provision in a contract between a husband and wife made, with or without a valuable consideration, during a period of separation waiving, releasing, or establishing rights and obligations to postseparation support, alimony, or spousal support shall remain valid following a period of reconciliation and subsequent separation if the contract is in writing, the provision waiving the rights or obligations is clearly stated in the contract, and the contract was acknowledged by both parties before a certifying officer. [G.S. 52-10(a1), *added by* S.L. 2013-140, § 1, effective June 19, 2013.]

iv. For reconciliation in the alimony context, see Section III.I.3.d, below.

v. See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1 for effect of reconciliation on obligations in a separation agreement.

G. Modification of an Order for Postseparation Support

1. An order for postseparation support, whether contested or entered by consent, may be modified or vacated at any time, upon a motion in the cause and a showing of changed circumstances by either party or anyone interested. [G.S. 50-16.9(a). *See Wolf v. Wolf*, 151 N.C. App. 523, 566 S.E.2d 516 (2002) (requiring a change in circumstances since entry of the order).]
2. The trial court did not err when it refused to modify a husband's postseparation support payments based on a substantial reduction in his income when it found that he had in bad faith disregarded his marital obligations. [*Wolf v. Wolf*, 151 N.C. App. 523, 566 S.E.2d 516 (2002) (noting that a substantial reduction in a supporting spouse's salary or income does not automatically entitle the supporting spouse to a reduction in support payments and finding that husband's unemployment was voluntary because his actions at work irritated and embarrassed his employer, resulting in an "entirely predictable" termination).]

H. Enforcement of an Order for Postseparation Support (PSS)

1. An order for postseparation support is enforceable by civil contempt, and its disobedience may be punished by criminal contempt. [G.S. 50-16.7(j).] Remedies set out in G.S. 50-16.7(k) also are available to enforce a PSS order. The enumeration of those remedies does not bar remedies otherwise available. [G.S. 50-16.7(l).]
2. Civil contempt.
   a. A party may be found in civil contempt for failure to comply with an order for postseparation support if:
      i. The order remains in force;
      ii. The purpose of the order may still be served by the supporting spouse's compliance with the order;
      iii. The supporting spouse's failure to comply with the order is willful; and

iv. The supporting spouse has the present ability to comply with the order (in whole or in part) or to take reasonable measures that would enable him to comply with the order (in whole or in part). [G.S. 5A-21(a); *Wolf v. Wolf*, 151 N.C. App. 523, 566 S.E.2d 516 (2002) (husband not in contempt for failure to pay postseparation support when trial court did not find that husband had the ability to pay or that his failure to pay was willful); *Thompson v. Thompson*, 223 N.C. App. 515, 519, 735 S.E.2d 214, 217 (2012) (citing *McMiller v. McMiller*, 77 N.C. App. 808, 336 S.E.2d 134 (1985)) (reversing contempt portion of an order when the trial court failed to make findings regarding subsections (1) and (2) of G.S. 5A-21(a); additionally, finding that "Defendant has had the ability and means to pay the Post Separation Support previously ordered, or at least a substantial portion of that amount" was insufficient because it spoke to past ability to pay and was not a finding about defendant's present ability to pay).]

b. The trial court did not err when it found husband in contempt of a PSS order that obligated him to pay certain percentages of future bonuses to his wife. [*Wolf v. Wolf*, 151 N.C. App. 523, 566 S.E.2d 516 (2002) (husband had prevented his wife from receiving part of his bonus by willfully relabeling the bonus a relocation expense).]

c. For more on contempt, see Section III.K.2, below. For other remedies, see Section III.K.5, below.

3. For enforcement of postseparation support provisions contained in a spousal agreement, see *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

I. Appeal of an Order for Postseparation Support

1. Right to take an immediate appeal.

a. Appeal of an order granting postseparation support (PSS) is interlocutory and does not affect a substantial right. [*Thompson v. Thompson*, 223 N.C. App. 515, 735 S.E.2d 214 (2012) (citing *Rowe v. Rowe*, 131 N.C. App. 409, 507 S.E.2d 317 (1998)) (PSS order remains interlocutory even after defendant found in contempt of the order).] The PSS order is reviewable once the trial court has entered an order awarding or denying alimony. [*Thompson v. Thompson*, 223 N.C. App. 515, 735 S.E.2d 214 (2012) (citing *Crocker v. Crocker*, 190 N.C. App. 165, 660 S.E.2d 212 (2008)).]

i. G.S. 50-19.1, *added by* S.L. 2013-411, § 2, effective Aug. 23, 2013, providing for immediate appeal of certain actions when other claims are pending in the same action, does not include postseparation support in the list of actions. Thus, the nonappealability of an order granting postseparation support is not changed by G.S. 50-19.1.

b. Appeal of an order denying or terminating temporary alimony has been found to affect a substantial right allowing immediate appeal. [*Sorey v. Sorey*, 233 N.C. App. 682, 757 S.E.2d 518 (2014) (citing *Mayer v. Mayer*, 66 N.C. App. 522, 311 S.E.2d 659 (1984)) (order denying motion for postseparation support affected a substantial right, so appeal was proper even though interlocutory); *Brown v. Brown*, 85 N.C. App. 602, 355 S.E.2d 525 (husband obtained order terminating his obligation in a consent order for alimony pendent lite, from which immediate appeal was allowed), *cert. denied*, 320 N.C. 511, 358 S.E.2d 516 (1987), *superseded on other grounds by statute as stated in Wells v. Wells*, 132 N.C. App. 401, 512 S.E.2d 468 (1999).]

2. Standard of review.
    a. The standard of review of an order concerning postseparation support is "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." [*Sorey v. Sorey*, 233 N.C. App. 682, 684, 757 S.E.2d 518, 519–20 (2014) (quoting *Oakley v. Oakley*, 165 N.C. App. 859, 861, 599 S.E.2d 925, 927 (2004)).]
3. Effect of an appeal on jurisdiction.
    a. Appeal of an alimony order probably divests the trial court of jurisdiction to enforce through contempt any arrearages accrued under a postseparation support (PSS) order before entry of the alimony order. [*See Harris v. Harris*, 173 N.C. App. 232, 617 S.E.2d 723 (2005) (**unpublished**) (wife attempted to enforce arrearages accrued pursuant to a PSS order by civil contempt after an alimony order had been entered and appealed; the appellate court held that husband's appeal of the alimony order divested the trial court of jurisdiction to consider wife's motion, filed during appeal of the alimony order, for civil contempt for husband's failure to pay postseparation support; alimony award "affected" postseparation support as that term is used in G.S. 1-294; also holding that PSS order did not continue in force during appeal of alimony award).]
4. For appeal of an alimony order, see Section VI, below.

III. Alimony

A. Definitions

1. Alimony. [G.S. 50-16.1A(1).]
    a. "Alimony" means an order for payment for the support and maintenance of a spouse or a former spouse, periodically or in a lump sum, for a specified or for an indefinite term, ordered in an action for divorce, whether absolute or from bed and board, or an action for alimony without divorce. [G.S. 50-16.1A(1).]
        i. Alimony means payment for support and maintenance of a spouse and does not mean payment for the support and maintenance of a spouse's business ventures. [*Beaman v. Beaman*, 77 N.C. App. 717, 336 S.E.2d 129 (1985).]
        ii. A court may order a supporting spouse to pay for health insurance for a dependent spouse as a form of "support and maintenance" if proper findings are made. [*Lucas v. Lucas*, 209 N.C. App. 492, 706 S.E.2d 270 (2011) (payments for health insurance are authorized under G.S. 50-16.1A(1) and 50-16.3A(a)).]
    b. North Carolina alimony law was rewritten by S.L. 1995-319, effective Oct. 1, 1995. That law does not apply to actions pending on Oct. 1, 1995, nor does it apply to motions to modify judgments in effect on that date.
    c. The 1995 statutory amendments created a new cause of action for alimony, a law that is fundamentally different from what existed before. [*Brannock v. Brannock*, 135 N.C. App. 635, 523 S.E.2d 110 (1999), *review denied, appeal dismissed*, 351 N.C. 351,

543 S.E.2d 123 (2000).] The new law replaced a "fault-based approach" with a "need-based approach" to alimony. [*Alvarez v. Alvarez*, 134 N.C. App. 321, 517 S.E.2d 420 (1999).]

2. Dependent spouse. [G.S. 50-16.1A(2).]
   a. "Dependent spouse" means a spouse, whether husband or wife, who is actually substantially dependent upon the other for his or her maintenance and support or is substantially in need of maintenance and support from the other. [G.S. 50-16.1A(2).] **NOTE:** The 1995 amendments to the alimony statutes did not amend the definition of dependency.
   b. The issue of dependency is for the trial judge. [*Long v. Long*, 71 N.C. App. 405, 322 S.E.2d 427 (1984), and *Stickel v. Stickel*, 58 N.C. App. 645, 294 S.E.2d 321 (1982) (both citing *Vandiver v. Vandiver*, 50 N.C. App. 319, 274 S.E.2d 243 (1981)).]
   c. Because the determination of dependency requires application of legal principles, it is a conclusion of law. [*Hunt v. Hunt*, 112 N.C. App. 722, 436 S.E.2d 856 (1993).]
   d. The burden of proving dependency is on the spouse asserting the claim for alimony. [*Bodie v. Bodie*, 221 N.C. App. 29, 727 S.E.2d 11 (2012) (citing *Williamson v. Williamson*, 217 N.C. App. 388, 719 S.E.2d 625 (2011)).]
   e. Even if a spouse is dependent, she is not entitled to an award of alimony if the other spouse does not have the ability to pay. [*Bodie v. Bodie*, 221 N.C. App. 29, 727 S.E.2d 11 (2012) (even if wife dependent, no award of alimony when husband in bankruptcy and did not have ability to pay any amount of alimony at time of hearing).]
   f. Dependency determination is not always undertaken by the court when alimony is part of a private agreement between the parties and is then incorporated into a court order such as a divorce decree. [*Cunningham v. Cunningham*, 345 N.C. 430, 480 S.E.2d 403 (1997).]
   g. A finding of adultery renders a dependency determination moot. [*Slight v. Slight*, 200 N.C. App. 321, 683 S.E.2d 467 (2009) (**unpublished**) (trial court's finding of wife's infidelity, which was supported by evidence, was a bar to her receiving alimony; whether she was a dependent spouse was moot).]
   h. To determine dependency, the court must determine the income and expenses of the parties, their standard of living, as well as the present earnings, earning capacity and any other "condition" of the parties at the time of hearing, including health and child custody. [*Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980); *Carpenter v. Carpenter*, 245 N.C. App. 1, 781 S.E.2d 828 (2016) (in calculating income for the dependency determination for alimony purposes, amounts received as postseparation support (PSS) are not to be included, as PSS is not permanent income and income may not be imputed to a dependent spouse without a finding of bad faith); *Fink v. Fink*, 120 N.C. App. 412, 462 S.E.2d 844 (1995) (childcare expenses of the custodial parents is one of the factors contemplated by *Williams* and should be considered when determining dependency), *review denied*, 342 N.C. 654, 467 S.E.2d 710 (1996).] **NOTE:** G.S. 50-16.3A(b)(7), discussed in Section III.D.9.g, below, requires the court to consider as a relevant factor in determining the amount and duration of an alimony award the extent to which the expenses of a spouse will be affected by serving as the custodian of a minor child. [*See Ritchie v. Ritchie*, 228 N.C. App. 282,

748 S.E.2d 774 (2013) (**unpublished**) (citing *Fink*) (a trial court has discretion when determining alimony to consider the caregiving obligations of the children's primary caregiver).]

i. In determining dependency, a trial court is to view the reasonableness of a spouse's expenses in light of the parties' accustomed standard of living during the marriage and is to identify those expenses that are reasonable. [*Carpenter v. Carpenter*, 245 N.C. App. 1, 781 S.E.2d 828 (2016) (citing *Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980)) (trial court erred in finding that wife's expenses were "excessive" and "lavish" without finding which of the claimed expenses, if any, were reasonable in light of her accustomed standard of living).]

j. In determining dependency, it was error for a court to "speculate" about the results of the parties' pending equitable distribution (ED) when there was no evidence presented as to the likely outcome. [*See Rhew v. Rhew*, 138 N.C. App. 467, 469, 531 S.E.2d 471, 473 (2000) (trial court finding that after ED, defendant "will have the ability to make a substantial down payment toward the purchase of a residence and should be able to finance the unpaid amount with a relatively small mortgage" was not supported by the evidence).] Similarly, a person's status as a dependent spouse is not determined based upon events set to occur in the future, but is established according to the person's accustomed standard of living prior to the parties' separation. [*Helms v. Helms*, 191 N.C. App. 19, 661 S.E.2d 906 (citing *Vadala v. Vadala*, 145 N.C. App. 478, 550 S.E.2d 536 (2001)) (fact that wife was to receive 41.5 percent of defendant's retirement upon the sale of the marital residence was not relevant to the court's determination of her status as a dependent spouse; status as a dependent spouse is not determined based on events to occur in the future), *review denied*, 362 N.C. 681, 670 S.E.2d 233 (2008).]

k. "Actually substantially dependent."

   i. "Actually substantially dependent" means that the spouse seeking alimony must be actually dependent on the other to maintain the standard of living to which that spouse became accustomed during the last several years before separation; the spouse must be actually unable to maintain the accustomed standard of living from his own means. [*Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980); *Bodie v. Bodie*, 221 N.C. App. 29, 727 S.E.2d 11 (2012) ("actually substantially dependent" means one spouse would be unable to maintain her preseparation accustomed standard of living without financial contribution from the other spouse); *Rhew v. Rhew*, 138 N.C. App. 467, 531 S.E.2d 471 (2000) (citing *Talent v. Talent*, 76 N.C. App. 545, 334 S.E.2d 256 (1985)); *Hunt v. Hunt*, 112 N.C. App. 722, 436 S.E.2d 856 (1993) (to be "actually substantially dependent," the party seeking alimony must be entirely without the means to maintain the preseparation accustomed standard of living); *Lamb v. Lamb*, 103 N.C. App. 541, 406 S.E.2d 622 (1991) (citing *Williams*).]

   ii. "Actually substantially dependent" means that the spouse is currently unable to meet his own maintenance and support needs. [*Barrett v. Barrett*, 140 N.C. App. 369, 536 S.E.2d 642 (2000) (citing *Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980)).]

iii. That party seeking alimony is able to meet her current expenses does not necessarily preclude a determination that the party is a dependent spouse entitled to receive alimony if the evidence shows that (1) the party is unable to maintain the standard of living to which the party was accustomed during the marriage and (2) the other spouse has the means to pay a sufficient amount of alimony to enable party seeking alimony to maintain previous standard of living. [*Bodie v. Bodie*, 221 N.C. App. 29, 727 S.E.2d 11 (2012).]

l. "Substantially in need of maintenance and support."

i. If the trial court determines that one spouse is not actually dependent upon the other, the court must consider the second test set out in G.S. 50-16.1A(2), whether one spouse is "substantially in need of maintenance and support" from the other. [*Rhew v. Rhew*, 138 N.C. App. 467, 531 S.E.2d 471 (2000).]

ii. "Maintenance and support" means more than mere economic survival; it means the economic standard established by the spouses for the family during the marriage. [*Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980).]

iii. "Substantially in need of maintenance and support" means something less than "actually substantially dependent"; a spouse is substantially in need of support if he is unable to maintain his accustomed standard of living without financial contribution from the other. [*Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980); *Lamb v. Lamb*, 103 N.C. App. 541, 406 S.E.2d 622 (1991) (citing *Phillips v. Phillips*, 83 N.C. App. 228, 349 S.E.2d 397 (1986)).]

iv. "Substantially in need of maintenance" means that a spouse will be unable to meet her needs in the future, even if she is currently meeting those needs. [*Barrett v. Barrett*, 140 N.C. App. 369, 536 S.E.2d 642 (2000) (citing *Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980)); *Quesinberry v. Quesinberry*, 210 N.C. App. 578, 709 S.E.2d 367 (2011) (citing *Barrett*); *Taylor v. Taylor*, 219 N.C. App. 402, 722 S.E.2d 211 (2012) (**unpublished**) (citing 2 Lee's North Carolina Family Law § 9.5 (5th ed. 1999)) (premise of substantially in need is that petitioning spouse, who may be meeting reasonable needs, will be unable to continue to do so).]

v. To determine when a spouse is "substantially in need" the trial court must:

(a) Determine the standard of living, socially and economically, to which the parties as a family unit had become accustomed during the several years prior to their separation.

(b) Determine the present earnings and prospective earning capacity and any other "condition" (such as health and child custody) of each spouse at the time of hearing.

(c) Determine whether the spouse seeking alimony has a demonstrated need for financial contribution from the other spouse in order to maintain the standard of living of the spouse seeking alimony in the manner to which that spouse became accustomed during the last several years prior to separation, considering what reasonable expenses the party seeking alimony has, bearing in mind the family unit's accustomed standard of living.

(d) Consider the financial worth or "estate" of both spouses. [*Williams v. Williams*, 299 N.C. 174, 183, 261 S.E.2d 849, 856 (1980); *Phillips v. Phillips*, 185 N.C. App. 238, 647 S.E.2d 481 (2007) (citing *Williams*), *aff'd per curiam*, 362 N.C. 171, 655 S.E.2d 350 (2008).] For a list of the findings set out by *Williams* as supporting a determination of substantially in need, see Section III.G.5.b.iv, below.

m. The court of appeals has held that an income-expense deficit is sufficient in and of itself to support a finding of dependency. [*Carpenter v. Carpenter*, 245 N.C. App. 1, 781 S.E.2d 828 (2016) (citing *Beaman v. Beaman*, 77 N.C. App. 717, 336 S.E.2d 129 (1985)) (court of appeals identified an income-expense deficit, and the lack of other means to make up the deficit, as a basis for concluding that a spouse is dependent); *Barrett v. Barrett*, 140 N.C. App. 369, 536 S.E.2d 642 (2000) (citing *Beaman* and *Phillips v. Phillips*, 83 N.C. App. 228, 349 S.E.2d 397 (1986)) (court found that income of $2,666 with reasonable expenses of $3,450 was sufficient to support conclusion of dependency but noted that other factors supported conclusion); *Helms v. Helms,* 191 N.C. App. 19, 661 S.E.2d 906 (citing *Beaman*) (income-expenses deficit of $627 per month sufficient to conclude that plaintiff a dependent spouse), *review denied*, 362 N.C. 681, 670 S.E.2d 233 (2008); *Phillips* (income of $978 with reasonable expenses of $1,300 was sufficient to support conclusion of dependency); *Webb v. Webb,* 207 N.C. App. 526, 700 S.E.2d 248 (2010) (**unpublished**) (citing *Barrett*) (income-expense deficit of $8,134 per month supported classification of wife as a dependent spouse), *review denied*, 365 N.C. 211, 709 S.E.2d 924 (2011). *But see Knott v. Knott*, 52 N.C. App. 543, 546, 279 S.E.2d 72, 75 (1981) (stating that "a mere comparison of plaintiff's expenses and income is an improperly shallow analysis" but affirming a finding of dependency because wife was without means to maintain her accustomed standard of living).]

n. Cases finding spouse not dependent.

i. *Bodie v. Bodie*, 221 N.C. App. 29, 727 S.E.2d 11 (2012) (wife not dependent when she was able to meet her current living expenses with a small monthly surplus; wife's lower standard of living since separation did not warrant award of alimony when the marital standard of living was not sustainable and had been "artificially maintained" by a massive infusion of debt).

ii. *Caldwell v. Caldwell*, 86 N.C. App. 225, 356 S.E.2d 821 (wife not dependent where parties' incomes were not significantly different in the two years before separation and parties had maintained separate bank accounts and divided expenses before separating), *cert. denied*, 320 N.C. 791, 361 S.E.2d 72 (1987).

o. Cases finding spouse dependent.

i. *Ellinwood v. Ellinwood*, 94 N.C. App. 682, 381 S.E.2d 162 (1989) (court found wife was dependent where her monthly expenses were $2,800 and her monthly earnings were $1,353 and found husband was supporting when his gross income was four times that of wife).

ii. *Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980) (wife dependent where she had a monthly shortfall of $1,667; without alimony, wife would have been required to deplete her estate to maintain marital standard of living).

p. For findings as to dependency, see Section III.G.5.b, below.

3. Supporting spouse. [G.S. 50-16.1A(5).]

a. "Supporting spouse" means a spouse, whether a husband or a wife, upon whom the other is actually substantially dependent for maintenance and support or from whom such spouse is substantially in need of maintenance and support.

b. Just because one spouse is dependent does not automatically mean the other is supporting. [*Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980); *Barrett v. Barrett*, 140 N.C. App. 369, 536 S.E.2d 642 (2000) (citing *Williams*).]

c. A surplus of income over expenses is sufficient in and of itself to warrant a supporting spouse classification. [*Bodie v. Bodie*, 221 N.C. App. 29, 727 S.E.2d 11 (2012) (citing *Barrett v. Barrett*, 140 N.C. App. 369, 536 S.E.2d 642 (2000)); *Barrett* (citing *Beaman v. Beaman*, 77 N.C. App. 717, 336 S.E.2d 129 (1985)) (defendant's income of $7,250 and reasonable expenses of $6,216 was sufficient to support conclusion that he was a supporting spouse). *See also Quesinberry v. Quesinberry*, 210 N.C. App. 578, 709 S.E.2d 367 (2011) (citing *Barrett*); *Rhew v. Felton*, 178 N.C. App. 475, 631 S.E.2d 859 (citing *Barrett*), *review denied, appeal dismissed*, 360 N.C. 648, 636 S.E.2d 810 (2006); and *Webb v. Webb*, 207 N.C. App. 526, 700 S.E.2d 248 (2010) (**unpublished**) (citing *Barrett*), *review denied*, 365 N.C. 211, 709 S.E.2d 924 (2011) *cf. Pawlus v. Wise-Pawlus*, 195 N.C. App. 325, 672 S.E.2d 782 (2009) (**unpublished**) (a surplus of income over expenses is sufficient in and of itself to warrant a supporting spouse classification, but a finding as to income alone is not sufficient).]

4. Marital misconduct. [G.S. 50-16.1A(3).]

a. Marital misconduct means any of the nine acts listed in G.S. 50-16.1A(3) and set out below that occur during the marriage and prior to or on the date of separation. [Pursuant to G.S. 50-16.3A(b)(1), a court may consider incidents of post–date of separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to the date of separation).] For a jury instruction on marital misconduct, see N.C.P.I.—Civil 815.70—Alimony—Marital Misconduct. For more on marital fault, see Cheryl Howell, *The Role of Fault in Alimony*, UNC Sch. of Gov't: On the Civil Side Blog (Jan. 8, 2016), http://civil.sog.unc.edu/the-role-of-fault-in-alimony/.

i. The date of separation, as used in G.S. 50-16.1A(3), is the date on which the husband and wife begin to live separate and apart, with "separate and apart" meaning that there was both a physical separation and an intention on the part of at least one of the parties to cease marital cohabitation. [*Romulus v. Romulus*, 215 N.C. App. 495, 715 S.E.2d 308 (2011) (adopting case law on date of separation in context of divorce under G.S. 50-6).]

ii. In addition to the intention on the part of at least one of the parties to separate, the parties must physically separate in a manner that indicates a cessation of cohabitation. While the trial court found "there was some physical separation of the parties" during the period of plaintiff's illicit sexual behavior, the court did not err in concluding that the parties were not separated. [*Romulus v. Romulus*, 215 N.C. App. 495, 525, 715 S.E.2d 308, 327 (2011) (evidence showed that husband came and went during the period of separation but continued to receive

mail and maintain belongings at the marital residence and that, while he occasionally slept at his office, he returned home to do chores and take the children to activities).]

b. Illicit sexual behavior means acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in G.S. 14-27.20(4), voluntarily engaged in by a spouse with someone other than the other spouse. [G.S. 50-16.1A(3)a. *See Romulus v. Romulus*, 215 N.C. App. 495, 715 S.E.2d 308 (2011) (identifying the four statutory categories of sexual misconduct as sexual intercourse, deviate sexual intercourse, deviate sexual acts, and sexual acts as defined in G.S. 14-27.1(4) (recodified as G.S. 14-27.20(4)).]

i. The term "sexual relations" is not part of the statutory definition for illicit sexual behavior. [*See Romulus v. Romulus*, 215 N.C. App. 495, 715 S.E.2d 308 (2011) (plaintiff's admission of sexual relations did not establish illicit sexual behavior).]

ii. Effect of condonation.

(a) In determining whether to award alimony, any act of illicit sexual behavior by either party that has been condoned by the other party shall not be considered by the court. [G.S. 50-16.3A(a).]

(b) For more on condonation, see Section III.F.2.a.iii, below. For condonation in the context of divorce, see *Divorce and Annulment*, Bench Book, Vol. 1, Chapter 5.

iii. Proof of illicit sexual behavior.

(a) To establish adultery, evidence, whether circumstantial or direct, must tend to show both opportunity and inclination to engage in sexual intercourse. [*Wallace v. Wallace*, 70 N.C. App. 458, 319 S.E.2d 680 (1984) (when evidence only shows opportunity, issue should not be submitted to jury), *review denied*, 313 N.C. 336, 327 S.E.2d 900 (1985); *In re Estate of Trogdon*, 330 N.C. 143, 409 S.E.2d 897 (1991) (adultery shown by sufficient circumstantial evidence of opportunity and inclination to commit adultery); *Slight v. Slight*, 200 N.C. App. 321, 683 S.E.2d 467 (2009) (**unpublished**) (citing *State v. Rinehart*, 106 N.C. 787 (1890)) (adultery is usually proved by circumstances and rarely by positive and direct evidence of adultery).]

(b) Admission of a party spouse has been competent to prove adultery since the effective date of the North Carolina Rules of Evidence in 1984. [*See* N.C. R. Evid. 801.] However, no husband or wife shall be compelled to disclose any confidential communication made by one to the other during the marriage. [G.S. 8-56.]

iv. Sexual intercourse.

(a) A finding of penetration of a vagina by a penis satisfies the definition of sexual intercourse. [*Romulus v. Romulus*, 215 N.C. App. 495, 715 S.E.2d 308 (2011).]

(b) In considering a claim for alimony, the doctrine of inclination and opportunity may be used to show "sexual intercourse." [*Romulus v. Romulus*, 215 N.C. App. 495, 715 S.E.2d 308 (2011) (while there was no direct evidence

of sexual intercourse, evidence of plaintiff's and third party's inclination and opportunity was sufficient to support the finding that plaintiff had engaged in sexual intercourse, despite evidence of third party's erectile dysfunction).]

v. Sexual acts as defined in G.S. 14-27.20(4) (formerly G.S. 14-27.1(4)).

(a) A finding of penetration of a vagina by a finger constitutes a sexual act as defined in G.S. 14-27.1(4). [*Romulus v. Romulus*, 215 N.C. App. 495, 715 S.E.2d 308 (2011).]

(b) In considering a claim for alimony, the doctrine of inclination and opportunity may be used to show "a sexual act" as defined in G.S. 14-27.1(4) (recodified as G.S. 14-27.20(4)). [*Romulus v. Romulus*, 215 N.C. App. 495, 715 S.E.2d 308 (2011) (doctrine of inclination and opportunity applies in cases involving sexual intercourse as well as other forms of "illicit sexual behavior").]

vi. Privilege for confidential communications.

(a) G.S. 8-56 provides that no husband or wife shall be compelled to disclose any confidential communication made by one to the other during their marriage.

(b) What constitutes a "confidential communication" is determined by whether the communication was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by the relationship. [*State v. Freeman*, 302 N.C. 591, 276 S.E.2d 450 (1981). *See also Scott v. Kiker*, 59 N.C. App. 458, 297 S.E.2d 142 (1982) (nonwitness spouse holds the privilege and may prevent the witness spouse from testifying about confidential conversations).]

(c) Husband's statement to wife that he had met another woman and planned to leave the family was not a privileged confidential marital communication under G.S. 8-56 when one of the party's children overheard the statement. [*Cooper v. Cooper*, 150 N.C. App. 713, 564 S.E.2d 319 (2002) (**unpublished**) (also noting that husband's statements to wife were admissions of a party opponent and were admissible pursuant to N.C. R. Evid. 801(d)).]

vii. Privilege for communications made during marital counseling.

(a) In an action for postseparation support or alimony, if either or both of the parties have sought and obtained marital counseling from persons listed in the statute, the person or persons rendering counseling are not competent to testify in the action concerning information acquired while rendering the counseling. [G.S. 8-53.6.]

viii. Privilege against self-incrimination.

(a) Adultery is a class 2 misdemeanor. [G.S. 14-184.]

(b) The Fifth Amendment to the U.S. Constitution (applicable to states by Section 1 of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 23 of the North Carolina Constitution) applies to the pleading, discovery, and trial stages of a civil matter to protect against disclosures

that the witness reasonably believes could be used in a criminal prosecution or that could lead to other evidence that may be so used. [*See In re Estate of Trogdon*, 330 N.C. 143, 409 S.E.2d 897 (1991) (wife's refusal to testify about the nature of her relationship with another man on the grounds that it might incriminate her, and her failure to refute the charge of adultery, logically gave rise to an inference of adultery); *Cantwell v. Cantwell*, 109 N.C. App. 395, 427 S.E.2d 129 (1993) (under prior law, wife waived right to pursue alimony claim by asserting privilege against self-incrimination when husband alleged adultery as a defense).]

(c) The privilege is not applicable if prosecution would be barred by a statute of limitations. [*Leonard v. Williams*, 100 N.C. App. 512, 397 S.E.2d 321 (1990) (statute of limitations for adultery prosecution is two years under G.S. 15-1).]

(d) For the jury instruction on the assertion of this privilege in a civil proceeding, see N.C.P.I.—Civil 101.38—Evidence—Invocation by Witness of Fifth Amendment Privilege Against Self-Incrimination.

ix. Immunity. [G.S. 15A-1051 and 15A-1052.] Statutory grants of immunity may be procured for witnesses who are called to testify concerning their own adultery, depending on the policy of the district attorney in the applicable judicial district. [*See Brown v. Brown*, 85 N.C. App. 602, 355 S.E.2d 525 (wife compelled to answer questions about her adultery after receiving immunity from prosecution; issue not addressed on appeal), *cert. denied*, 320 N.C. 511, 358 S.E.2d 516 (1987), *superseded on other grounds by statute as stated in Wells v. Wells*, 132 N.C. App. 401, 512 S.E.2d 468 (1999).]

c. Involuntary separation of the spouses in consequence of a criminal act committed prior to the proceeding in which alimony is sought. [G.S. 50-16.1A(3)b.]

d. Abandonment of the other spouse. [G.S. 50-16.1A(3)c.]

i. One spouse abandons the other when he brings cohabitation to an end without justification, without the consent of the other spouse, and without intent of renewing cohabitation. [*Sorey v. Sorey*, 233 N.C. App. 682, 757 S.E.2d 518 (2014) (citing *Hanley v. Hanley*, 128 N.C. App. 54, 493 S.E.2d 337 (1997)); *Panhorst v. Panhorst*, 277 N.C. 664, 178 S.E.2d 387 (1971); *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005) (citing *Corbett v. Corbett*, 67 N.C. App. 754, 313 S.E.2d 888 (1984)); *Hanley*; *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985), *rev'd in part on other grounds*, 318 N.C. 404, 348 S.E.2d 593 (1986).]

ii. When the evidence, when considered in the light most favorable to plaintiff, is sufficient to raise a factual question as to the issue of abandonment, it is proper to submit that issue to the jury. [*Tan v. Tan*, 49 N.C. App. 516, 272 S.E.2d 11 (1980), *review denied*, 302 N.C. 402, 279 S.E.2d 356 (1981).]

iii. Since there is no all-inclusive definition as to what will justify abandonment, each case must be determined in large measure upon its own circumstances. [*Hanley v. Hanley*, 128 N.C. App. 54, 493 S.E.2d 337 (1997) (citing *Tan v. Tan*, 49 N.C. App. 516, 272 S.E.2d 11 (1980)).]

iv. The spouse alleging abandonment must prove the absence of justification for the abandonment. [*Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005) (citing *Corbett v. Corbett*, 67 N.C. App. 754, 313 S.E.2d 888 (1984)); *Morris v. Morris*, 46 N.C. App. 701, 266 S.E.2d 381 (plaintiff does not have to negate every possible justification for defendant's leaving but must prove only an absence of conduct by plaintiff that made it impossible for defendant to continue in the marriage), *aff'd per curiam*, 301 N.C. 525, 272 S.E.2d 1 (1980).]

v. A spouse is not justified in bringing cohabitation to end unless the conduct of the other spouse is such as would likely render it impossible for the withdrawing spouse to continue the marital relationship with safety, health, and self-respect. [*Caddell v. Caddell*, 236 N.C. 686, 73 S.E.2d 923 (1953). *See also Morris v. Morris*, 46 N.C. App. 701, 266 S.E.2d 381 (discussing burdens of proof on issue of abandonment), *aff'd per curiam*, 301 N.C. 525, 272 S.E.2d 1 (1980).]

vi. Abandonment does not occur if the parties live apart by mutual agreement. [*Sauls v. Sauls*, 288 N.C. 387, 218 S.E.2d 338 (1975) (noting that consent that is a positive willingness on the part of the complainant, not induced by the misconduct of the other spouse, to cease cohabitation negates a claim of abandonment, while an agreement to separate induced by the other spouse's misconduct does not preclude the complainant from maintaining a claim for abandonment).]

vii. A spouse's failure to object to the other spouse's decision to leave the marital home does not necessarily constitute consent to abandonment. [*Sorey v. Sorey*, 233 N.C. App. 682, 757 S.E.2d 518 (2014) (when wife alleged that she told husband in advance that she was moving and husband said he did not want to move with her, husband's statement did not necessarily constitute consent; husband was under no obligation to explicitly protest wife's decision to leave the marital home; finding that husband did not consent was supported by finding that he only became aware that wife was leaving when he was out of town and when, upon calling wife, he was informed that wife no longer wanted him and had found someone else).]

viii. Where parties occupied adjacent apartments and ceased having sexual relations but had extensive interactions for about ten years, parties were not living "separate and apart." Husband held to have abandoned wife when he moved from adjacent apartment and stopped paying wife's rent and other expenses. [*Lin v. Lin*, 108 N.C. App. 772, 425 S.E.2d 9 (1993).]

ix. Trial court did not err in finding that wife had abandoned husband when wife left for Hawaii without saying when she would return, bought a car while there, and did not notify husband of her return. [*Hanley v. Hanley*, 128 N.C. App. 54, 493 S.E.2d 337 (1997).]

x. One spouse may abandon the other without physically leaving the home. [*Panhorst v. Panhorst*, 277 N.C. 664, 178 S.E.2d 387 (1971) (a court could find constructive abandonment based on either affirmative acts of physical or mental cruelty or affirmative acts of a willful nature, such as a willful failure to provide adequate support); *Ellinwood v. Ellinwood*, 88 N.C. App. 119, 362 S.E.2d 584 (1987) (mental or physical cruelty, or failure to fulfill obligations of

marriage, may constitute constructive abandonment).] But a spouse who has neither left the marital home nor withheld support cannot be found to have abandoned the other spouse merely by electing to sleep in a separate bedroom. [*Oakley v. Oakley*, 54 N.C. App. 161, 282 S.E.2d 589 (1981) (desertion of the marital bed not sufficient by itself to constitute abandonment).]

xi. A court can find constructive abandonment by the defendant even though the defendant was forcibly removed from the marital home pursuant to a G.S. Chapter 50B emergency protective order. [*Walker v. Walker*, 143 N.C. App. 414, 546 S.E.2d 625 (2001) (fact that defendant did not voluntarily leave the residence did not preclude a verdict in favor of plaintiff on the issue of constructive abandonment).]

xii. No constructive abandonment of the husband by the wife if the wife's refusal to engage in sexual relations except on rare occasions, asserted by the husband as justification for his departure from the home, was not willful but was due to her health and physical condition. [*Panhorst v. Panhorst*, 277 N.C. 664, 178 S.E.2d 387 (1971).]

xiii. Proof of constructive abandonment may not be based on actions after separation. [*Ellinwood v. Ellinwood*, 88 N.C. App. 119, 362 S.E.2d 584 (1987) (citing *Fogelman v. Fogelman*, 41 N.C. App. 597, 255 S.E.2d 269 (1979)).]

xiv. For more on abandonment as marital misconduct, see N.C.P.I. Civil—815.70 Alimony—Issue of Marital Misconduct.

xv. For more on this topic, see *Divorce and Annulment*, Bench Book, Vol. 1, Chapter 5.

e. Malicious turning out-of-doors of other spouse. [G.S. 50-16.1A(3)d.]

i. Evidence wife presented on issue of whether she was maliciously turned out-of-doors was sufficient to submit to a jury when it tended to show that husband threatened wife with bodily harm if she did not comply with his wishes, wife was afraid not to do as she was told, and husband took wife to the airport and bought her a one-way ticket to California and put her on the plane. [*Osornio v. Osornio*, 12 N.C. App. 30, 182 S.E.2d 283 (1971).]

f. Cruel or barbarous treatment endangering the life of the other spouse. [G.S. 50-16.1A(3)e.]

i. Trial court did not err in finding husband's conduct constituted cruel or barbarous treatment when husband's love and affection for wife had ceased, he no longer cared where wife went or what she did, and he repeatedly slapped wife, cursed her, and stated he could kill her. [*Gardner v. Gardner*, 40 N.C. App. 334, 252 S.E.2d 867 (considering conduct in context of wife's claim for temporary alimony under former statute), *review denied*, 297 N.C. 299, 254 S.E.2d 917 (1979).]

g. Indignities rendering the condition of the other spouse intolerable and her life burdensome. [G.S. 50-16.1A(3)f.]

i. North Carolina courts have declined to specifically define "indignities," preferring instead to examine the facts on a case-by-case basis. [*Barwick v. Barwick*,

228 N.C. 109, 44 S.E.2d 597 (1947); *Evans v. Evans*, 169 N.C. App. 358, 610 S.E.2d 264 (2005); *Presson v. Presson*, 12 N.C. App. 109, 182 S.E.2d 614 (1971) (whether spouse has committed indignities is determined by the facts and circumstances of each individual case).]

ii. Must be more than isolated instances of misconduct. [*Hall v. Mabe*, 77 N.C. App. 758, 336 S.E.2d 427 (1985). *See Schmeltzle v. Schmeltzle*, 147 N.C. App. 127, 130, 555 S.E.2d 326, 328 (2001) (emphasis in original) (quoting *Traywick v. Traywick*, 28 N.C. App. 291, 295, 221 S.E.2d 85, 88 (1976)) (stating that "[t]he fundamental characteristic of indignities is that it must consist of a *course* of conduct or *continued* treatment which renders the condition of the injured party intolerable and life burdensome" and that "indignities must be *repeated and persisted in* over a period of time").]

iii. Failure to protect or preserve the marital relationship, standing alone, does not constitute an indignity. [*Vann v. Vann*, 128 N.C. App. 516, 495 S.E.2d 370 (1998) (husband did not have a greater duty than wife to recognize the difficulties between himself and wife; his failure to do so did not constitute indignities).]

iv. "Indignities consist of a course of conduct or repeated treatment over a period of time including behavior such as 'unmerited reproach, studied neglect, abusive language, and other manifestations of settled hate and estrangement.'" [*Evans v. Evans*, 169 N.C. App. 358, 363–64, 610 S.E.2d 264, 269 (2005) (quoting *Chambless v. Chambless*, 34 N.C. App. 720, 722, 239 S.E.2d 624, 625 (1977)).]

v. Court may consider factors such as the station in life, the temperament, state of health, habits, feelings, relative sensitiveness and refinement, etc. of the parties. [*Barwick v. Barwick*, 228 N.C. 109, 112, 44 S.E.2d 597, 599 (1947) (noting that treatment that would send "the broken heart of one to the grave" would make "no sensible impression" upon another).]

vi. Ultimate finding that defendant's conduct constituted indignities was fully supported by a guardian ad litem report and detailed in specific findings that defendant controlled all finances during the marriage, as well as the associations of wife and children and the food they ate, refused to allow one child to attend public school, and engaged in parental alienation, which actions were intentional and malicious and part of a long-standing course of conduct and were not an isolated incident, amounting to emotional abuse of wife. [*Dechkovskaia v. Dechkovskaia*, 232 N.C. App. 350, 358, 754 S.E.2d 831, 837 (defendant's "overwhelming control" and attempts at isolation from "broader society" supported a determination of indignities, especially when plaintiff was a relatively recent immigrant to the U.S.), *review denied*, 367 N.C. 506, 758 S.E.2d 870 (2014).]

vii. In *Dechkovskaia v. Dechkovskaia*, 232 N.C. App. 350, 754 S.E.2d 831, *review denied*, 367 N.C. 506, 758 S.E.2d 870 (2014), the trial court's failure to find that the indignities defendant offered to plaintiff were "without adequate provocation" did not require reversal of the order awarding alimony when:

(a) It is not clear that a finding on provocation is required, as G.S. 50-16.1A does not speak to provocation and requires a factor analysis that seems inconsistent with such a requirement; no case decided under G.S. 50-16.1A

has explicitly required a finding of an absence of provocation before determining whether indignities were offered; even though the definition of "indignities" has not changed over the years and is the same in the divorce statute, the requirement of a lack of provocation, added "generations ago," has been carried forward as "judicial gloss" without consideration of its origins and its application to the modern alimony statute; earlier cases that support a requirement of provocation were decided when divorce was fault-based and are based on antiquated beliefs about the roles of husband and wife; there have been substantial changes in pleading requirements and in procedural law; and substantive changes in North Carolina family law, and a vast societal change in the status of women, severely undermine the rational for a provocation rule.

(b) Assuming, however, that a finding as to lack of provocation is required, defendant did not raise plaintiff's failure to do so in the trial court and did not present any evidence that could sustain a finding that plaintiff had "provoked" the conduct that constituted indignities. (Matter remanded only so that the trial court could reconsider the alimony amount and term in light of the new equitable distribution award to be entered on remand.)

viii. Wife's forced removal of husband from the marital home without justification, her sexually explicit emails to another man, her hostility toward husband, which included slapping him fifteen to twenty times, her decision to take several trips without telling husband where she was going, and her extreme lack of care and destruction of the marital home, constituted indignities justifying a denial of postseparation support. [*Evans v. Evans*, 169 N.C. App. 358, 610 S.E.2d 264 (2005); *Hunt v. Hunt*, 233 N.C. App. 785, 759 S.E.2d 712 (**unpublished**) (citing *Evans*) (husband's inappropriately close relationship with a female co-worker over a period of time before separation, fact that he frequently left the house at night without explanation, and was caught with sexual items for which he did not have an adequate explanation constituted indignities), *review denied*, 367 N.C. 524, 762 S.E.2d 443 (2014).]

ix. Indignities found when husband saw another woman every weekend and holiday for a year, moved to the basement and withdrew from active participation in the family, used pornographic material in the presence of the parties' minor children, made sexual advances upon the parties' daughter, and requested that plaintiff indulge him in various unnatural sexual desires. [*Vandiver v. Vandiver*, 50 N.C. App. 319, 274 S.E.2d 243, *review denied*, 302 N.C. 634, 280 S.E.2d 449 (1981).]

x. Denial of plaintiff's request for alimony based on indignities affirmed when plaintiff had caused defendant great embarrassment and humiliation, had caused her family to "walk on eggshells," had withdrawn from her family, had continually yelled, and was explosive. [*Schmeltzle v. Schmeltzle*, 164 N.C. App. 598, 596 S.E.2d 474 (2004) (**unpublished**) (plaintiff's contention on appeal, that her conduct arose from her mental illnesses, was not presented at trial).]

xi. For more on indignities as marital misconduct, see N.C.P.I. Civil 815.70—Alimony—Issue of Marital Misconduct.

xii. For more on this topic, see *Divorce and Annulment*, Bench Book, Vol. 1, Chapter 5.

h. Reckless spending of the income of either party, or the destruction, waste, diversion, or concealment of assets. [G.S. 50-16.1A(3)g. *See Odom v. Odom*, 47 N.C. App. 486, 267 S.E.2d 420 (defining "spendthrift" under prior law), *review denied*, 301 N.C. 94, 273 S.E.2d 300 (1980).]

i. Even though trial court found that dependent spouse's expenditures on clothing were excessive and unreasonable, conclusion that she had not engaged in marital misconduct was correct because court found that excessive and unreasonable spending was part of the accustomed standard of living by both parties during the marriage. [*Glass v. Glass*, 131 N.C. App. 784, 509 S.E.2d 236 (1998).]

ii. Where a party properly raised the issue of spendthrift and offered evidence to support his allegation, the trial court erred in refusing to submit the issue of spendthrift to the jury. [*Skamarak v. Skamarak*, 81 N.C. App. 125, 343 S.E.2d 559 (1986).]

i. Excessive use of alcohol or drugs so as to render condition of the other spouse intolerable and life burdensome. [G.S. 50-16.1A(3)h.]

i. Allegation that defendant had been an habitual drunkard for the last three years constituted a ground for divorce from bed and board and alimony under prior law, even though other insufficient allegations also appeared in the complaint. [*Best v. Best*, 228 N.C. 9, 44 S.E.2d 214 (1947).]

j. Willful failure to provide necessary subsistence according to one's means and condition so as to render the condition of the other spouse intolerable and life burdensome. [G.S. 50-16.1A(3)i.]

i. Absent waiver by plaintiff of her alimony rights, defendant's postseparation failure to support a dependent spouse constituted a ground for alimony. [*See Brown v. Brown*, 104 N.C. App. 547, 410 S.E.2d 223 (1991) (prior law) (award of permanent alimony on this ground affirmed), *cert. denied*, 331 N.C. 383, 417 S.E.2d 789 (1992).]

ii. Evidence regarding a party's earnings and earning capacity is relevant when the other party is seeking alimony under this provision. [*VanDooren v. VanDooren*, 37 N.C. App. 333, 246 S.E.2d 20 (trial court erred in excluding evidence as to husband's earnings and earning capacity; information relevant to party's "means and condition"), *review denied*, 295 N.C. 653, 248 S.E.2d 258 (1978).]

iii. For more on willful failure to support as marital misconduct, see N.C.P.I. Civil 815.70—Alimony—Issue of Marital Misconduct.

B. Procedure for Alimony

1. Manner of asserting claim.

a. In an action brought pursuant to G.S. Chapter 50, either party may move for alimony. [G.S. 50-16.3A(a); 50-16.1A(a) (where alimony is defined as support ordered in an action for divorce, whether absolute or from bed and board, or in an action for alimony without divorce).]

b. A party seeking to claim alimony must comply with G.S. 1A-1, Rule 8(a)(1). Thus, an alimony pleading must contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences . . . showing that the pleader is entitled to relief[.]" [*Coleman v. Coleman*, 182 N.C. App. 25, 31, 641 S.E.2d 332, 337 (2007) (quoting Rule 8(a)(1) and citing 2 Lee's North Carolina Family Law § 9.62 (5th ed. 1999)) (a pleading or motion for alimony should contain allegations addressed to dependency, supporting spouse, and some of the economic and other factors that make an award of alimony equitable under the circumstances).]

c. The trial court erred by dismissing plaintiff's alimony claim based on his failure to reply to what defendant contended were counterclaims related to alimony. Rather than asserting counterclaims to which a reply was required, by incorporating in three counterclaims language from an earlier paragraph that asserted that plaintiff was not a dependent spouse and that defendant was not a supporting spouse, defendant merely denied in the affirmative allegations in the complaint. [*Crowley v. Crowley*, 203 N.C. App. 299, 309, 691 S.E.2d 727, 734 (holding that a plaintiff is not required to re-allege allegations in a complaint that have been "denied in the affirmative" in a counterclaim), *review denied*, 364 N.C. 749, 700 S.E.2d 749 (2010).]

2. Sufficiency of a pleading or motion for alimony.

a. According to *Quesinberry v. Quesinberry*, 210 N.C. App. 578, 709 S.E.2d 367 (2011) (citing 2 Lee's North Carolina Family Law § 9.62 (5th ed. 1999)), to be sufficient:

i. A pleading or motion for alimony should contain facts addressed to dependency, supporting spouse, and some of the economic and other facts that make an award of alimony equitable under the circumstances.

ii. The statement of the claim on dependent and supporting spouses should include facts that indicate that the petitioner has a shortfall between income and expenses, or that the petitioner will experience such a shortfall, and that the other spouse is able to address that shortfall. The statement of the claim on dependent and supporting spouses should include factual allegations on the petitioner's needs and inability to meet them and must offer more than just the amount of the other spouse's income.

b. Pleadings sufficient.

i. Complaint, when read in its entirety, sufficiently alleged husband's income-expense shortfall and wife's ability to address that shortfall and sufficiently stated a claim for alimony, even though it did not specifically detail husband's standard of living, amount of wife's income and expenses, or her income surplus. [*Quesinberry v. Quesinberry*, 210 N.C. App. 578, 592, 593, 709 S.E.2d 367, 378 (2011) (husband addressed the shortfall between his income and expenses; alleged that wife, unlike husband, was "an able-bodied person capable of gainful employment" who received a "significant income as a result of her employment"; and alleged that husband needed support to "maintain his accustomed standard of living established during the marriage").]

c. Pleadings not sufficient.

i. Wife's counterclaim "hereby request[ing] alimony payments from Plaintiff in the amount of $1500.00 per month" was not sufficient to state a claim for alimony. [*Coleman v. Coleman*, 182 N.C. App. 25, 30, 641 S.E.2d 332, 337 (2007) (statement provided no notice of any grounds upon which wife might have pursued and been entitled to alimony, such as her status as the dependent spouse).]

ii. Plaintiff's complaint failed to state a claim for alimony when it alleged that she was a dependent spouse, but the only allegation in support of this position was a factually incorrect statement of the amount of her husband's salary. [*Shook v. Shook*, 95 N.C. App. 578, 383 S.E.2d 405 (1989) (complaint properly dismissed pursuant to G.S. 1A-1, Rule 12(b)(6)), *review denied, appeal dismissed*, 326 N.C. 50, 389 S.E.2d 94 (1990).]

3. Right to a jury trial.

   a. In an action for alimony, either spouse may request a jury trial on the issue of marital misconduct as defined in G.S. 50-16.1A. [G.S. 50-16.3A(d).]

   b. If a jury trial is requested, the jury will decide whether either spouse or both have established marital misconduct. [G.S. 50-16.3A(d).] For a jury instruction on marital misconduct, see N.C.P.I. Civil—815.70—Alimony—Issue of Marital Misconduct.

   c. The court of appeals has held that an appeal of a jury verdict on fault divests the trial court of jurisdiction to enter an alimony order. [*Lewis v. Lewis*, 128 N.C. App. 183, 493 S.E.2d 785 (1997) (trial court had no jurisdiction to enter alimony order during husband's appeal of a verdict finding that he had committed adultery).] However, the court did not address whether the appeal was an appropriate interlocutory appeal.

4. Pretrial mediated settlement conference. [G.S. 7A-38.4A.]

   a. A chief district court judge may order a mediated settlement conference, or other settlement procedure pursuant to G.S. 7A-38.4A(g), for any pending action involving issues of alimony, postseparation support, or claims arising out of contracts between the parties under G.S. 52-10, 52-10.1, or Chapter 52B. [G.S. 7A-38.4A(c).] In the mediated settlement conference or other settlement procedure required in all equitable distribution matters, all financial issues between the parties, including those set out above, as well as child support, may be discussed, negotiated, or decided during the settlement conference. [N.C. Gen. Stat. Annotated Rules of North Carolina, Rules Implementing Settlement Procedures in Equitable Distribution & Other Family Financial Cases 1.C(1), (2).]

   b. At the request of a party and with the consent of all parties, a chief district court judge, or that judge's designee, may order parties to attend and participate in any other settlement procedure authorized by local or supreme court rule in lieu of attending a mediated settlement conference. [G.S. 7A-38.4A(g).]

   c. All parties, their attorneys, and other persons with authority to settle a claim (except victims of domestic violence may be excused from attending) must attend the mediated settlement conference or other settlement procedure. [G.S. 7A-38.4A(d).]

   d. Those required to attend who, without good cause, fail to appear or fail to pay any or all of the mediator or other neutral's fee are subject to contempt and monetary

sanctions imposed by a district court judge. [G.S. 7A-38.4A(e).] See procedure in G.S. 7A-38.4A(e).

e. The trial court did not err when it set aside a consent order incorporating an agreement signed by the parties and their counsel in a mandatory mediation when the wife withdrew her consent to entry of the order before the agreement was signed by the judge. [*Small v. Parker*, 184 N.C. App. 358, 646 S.E.2d 658 (2007) (agreement not enforceable as an order of the court; court did not address enforceability of the agreement as a contract).]

f. For rules implementing G.S. 7A-38.4A, see N.C. Gen. Stat. Annotated Rules of North Carolina, Rules Implementing Settlement Procedures in Equitable Distribution & Other Family Financial Cases.

5. In an action for alimony or postseparation support, if either or both parties have sought and obtained marital counseling from persons listed in the statute, the person or persons rendering counseling are not competent to testify in the action concerning information acquired while rendering the counseling. [G.S. 8-53.6.]

6. Relationship of alimony to entry of divorce judgment.

a. General rules on effect of a judgment for divorce.

i. A judgment of absolute divorce destroys the right of a spouse to alimony unless the right has been asserted prior to judgment of absolute divorce. [*See* G.S. 50-11(c); 50-6.]

ii. A divorce obtained outside the state from a court without jurisdiction over the dependent spouse will not impair or destroy the dependent spouse's right to alimony in this state. [G.S. 50-11(d).]

b. The trial court's reservation of the issue of alimony in the divorce order only preserves a claim that has been asserted and not dismissed before judgment of absolute divorce. [*Stark v. Ratashara*, 177 N.C. App. 449, 628 S.E.2d 471, *review denied*, 360 N.C. 536, 633 S.E.2d 826 (2006).]

c. Whether an action for alimony was pending at the time a judgment of divorce was granted has been the matter of some litigation.

i. Claim for alimony not pending; claim lost.

(a) Statement in wife's answer that "the claims for alimony and equitable distribution pending this action are to be reserved" did not assert a claim for alimony. [*Stark v. Ratashara*, 177 N.C. App. 449, 451, 628 S.E.2d 471 (because wife had filed no counterclaim or separate action for alimony before entry of divorce judgment, she lost her alimony claim), *review denied*, 360 N.C. 536, 633 S.E.2d 826 (2006).]

(b) Wife's counterclaim "hereby request[ing] alimony payments from Plaintiff in the amount of $1500.00 per month" was not sufficient to state a claim for alimony. Thus, no alimony claim was pending at time divorce judgment was entered. [*Coleman v. Coleman*, 182 N.C. App. 25, 30, 641 S.E.2d 332, 337 (2007).]

ii. Claim for alimony pending; claim not lost.

(a) Wife's claim for alimony, asserted in her action for divorce and not dismissed before entry of divorce judgment, was pending when judgment of absolute divorce was entered. [*Stegall v. Stegall*, 336 N.C. 473, 444 S.E.2d 177 (1994).]

(b) Action for divorce from bed and board is "pending action" asserting spouse's right with respect to alimony within meaning of G.S. 50-6. [*Wilhelm v. Wilhelm*, 43 N.C. App. 549, 259 S.E.2d 319 (1979).]

d. Effect of a voluntary dismissal on a claim for alimony.

i. A properly asserted claim for alimony is lost by the taking of a voluntary dismissal **before** entry of judgment of absolute divorce. [*Banner v. Banner*, 86 N.C. App. 397, 358 S.E.2d 110, *review denied*, 320 N.C. 790, 361 S.E.2d 70 (1987), *overruled on other grounds by Stachlowski v. Stach*, 328 N.C. 276, 401 S.E.2d 638 (1991). *See also Rhue v. Pace*, 165 N.C. App. 423, 598 S.E.2d 662 (2004) (applying principle to voluntarily dismissed equitable distribution claim).]

ii. A properly asserted claim for alimony is not lost by the taking of a voluntary dismissal **after** entry of judgment of absolute divorce and may be the basis of a new action for alimony filed within the one-year period provided by G.S. 1A-1, Rule 41(a). [*Stegall v. Stegall*, 336 N.C. 473, 444 S.E.2d 177 (1994) (alimony claim was asserted in an action separate from the action in which divorce decree was entered).] NOTE: A plaintiff may not voluntarily dismiss an action without the other party's consent if the defendant asserts a counterclaim arising out of the same transaction as alleged in the complaint. [*See Swygert v. Swygert*, 46 N.C. App. 173, 264 S.E.2d 902 (1980) (citing *McCarley v. McCarley*, 289 N.C. 109, 221 S.E.2d 490 (1976)) (trial court did not err when it refused to allow plaintiff's G.S. 1A-1, Rule 41(a) voluntary dismissal of complaint for divorce from bed and board and alimony when defendant had filed a counterclaim for absolute divorce).]

e. In certain circumstances, the doctrine of equitable estoppel may be available to allow a party to assert a claim for alimony that would otherwise be barred.

i. Under appropriate circumstances, a supporting spouse may be estopped from asserting divorce as a bar to alimony. [*See Hamilton v. Hamilton*, 296 N.C. 574, 251 S.E.2d 441 (1979) (defendant estopped from asserting divorce as bar to alimony when court entered absolute divorce based on parties' representations that they had reached settlement as to support claims, but settlement never materialized).]

7. Relationship of alimony to equitable distribution (ED).

a. Alimony claim may be heard before ED.

i. For actions filed on or after Oct. 1, 1995, a claim for alimony may be heard on the merits before entry of a judgment for ED. [G.S. 50-16.3A(a), *amended by* S.L. 1995-319, § 2, effective Oct. 1, 1995.]

ii. If alimony is awarded before entry of a judgment for ED, the issues of amount and whether a spouse is a dependent or supporting spouse may be reviewed by the court after the conclusion of the ED claim. [G.S. 50-16.3A(a).] Unlike G.S. 50-20(f), cited immediately below, G.S. 50-16.3A(a) does not appear to

require a finding of changed circumstances before an alimony order can be modified following ED.

iii. Upon request of either party after entry of an ED judgment, the court must consider whether an order for alimony should be vacated or modified pursuant to G.S. 50-16.9 (G.S. 50-16.9(a) requires a showing of changed circumstances.) [G.S. 50-20(f); *Romulus v. Romulus*, 215 N.C. App. 495, 529, 715 S.E.2d 308, 329 (2011) (noting that G.S. 50-20(f) "does not address the details of scheduling of hearings, but only what the trial court should consider as to each aspect of the case").]

iv. If alimony is heard first, the trial court should not speculate about the pending ED claim in determining its award of alimony. [*See Rhew v. Rhew*, 138 N.C. App. 467, 469, 531 S.E.2d 471, 473 (2000) (in determining whether to award alimony, it was error for a court to "speculate" about the results of the parties' pending ED when there was no evidence presented as to the likely outcome; trial court finding that after ED, defendant "will have the ability to make a substantial down payment toward the purchase of a residence and should be able to finance the unpaid amount with a relatively small mortgage" not supported by evidence).]

v. Before G.S. 50-16.3A(a) was added in 1995, case law provided that when both alimony and ED were requested, the court was to decide the ED claim first. [*Talent v. Talent*, 76 N.C. App. 545, 334 S.E.2d 256 (1985), *superseded by statute as stated in Rhew v. Rhew,* 138 N.C. App. 467, 531 S.E.2d 471 (2000); *McIntosh v. McIntosh*, 74 N.C. App. 554, 328 S.E.2d 600 (1985).]

b. ED may be heard before alimony claim.

i. G.S. 50-16.3A(a) provides that a claim for alimony may be heard before entry of a judgment for ED but does not require it. G.S. 50-16.3A(b)(16) directs a trial judge determining the amount, duration, and manner of payment of alimony to consider that income received by a party was previously considered in determining the value of marital or divisible property during ED.

ii. In *Carpenter v. Carpenter*, 245 N.C. App. 1, 6, 781 S.E.2d 828, 834 (2016), the trial court heard alimony and ED claims simultaneously. On remand from an appeal of the order deciding those claims, the court of appeals directed the trial court to determine the final equitable distribution before determining alimony "since the distribution could potentially change the financial circumstances of the parties including the need for or ability to pay alimony."

iii. Cases where the ED claim was heard before the alimony claim include *Embler v. Embler*, 143 N.C. App. 162, 545 S.E.2d 259 (2001), and *McIntyre v. McIntyre*, 175 N.C. App. 558, 623 S.E.2d 828 (2006), discussed in Section III.B.7.d.ii, below.

iv. If the ED claim is heard first or is heard simultaneously with the alimony claim, the trial court should be mindful, when considering the separate estates of the parties for alimony purposes, to use the value of property within a reasonable time before or after the commencement of the action for permanent alimony. [*Clark v. Clark*, 301 N.C. 123, 135, 271 S.E.2d 58, 67 (1980) (value of property within a reasonable time before or after commencement of an action for alimony is "a proper subject of inquiry" for the court; otherwise, it would be difficult, if

not completely impossible, to accurately assess the value of the parties' separate estates and make a fair determination of the ability of one spouse to provide, and the need of the other spouse to receive, such an award at the time the order is entered). *See also Kelly v. Kelly*, 151 N.C. App. 748, 567 S.E.2d 468 (2002) (**unpublished**) (citing *Clark*) (in a case where the court entered an ED judgment the day before it entered an order denying plaintiff alimony, the trial court erred when denial was based in part on the value, taken directly from the ED order, of the marital property awarded to plaintiff in ED, when the value was based on the value of the property on the date of separation, some seven years before entry of the alimony order).]

v. A trial court may, under appropriate circumstances, take judicial notice of findings of fact in a previously entered order in the same cause when making findings in an order for alimony. [*See Williamson v. Williamson*, 217 N.C. App. 388, 719 S.E.2d 625 (2011) (trial court, in making a finding about plaintiff's income in an order awarding alimony, could rely on a finding in a previous ED order of gross weekly income of $1,250; trial court determined that defendant's evidence at the alimony hearing that plaintiff earned $7,000 a month was not credible, and plaintiff did not present evidence of his income at the alimony hearing).] Note, however, that not all findings of fact in previously entered orders in the same cause may be relied upon by the court in later proceedings. [*See Khaja v. Husna*, 243 N.C. App. 330, 350, 777 S.E.2d 781, 792–93 (trial court erred when it relied (1) on the date of separation (DOS) found in a summary judgment divorce when the trial court later determined alimony and (2) on findings as to wife's marital misconduct in an order granting a preliminary injunction; as to (1), the DOS was not a necessary finding in the summary judgment divorce when parties agreed that they had been separated for the statutorily required period but contested the actual DOS, thus the DOS "should . . . have been irrelevant to the trial court when considering alimony;" as to (2), an order granting a preliminary injunction is interlocutory, making findings and conclusions in that order not binding at the final hearing; trial court on remand was to make its own independent determination of martial misconduct by wife), *appeal dismissed*, 368 N.C. 605, 780 S.E.2d 757, *appeal dismissed*, *petition for supersedeas dismissed*, 368 N.C. 605, 781 S.E.2d 293 (2015).]

c. Simultaneous hearing of ED and alimony claims.

i. It is not clear whether claims for alimony and ED may be heard together. [*See Romulus v. Romulus*, 215 N.C. App. 495, 715 S.E.2d 308 (2011) (plaintiff waived argument that trial court erred by hearing alimony and ED together when plaintiff failed to object to having both claims heard at the same time and failed to request separate hearings; moreover, plaintiff invited the error, if any, and was not prejudiced by it).]

ii. Cases where the claims have been heard simultaneously without considering the appropriateness of that procedure include *Helms v. Helms*, 191 N.C. App. 19, 28, 661 S.E.2d 906, 912 (Stephens, J., concurring and dissenting in part and noting that the "case confounds me," based partially on the trial court's attempt to resolve simultaneously the issues of postseparation support, alimony, and ED),

review denied, 362 N.C. 681, 670 S.E.2d 233 (2008), *Robinson v. Robinson*, 210 N.C. App. 319, 707 S.E.2d 785 (2011) (trial of child support, alimony, and ED with defendant not present), *Lucas v. Lucas*, 209 N.C. App. 492, 706 S.E.2d 270 (2011), and *Johnson-White v. White*, 209 N.C. App. 750, 709 S.E.2d 602 (2011) (**unpublished**).]

iii. In *Carpenter v. Carpenter*, 245 N.C. App. 1, 6, 781 S.E.2d 828, 834 (2016), the trial court heard alimony and ED claims simultaneously. On remand from an appeal of the order deciding those claims, the court of appeals directed the trial court to determine the final equitable distribution before determining alimony "since the distribution could potentially change the financial circumstances of the parties including the need for or ability to pay alimony."

d. Appeal of alimony order when other claims remain pending.

i. G.S. 50-19.1, *amended by* S.L. 2018-86, § 1, effective June 25, 2018, may change the result in the cases listed in Section III.B.7.d.ii, below. It provides:

(a) Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, the validity of a premarital agreement as defined by G.S. 52B-2(1), child custody, child support, alimony or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action.

(b) A party does not forfeit the right to appeal under this section if the party fails to immediately appeal from an order or judgment described in G.S. 50-19.1.

(c) An appeal from an order or judgment under G.S. 50-19.1 shall not deprive the trial court of jurisdiction over any other claims pending in the same action. [G.S. 50-19.1.] Thus, in actions to which G.S. 50-19.1 applies, appeal from a final alimony order may be taken even if claims for divorce, either absolute or from bed and board, custody, child support, or ED remain pending.

ii. Before the effective date of G.S. 50-19.1, final judgments of equitable distribution, alimony, child support, custody, divorce, and divorce from bed and board could not be appealed if other claims remained pending in the case, unless the trial judge certified that there is no just reason for delay pursuant to G.S. 1A-1, Rule 54(b). [*See Embler v. Embler*, 143 N.C. App. 162, 545 S.E.2d 259 (2001) (noting that interlocutory appeals that challenge only the financial repercussions of a separation or divorce generally do not affect a substantial right; therefore, appeal of ED order was interlocutory and inappropriate while claims for alimony, child custody, and support remained pending); *McIntyre v. McIntyre*, 175 N.C. App. 558, 623 S.E.2d 828 (2006) (citing *Embler*) (appeal from an ED order that left open the issue of alimony was dismissed as interlocutory; that appellate court decision on ED could put trial court in a better position to determine alimony or could avoid a retrial on alimony not a "substantial right").]

e. Allocation of postseparation debt payments in alimony proceeding.

i. Whether certain postseparation payments by a supporting spouse should be credited as alimony depends on the classification of the debts or liabilities being paid. If the payments were made toward marital debt, the payments should not be considered as alimony, but if they were paid to the dependent spouse, or paid on his behalf, for the dependent spouse's personal expenses or to make payments on his separate property, they may be considered payments of alimony. [*Robinson v. Robinson*, 210 N.C. App. 319, 707 S.E.2d 785 (2011) (supporting spouse sought to have postseparation mortgage and car payments applied to his retroactive alimony obligation, but residence and cars were not classified, valued, and distributed, so appellate court could not determine whether payments should have been credited as alimony or included within the ED order).]

8. Financial affidavits.

a. Local rules may require the parties to file a financial affidavit.

b. A sworn financial affidavit is competent evidence as to the information contained therein. [*Parsons v. Parsons*, 231 N.C. App. 397, 752 S.E.2d 530 (2013) (citing *Row v. Row*, 185 N.C. App. 450, 650 S.E.2d 1 (2007)) (affidavit of expenses itself is evidence of a party's expenses; thus, wife's affidavit as to her monthly expenses did not have to be supported by other evidence).]

c. When a party files a financial affidavit with the court and also submits as evidence a financial statement provided to her bank that is contrary in some respects, the court may assign greater weight and credibility to the financial statement submitted to the bank. [*Clark v. Clark*, 231 N.C. App. 514, 753 S.E.2d 743 (2013) (**unpublished**) (when financial affidavit filed with the court listed a $250/month warehouse debt but financial statement to the bank did not, trial court did not have to include that debt in defendant's reasonable monthly expenses).]

9. Evidence.

a. A trial court is not personally required to take an offer of proof under G.S. 1A-1, Rule 43(c). [*Rhew v. Felton*, 178 N.C. App. 475, 631 S.E.2d 859 (Rule 43(c) requires the trial court, upon request, to allow the insertion of excluded evidence in the record but does not require the judge to personally consider the offer of proof; allowing party to make a tape recording of his offer of proof regarding changed circumstances in the presence of a courtroom clerk sufficient), *review denied, appeal dismissed*, 360 N.C. 648, 636 S.E.2d 810 (2006).]

b. A trial court may, under appropriate circumstances, take judicial notice of findings of fact in previously entered orders in the same cause. [*Williamson v. Williamson*, 217 N.C. App. 388, 719 S.E.2d 625 (2011) (citing *Devaney v. Miller*, 191 N.C. App. 208, 662 S.E.2d 672 (2008)) (trial court, in making a finding about plaintiff's income in an order awarding alimony, could rely on a finding in a previous ED order of a gross weekly income of $1,250; trial court determined that defendant's evidence at the alimony hearing that plaintiff earned $7,000 a month was not credible, and plaintiff did not present evidence of his income at the alimony hearing).] Note, however, that not all findings of fact in previously entered orders in the same cause may be relied upon by the court in later proceedings. [*See Khaja v. Husna*, 243 N.C. App. 330, 350,

777 S.E.2d 781, 792–93 (trial court erred when it relied (1) on the date of separation (DOS) found in an summary judgment divorce when the trial court later determined alimony and (2) on findings as to wife's marital misconduct in an order granting a preliminary injunction; as to (1), the DOS was not a necessary finding in the summary judgment divorce when parties agreed that they had been separated for the statutorily required period but contested the actual DOS, thus the DOS "should . . . have been irrelevant to the trial court when considering alimony;" as to (2), an order granting a preliminary injunction is interlocutory, making findings and conclusions in that order not binding at the final hearing; trial court on remand was to make its own independent determination of martial misconduct by wife), *appeal dismissed*, 368 N.C. 605, 780 S.E.2d 757, *appeal dismissed*, *petition for supersedeas dismissed*, 368 N.C. 605, 781 S.E.2d 293 (2015).]

c. Trial court's decision not to admit an email of plaintiff when defendant wrongfully obtained it from a password-protected email account was upheld. Even if court assumed exclusion of the email was error, defendant failed to show prejudicial error. [*Williamson v. Williamson*, 217 N.C. App. 388, 719 S.E.2d 625 (2011).]

10. Summary judgment.

a. Denial of party's motions pursuant to G. S. 1A-1, Rule 12(c) and Rule 12(b)(6) for judgment on the pleadings and for dismissal of a complaint for postseparation support, alimony, and ED did not preclude the trial court from granting a subsequent motion for summary judgment. [*Rhue v. Pace*, 165 N.C. App. 423, 598 S.E.2d 662 (2004) (citing *Barbour v. Little*, 37 N.C. App. 686, 247 S.E.2d 252 (1978)) (denial of a Rule 12(b)(6) motion). *See also Smithwick v. Crutchfield*, 87 N.C. App. 374, 361 S.E.2d 111(1987) (in a personal injury case, denial of a Rule 12(c) motion did not prevent the trial court from granting a subsequent motion for summary judgment; motion for judgment on the pleadings did not present the same question as that raised by later motion for summary judgment).]

11. Setting aside a judgment or order under G.S. 1A-1, Rule 60(b).

a. Action of the trial court setting aside an order for ED and permanent alimony pursuant to Rule 60(b)(6) was upheld based on husband's failure to disclose to the court that he had borrowed against a home equity line of credit that the parties had previously satisfied. [*Sloan v. Sloan*, 151 N.C. App. 399, 566 S.E.2d 97 (2002).]

C. Entitlement to Alimony

1. The court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award is equitable after considering all relevant factors, including the factors set out in G.S. 50-16.3A(b). [G.S. 50-16.3A(a).]

a. For definition of "dependent spouse," see Section III.A.2, above.

b. For cases considering whether an award of alimony is or is not equitable, see Section III.G.5.d, below.

c. For actions filed before Oct. 1, 1995, former G.S. 50-16.2 allowed an award of alimony to a dependent spouse upon proof that the supporting spouse had committed one of the fault grounds listed in the statute.

2. "Illicit sexual behavior" may determine entitlement to alimony.
   a. If the court finds that the dependent spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., set out in Section III.A.4.b, above, during the marriage and before or on the date of separation, the court shall not award alimony unless the court finds that the supporting spouse also participated in an act of illicit sexual behavior before or on the date of separation. [G.S. 50-16.3A(a).]
   b. If the court finds that the supporting spouse participated in an act of illicit sexual behavior during the marriage and before or on the date of separation, then the court shall order that alimony be paid unless the court finds that the dependent spouse also participated in an act of illicit sexual behavior before or on the date of separation. [G.S. 50-16.3A(a); *Fleming v. Fleming,* 237 N.C. App. 618, 767 S.E.2d 704 (2014) (**unpublished**) (trial court erred when it denied plaintiff's request for alimony after finding that she was a dependent spouse, that defendant was a supporting spouse, and that defendant had engaged in illicit sexual behavior before the date of separation; language in G.S. 50-16.3A(a) that court "shall" order alimony is mandatory; trial court's belief that plaintiff had received a sufficient amount of postseparation support up to the time of the trial could warrant a conclusion that plaintiff was not entitled to retroactive alimony but could not be the basis for denying prospective alimony).]
   c. If the court finds that both the supporting and the dependent spouse engaged in illicit sexual behavior during the marriage and before or on the date of separation, the court shall award or deny alimony in its discretion after consideration of all of the circumstances. [G.S. 50-16.3A(a).]
   d. The court shall not consider any act of illicit sexual behavior by either party that has been condoned by the other party. [G.S. 50-16.3A(a).]
   e. Illicit sexual behavior is treated differently than the other statutory categories of marital misconduct. The trial court has discretion under G.S. 50-16.3A(b) to weigh the other forms of marital misconduct and to determine the effect, if any, the misconduct should have on the alimony award; but as to illicit sexual behavior only, the trial court's discretion to weigh the marital misconduct is eliminated unless both spouses have engaged in the behavior. [*Romulus v. Romulus*, 215 N.C. App. 495, 715 S.E.2d 308 (2011).]
   f. Under G.S. 50-16.3A(b), if only the dependent spouse has engaged in uncondoned illicit sexual behavior during the marriage and before the date of separation, the trial court cannot award alimony, even if the supporting spouse has committed egregious marital misconduct of another sort. [*Romulus v. Romulus*, 215 N.C. App. 495, 715 S.E.2d 308 (2011) (finding that one act by dependent spouse is sufficient to bar alimony).]

D. Amount of Alimony

1. "In setting the amount of an alimony award, the trial court must do three things: determine the needs of the dependent spouse and the ability of the supporting spouse to address those needs, compare income and expenses of both spouses and consider all relevant factors, including those specifically enumerated in [G.S.] 50-16.3A(b)." [*Bryant*

v. Bryant, 139 N.C. App. 615, 617, 534 S.E.2d 230, 231–32 (citing 2 Lee's North Carolina Family Law § 9.22 (5th ed. 1999)), *review denied*, 353 N.C. 261, 546 S.E.2d 91 (2000).]

2. "Alimony is ordinarily determined by a party's actual income . . . at the time of the order" based on evidence presented at the hearing. [*See Green v. Green,* 806 S.E.2d 45, 54 (N.C. Ct. App. 2017) (quoting *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998)), *review denied*, 818 S.E.2d 273, *review dismissed*, 818 S.E.2d 278 (N.C. 2018); *Burger v. Burger*, 790 S.E.2d 683, 686 (N.C. Ct. App. 2016) (quoting *Works v. Works*, 217 N.C. App. 345, 347, 719 S.E.2d 218, 219 (2011)) (finding that husband was unemployed and had no monthly income at the time of the hearing); *Works*, 217 N.C. App. at 347, 719 S.E.2d at 219 (quoting *Kowalick*).] Extensive time between the hearing and entry of the alimony order may raise concerns, especially if the evidence of income at the hearing was not recent. [*See Collins v. Collins*, 243 N.C. App. 696, 704–05, 778 S.E.2d 854, 858–59 (2015) (order entered in 2014 pursuant to a hearing in 2012, at which the trial court considered evidence of the parties' incomes for years 2007 to 2009, was reversed; error to determine amount of dependent spouse's shortfall by using dependent spouse's income five to seven years prior to entry of the order).]
3. Alimony may be based on earning capacity rather than actual income if the court finds that the party is deliberately depressing income in bad faith. For a discussion on imputing income to a party who has acted in bad faith, see Section III.D.9.b.iii, below.
4. "The determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves." [*Nicks v. Nicks*, 241 N.C. App. 487, 501, 774 S.E.2d 365, 376 (2015) (quoting *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32 (1982)); *Byrant v. Bryant*, 139 N.C. App. 615, 618, 534 S.E.2d 230, 232 (citing *Whedon*), *review denied*, 353 N.C. 261, 546 S.E.2d 91 (2000). *See also Bookholt v. Bookholt*, 136 N.C. App. 247, 250, 523 S.E.2d 729, 731 (1999) (quoting *Whedon*) (also noting that implicit in the judge's discretion is that a "trial judge may resort to his own common sense and every-day experiences in calculating the reasonable needs and expenses of the parties"), *superseded on other grounds by statute as stated in Williamson v. Williamson*, 142 N.C. App. 702, 543 S.E.2d 897 (2001); *Harris v. Harris*, 188 N.C. App. 477, 485, 656 S.E.2d 316, 320 (2008) (quoting *Bookholt* "common sense" statement).]
5. Amount of alimony is question for judge. [*Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982) (citing 2 Lee's North Carolina Family Law § 139 (4th ed. 1980)).] The court must set out the reasons for the amount of alimony awarded. [G.S. 50-16.3A(c) (requiring the court, if awarding alimony, to set forth the reasons for the amount of the award).] For findings as to amount of the award, see Section III.G.4.e, below.
6. An alimony award must be fair and just to all parties. [*Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982) (citing *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976)); *Swain v. Swain*, 179 N.C. App. 795, 635 S.E.2d 504 (2006) (citing *Quick*) (an award that required both parties to deplete their estates to meet their living expenses was fair to both parties), *review denied*, 361 N.C. 437, 649 S.E.2d 897 (2007).] See Section III.G.5.d, below, on fairness and equity of the award.
7. Alimony means payment for support and maintenance of a spouse and does not mean payment for the support and maintenance of a spouse's business ventures. [*Beaman v. Beaman*, 77 N.C. App. 717, 336 S.E.2d 129 (1985) (where wife had business in her

home and had business expenses that duplicated her personal expenses, the trial court was instructed to determine the extent of the duplication and to consider the duplication when setting amount of alimony).]

8. An award of alimony must be based on the statutory requirements of G.S. 50-16.3A, including the sixteen factors in G.S. 50-16.3A(b), set out in Section III.D.9, immediately below, on which evidence is offered. [*Collins v. Collins*, 243 N.C. App. 696, 707, 778 S.E.2d 854, 861 (2015) (supporting spouse argued on appeal that the trial court erred when it tried to achieve a "parity of income" between the parties with its alimony award instead of basing the award on the requirements in G.S. 50-16.3A; appellate court agreed).]

9. In determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors, including:

   a. The marital misconduct of either spouse. [G.S. 50-16.3A(b)(1). See Section III.A.4, above, for definition of marital misconduct and for case law on various categories of misconduct.]

      i. North Carolina courts have held that the purpose of alimony is to provide reasonable support for the dependent spouse, not to punish the supporting spouse or to divide the supporting spouse's estate. [*See Schloss v. Schloss*, 273 N.C. 266, 160 S.E.2d 5 (1968) (alimony pendent lite), and *Taylor v. Taylor*, 26 N.C. App. 592, 216 S.E.2d 737 (1975) (citing *Schloss*).]

      ii. The 1995 amendments to the alimony statutes replaced a "fault-based approach" with a "needs-based" approach to alimony. Under the needs-based approach, marital misconduct is only one factor considered when determining the amount and duration of a potential alimony award. [*Alvarez v. Alvarez*, 134 N.C. App. 321, 517 S.E.2d 420 (1999).]

   b. The relative earnings and earning capacities of the spouses. [G.S. 50-16.3A(b)(2).]

      i. Earning capacity generally.

         (a) Earning capacity typically refers to earning capacity from working. [*See Honeycutt v. Honeycutt*, 152 N.C. App. 673, 568 S.E.2d 260 (2002).]

         (b) A court may properly consider the parties' relative estates in evaluating the earnings and earning capacities of the parties. [*Swain v. Swain*, 179 N.C. App. 795, 635 S.E.2d 504 (2006) (citing *Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980)) (court properly considered the relative estates of the parties as well as their relative income and earning capacities in setting amount of alimony), *review denied*, 361 N.C. 437, 649 S.E.2d 897 (2007).]

         (c) A party's earning capacity generally is not the type of undisputed fact that is appropriate for judicial notice. [*Khaja v. Husna*, 243 N.C. App. 330, 777 S.E.2d 781 (wife's earning capacity was contested; trial court erred when it took judicial notice of Department of Labor statistics to find that wife could earn $99,540/year as an electrical engineer), *appeal dismissed*, 368 N.C. 605, 780 S.E.2d 757, *appeal dismissed*, *petition for supersedeas dismissed*, 368 N.C. 605, 781 S.E.2d 293 (2015).]

      ii. A party's earning capacity may be used to determine the appropriate amount to award as alimony. [The "earning capacity" considered by the court as a factor

pursuant to G.S. 50-16.3A(b)(2) is different than the "earning capacity" used by the court when deciding whether to impute income. Earning capacity in the latter context requires a finding of bad faith. See Section III.D.9.b.iii, below.]

(a) The trial court did not err in determining the amount of alimony to be awarded to a dependent spouse by considering, among other things, the dependent spouse's earning capacity as a nurse of $42,767 per year, even though it was likely that she would have to complete a refresher course. [*Bersin v. Golonka*, 170 N.C. App. 436, 613 S.E.2d 752 (**unpublished**) (at the time of trial, wife was certified and licensed to practice nursing in North Carolina, had bachelor's and master's degrees in nursing, and had experience in the field), *review denied*, 360 N.C. 60, 623 S.E.2d 578 (2005).]

(b) The earning capacity must not be too speculative, however. [*See Rice v. Rice*, 159 N.C. App. 487, 584 S.E.2d 317 (2003) (error to consider as part of the wife's income the potential rental income she could have earned from renting the North Carolina marital residence while she was living out of state as a probationary employee at a new job; wife's continued employment and residence were uncertain); *Gatlin v. Gatlin*, 188 N.C. App. 164, 654 S.E.2d 833 (2008) (**unpublished**) (error to consider the earning potential of a certificate of deposit when there was no evidence in the record to support a finding that the certificate could produce a return of $300 per month).]

iii. While the alimony statute allows a court to consider a party's earning capacity, a trial court may not impute income to a party without first finding that the party is deliberately depressing income or indulging in excessive spending because of disregard of a marital support obligation. [*See Works v. Works*, 217 N.C. App. 345, 347, 719 S.E.2d 218, 219 (2011) (quoting 2 Lee's North Carolina Family Law § 9.26 (5th ed. 1999)) (in the context of alimony, bad faith means that "the spouse is not living up to income potential in order to avoid or frustrate the support obligation" or that a spouse has "the intent to avoid reasonable support obligations, from evidence that a spouse has refused to seek or to accept gainful employment; willfully refused to secure or take a job; deliberately not applied himself or herself to a business or employment; [or] intentionally depressed income to an artificial low"); *Carpenter v. Carpenter*, 245 N.C. App. 1, 781 S.E.2d 828 (2016) (citing *Works*) (when trial court's calculation of wife's income at $130,000/year was not based on evidence presented at trial, which was that wife earned between $40,000 to $50,000/year, trial court must have imputed income to wife, which was error without finding that she had depressed her income in bad faith); *Nicks v. Nicks*, 241 N.C. App. 487, 503, 774 S.E.2d 365, 377 (2015) (quoting "not living up to" language from *Works* set out above); *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976); *Spencer v. Spencer*, 70 N.C. App. 159, 171, 319 S.E.2d 636, 645 (1984) (to impute income, a trial court must find that the "reduction in income was primarily motivated by a desire to avoid . . . reasonable support obligations").]

iv. A trial court may in some circumstances, average a parent's prior income without "imputing" income to that parent. [*See Zurosky v. Shaffer*, 236 N.C. App. 219, 763 S.E.2d 755 (2014) (citing *Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25

(2006)) (when determining father's income for alimony and child support purposes, trial court used father's net income from 2003–2008 to determine father's actual income in 2013; determination of income upheld when trial court found father's reported income was not credible; findings in support of unreliability of father's evidence included that father overstated his monthly tax payments, contended that he operated at a significant deficit each month, failed to report significant expenditures, and presented conflicting evidence as to his postseparation work habits); *cf. Green v. Green,* 806 S.E.2d 45 (N.C. Ct. App. 2017) (trial court erred in relying on supporting spouse's average income without first concluding that evidence of his actual present income was not credible), *review denied*, 818 S.E.2d 273, *review dismissed*, 818 S.E.2d 278 (N.C. 2018).]

v. The court of appeals has held that the 1995 amendments to the alimony statutes did not change the earning capacity rule. [*See Wolf v. Wolf*, 151 N.C. App. 523, 527, 566 S.E.2d 516, 519 (2002) (the "dispositive issue is whether a party is motivated by a desire to avoid his reasonable support obligation"); *Megremis v. Megremis*, 179 N.C. App. 174, 633 S.E.2d 117 (2006) (citing *Conrad v. Conrad*, 252 N.C. 412, 113 S.E.2d 912 (1960)) (acknowledging well-established rule that a trial court may impute income only upon finding that the party acted in bad faith);

vi. Courts most frequently impute income to a supporting spouse

(a) The rule allowing an award of alimony to be based upon the supporting spouse's ability to earn, as distinguished from his actual income, "seems to be applied only when it appears from the record that there has been a deliberate attempt on the part of the supporting spouse to avoid his financial family responsibilities by refusing to seek or to accept gainful employment; by willfully refusing to secure or take a job; by deliberately not applying himself to his business; by intentionally depressing his income to an artificial low; or by intentionally leaving his employment to go into another business." [*Bowes v. Bowes*, 287 N.C. 163, 171–72, 214 S.E.2d 40, 45 (1975) (evidence before the trial court was insufficient to support an award based on earning capacity rather than actual earnings); *Wolf v. Wolf*, 151 N.C. App. 523, 566 S.E.2d 516 (2002) (citing *Bowes* and the above-listed factors and adding as factors that the supporting spouse failed to exercise his reasonable capacity to earn, deliberately avoided his family's financial responsibilities, and acted in deliberate disregard for his support obligations); *Juhnn v. Juhnn*, 242 N.C. App. 58, 775 S.E.2d 310 (2015) (citing *Wolf* and the eight factors set out therein).]

(b) Before imputing income, the finder of the fact must have before it sufficient evidence of the proscribed intent. [*Bowes v. Bowes*, 287 N.C. 163, 214 S.E.2d 40 (1975); *Wachacha v. Wachacha*, 38 N.C. App. 504, 248 S.E.2d 375 (1978) (citing *Bowes*); *Wolf v. Wolf*, 151 N.C. App. 523, 566 S.E.2d 516 (2002) (citing *Wachacha*).]

(c) Upon a finding of bad faith, a court may impute income when determining an initial award of alimony and when considering a motion to modify an

alimony award. [*Wachacha v. Wachacha*, 38 N.C. App. 504, 248 S.E.2d 375 (1978).]

(d) It is error to impute income to a supporting spouse without a finding of bad faith or when the finding of bad faith is not supported by competent evidence. See Sections III.G.3.b.vi, vii, below.

vii. While income is most frequently imputed to a supporting spouse, there may be circumstances where it would be appropriate to impute income to a dependent spouse upon a finding of bad faith. [*See Works v. Works*, 217 N.C. App. 345, 347, 719 S.E.2d 218, 219 (2011) (quoting 2 Lee's North Carolina Family Law § 9.26 (5th ed. 1999)) (noting that in the context of alimony, "[b]ad faith for the dependent spouse means shirking the duty of self-support. . . ."); *Burger v. Burger*, 790 S.E.2d 683 (N.C. Ct. App. 2016) (no abuse of discretion when trial court imputed minimum wage income to dependent spouse who acted in bad faith by exhibiting a naïve indifference toward his self-support and toward his duty of support for his children); *Brown v. Brown*, 192 N.C. App. 734, 666 S.E.2d 217 (2008) (**unpublished**) (considering whether to impute income to a dependent spouse for the fair market value of a basement apartment occupied rent-free by emancipated son; because there was no finding of bad faith on the part of the dependent spouse, decision not to impute $600/month to the dependent spouse as income affirmed); 2 Lee's North Carolina Family Law § 9.26 (5th ed. 1999) (noting that in context of alimony, requirement of a finding of bad faith before imputing income is applicable to both dependent and supporting spouses).]

(a) It was error to impute income to the dependent spouse based on a finding that she "has the ability to earn at least minimum wage" without first finding that she had depressed her income in bad faith. [*Works v. Works*, 217 N.C. App. 345, 347, 719 S.E.2d 218, 219 (2011) (citing 2 Lee's North Carolina Family Law § 9.26 (5th ed. 1999)) (even though court made findings on wife's limited recent work experience and her failure to complete training needed for her brief pursuits in real estate and in a clerical setting, without a finding of bad faith, findings were not sufficient to support trial court's decision to impute income to wife); *Carpenter v. Carpenter*, 245 N.C. App. 1, 781 S.E.2d 828 (2016) (citing *Works*) (when trial court's calculation of wife's income at $130,000/year was not based on evidence presented at trial, which was that wife earned between $40,000 to $50,000/year, trial court must have imputed income to wife, which was error without finding that she had depressed her income in bad faith).]

c. The ages and the physical, mental, and emotional conditions of the spouses. [G.S. 50-16.3A(b)(3). *See Brandt v. Brandt*, 92 N.C. App. 438, 374 S.E.2d 663 (1988) (in case considering child support, mother's medical condition prevented meaningful employment), *aff'd per curiam*, 325 N.C. 429, 383 S.E.2d 656 (1989); *Burger v. Burger*, 790 S.E.2d 683, 686 (N.C. Ct. App. 2016) (even though husband "would be at a disadvantage for employment prospects due to his health," husband was able to work and earn minimum wage).]

d. The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, Social Security, or others. [G.S. 50-16.3A(b)(4).]

i. In determining income, the trial court must include a party's total income, undiminished by savings contributions or income automatically reinvested. [*Bryant v. Bryant*, 139 N.C. App. 615, 534 S.E.2d 230 (interpreting first part of holding in *Glass v. Glass*, 131 N.C. App. 784, 509 S.E.2d 236 (1998), to require that income invested in retirement accounts and dividends being automatically reinvested be included in income), *review denied*, 353 N.C. 261, 546 S.E.2d 91 (2000); *Friend-Novorska v. Novorska*, 131 N.C. App. 867, 509 S.E.2d 460 (1998) (must include investment income that is automatically reinvested); *Glass* (must include deferred compensation and contributions to 401K accounts); *Parsons v. Parsons*, 231 N.C. App. 397, 752 S.E.2d 530 (2013) (interest and dividend income, generated by investment account and distributed to wife monthly as her sole source of income, properly used to determine wife's gross monthly income; passive appreciation in the value of the investment account, approximately $4,500/month over relevant three-year period, not treated as income to wife, and husband's argument that wife should use this amount to supplement her income was rejected; trial court properly considered the total value of the investment account, including passive appreciation of $4,500/month, in the estimate of wife's estate). *See also Kabasan v. Kabasan,* 810 S.E.2d 691 (N.C. Ct. App. 2018) (in determining defendant's income for purposes of child support, trial court did not impute income to supporting spouse when it included amount earned on an investment account, the receipt of which he deferred; the deferred amounts were properly counted as actual income).]

ii. As gross income includes earned and unearned income, the court must include employer-paid benefits such as life insurance, car allowance, and IRA contributions. [*Barrett v. Barrett*, 140 N.C. App. 369, 536 S.E.2d 642 (2000); *Clark v. Clark*, 231 N.C. App. 514, 753 S.E.2d 743 (2013) (**unpublished**) (calculation of defendant's gross annual income properly included income from the sale of stock).]

iii. Social Security payments received by child on behalf of supporting spouse properly counted as income of the supporting spouse. [*Kabasan v. Kabasan,* 810 S.E.2d 691 (N.C. Ct. App. 2018) (supporting spouse's child support obligation also included as one of his expenses in determining alimony).]

iv. Trial court order did not result in "double dipping" when pension benefits were classified as marital property in equitable distribution and counted as income to the supporting spouse when determining award of postseparation support to dependent spouse. [*Kabasan v. Kabasan*, 810 S.E.2d 691 (N.C. Ct. App. 2018).]

v. Income does not include amount received as postseparation support (PSS), as PSS is not permanent income. [*Carpenter v. Carpenter*, 245 N.C. App. 1, 781 S.E.2d 828 (2016).]

vi. Award of alimony vacated when trial court made no findings with respect to wife's medical benefits or potential income from her IRA, although evidence

of these additional sources of income was presented at the hearing. [*Phillips v. Phillips*, 185 N.C. App. 238, 647 S.E.2d 481 (2007), *aff'd per curiam*, 362 N.C. 171, 655 S.E.2d 350 (2008). *See also Phillips v. Phillips*, 206 N.C. App. 330, 698 S.E.2d 557 (2010) (**unpublished**) (award vacated on remand when trial court made a finding as to only one of two IRA accounts of wife; court also found that wife had employer-paid health insurance but made no finding as to value of that benefit).]

vii. Tax refunds and sporadic bonuses are not to be included in the calculation of regular income. [*Williamson v. Williamson*, 217 N.C. App. 388, 719 S.E.2d 625 (2011) (citing *Edwards v. Edwards,* 102 N.C. App. 706, 403 S.E.2d 530 (1991)) (trial court improperly included defendant's tax refund as a part of her regular income). *Cf. Burger v. Burger*, 790 S.E.2d 683 (N.C. Ct. App. 2016) (trial court properly included supporting spouse's 2014 bonus in her average gross monthly income when evidence established that wife had consistently received bonuses for the past four years and wife had included the bonus in the monthly gross income listed in her financial affidavit and in a loan application; court of appeals distinguished *Williamson* based on the lack of evidence in that case that defendant's tax refund "constituted regular income").]

viii. Closely held or Subchapter S corporation.

(a) Trial court did not err in ordering supporting spouse to pay alimony based on his annual salary of $200,000, plus additional alimony of 50 percent of any bonuses received, capped by the dependent spouse's reasonable needs at the time of trial, which trial court found to be $97,608 annually. [*Webb v. Webb*, 207 N.C. App. 526, 700 S.E.2d 248 (2010) (**unpublished**) (noting that defendant supporting spouse worked for a closely held family corporation where he had substantial input as to his own compensation and that amount ordered as alimony resulted in a shortfall for dependent spouse, making order for sharing of any bonuses reasonable), *review denied*, 365 N.C. 211, 709 S.E.2d 924 (2011).]

(b) Money a party received from corporations in which he had an interest, which was separate from the salary paid by the party's employer, properly included as income to party and not subject to being discounted because it was funneled first through the corporations. [*Webb v. Webb*, 207 N.C. App. 526, 700 S.E.2d 248 (2010) (**unpublished**) (monthly income defendant received from two entities in which he owned 99 percent and 50 percent interests properly considered income to defendant), *review denied*, 365 N.C. 211, 709 S.E.2d 924 (2011). *See also Cooper v. Cooper*, 150 N.C. App. 713, 564 S.E.2d 319 (2002) (**unpublished**) (not paginated on Westlaw) (trial court properly found that defendant's income was substantially higher than the gross annual income reported on his W-2 statement; evidence showed that defendant derived income from a corporation he solely owned, in addition to his annual salary, in the form of a car, funds received as repayment of a "shareholder's loan," and nonemployee compensation paid to the "other woman").]

(c) The trial court properly considered the financial benefits defendant received from his solely-owned company, such as health insurance, use of a vehicle, and reimbursed living expenses, when calculating the amount of alimony owed to plaintiff. [*Walker v. Walker*, 143 N.C. App. 414, 546 S.E.2d 625 (2001).]

(d) Trial court can consider expenditures on behalf of the supporting spouse when determining income available to pay alimony. [*Ahern v. Ahern*, 63 N.C. App. 728, 306 S.E.2d 140 (1983) (alimony award of $25,000 a year upheld, even though husband's salary from drug company that he owned was $31,000 a year, where evidence showed that the company paid for many of the couple's living and other expenses).]

(e) Finding that defendant's monthly earned income was greater than shown in defendant's financial affidavit upheld, even though "problematic," because income from defendant's consulting business structured as a Subchapter S corporation fluctuated yearly and included periods of unemployment. [*Dorwani v. Dorwani*, 214 N.C. App. 560, 714 S.E.2d 868 (2011) (**unpublished**).]

(f) Act of supporting spouse in pledging cash reserves of his Subchapter S corporation to a bank, thus precluding those funds from being income to him, improperly placed the burden of his voluntarily-assumed business investment on the dependent spouse. [*Barham v. Barham*, 127 N.C. App. 20, 487 S.E.2d 774 (1997), *aff'd per curiam*, 347 N.C. 570, 494 S.E.2d 763 (1998).]

ix. Income includes true severance pay. The court of appeals has cited the American Heritage Dictionary (2d ed. 1982) definition of "severance pay" as "a sum of money usually based on length of employment for which an employee is eligible upon termination." [*Glass v. Glass*, 131 N.C. App. 784, 789, 509 S.E.2d 236, 239 (1998) (to determine to what extent the pay is true severance pay, trial court should use the analytic approach, which asks what the award was intended to replace). *Cf. Ross v. Ross*, 193 N.C. App. 247, 666 S.E.2d 889, (2008) (**unpublished**) (citing *Glass*) (lump sum payment from corporate employer to wife was not income to wife when payment was made in consideration of her early retirement from an employer in the process of merger; noting in footnote 1 that when a lump sum payment is not based on the length of a spouse's employment but is made, rather, in exchange for the spouse's waiver of certain rights, the payment is not included in the spouse's income for purposes of determining the amount and duration of an alimony award), *review dismissed*, 363 N.C. 656, 685 S.E.2d 105 (2009).]

e. The duration of the marriage. [G.S. 50-16.3A(b)(5).]

f. The contribution by one spouse to the education, training, or increased earning power of the other spouse. [G.S. 50-16.3A(b)(6).]

g. The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as custodian of a minor child. [G.S. 50-16.3A(b)(7).]

i. Enactment of G.S. 50-16.3A(b)(7) mandates that trial courts consider the expenses and financial obligations related to serving as a custodian of a minor

child when setting the amount and duration of an alimony award. [*Harris v. Harris*, 188 N.C. App. 477, 656 S.E.2d 316 (2008).]

ii. Where court in postseparation support order considered wife's expenses as custodian and calculated her reasonable housing expenses in part on the receipt of child support, attributing one-half of housing expenses to wife and other half to child, trial court in alimony modification proceeding was within its discretion when it considered the cessation of child support payments and when it, given the "limited circumstances" of the case, increased husband's alimony obligation accordingly. [*Harris v. Harris*, 188 N.C. App. 477, 656 S.E.2d 316 (2008) (increase in alimony award affirmed but appellate court careful to note that it was not holding that cessation of child support would always provide adequate grounds to warrant modification of an alimony award); *Hunt v. Hunt*, 233 N.C. App. 785, 759 S.E.2d 712 (**unpublished**) (trial court did not impermissibly blur line between child support and alimony when it ordered $800/month in alimony to wife until children no longer attended private school, at which time alimony payable to wife would be increased by the cost of private school tuition), *review denied*, 367 N.C. 524, 762 S.E.2d 443 (2014).]

iii. While this factor allows the court to consider the expenses of the custodial parent relating to the child when determining dependency for alimony, fairness requires that the court consider the noncustodial parent's contributions in a like manner. [*Robinson v. Robinson*, 210 N.C. App. 319, 707 S.E.2d 785 (2011) (citing *Fink v. Fink*, 120 N.C. App. 412, 462 S.E.2d 844 (1995)) (father was credited only with guideline amount of child support while mother, the custodial parent, was credited with her actual expenses for the child, which increased her monthly shortfall and father's alimony obligation; alimony award vacated so that alimony could be determined based upon mother's shortfall after paying only her guideline share of the child's expenses).]

h. The standard of living of the spouses established during the marriage. [G.S. 50-16.3A(b)(8).]

i. This factor is of "critical importance" in determining amount as well as dependency. [*Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982).]

ii. The point in evaluating the parties' accustomed standard of living is to consider the pooling of resources that marriage allows. [*Rice v. Rice*, 159 N.C. App. 487, 584 S.E.2d 317 (2003).]

iii. Marital standard of living is one of the factors the court takes into consideration in calculating the reasonable expenses of each party. [*Bryant v. Bryant*, 139 N.C. App. 615, 534 S.E.2d 230 (noting, however, as a practical matter, that the parties' reasonable expenses and their standard of living are two separate and distinct considerations), *review denied*, 353 N.C. 261, 546 S.E.2d 91 (2000).]

iv. A trial court may consider accustomed pattern of savings during the marriage when determining the parties' standard of living. [*Vadala v. Vadala*, 145 N.C. App. 478, 550 S.E.2d 536 (2001) (citing *Rhew v. Rhew*, 138 N.C. App. 467, 531 S.E.2d 471 (2000), and *Glass v. Glass*, 131 N.C. App. 784, 509 S.E.2d 236 (1998)); *Rhew* (parties had a "historical pattern" of savings contribution); *Glass* (trial court can properly consider parties' custom of making regular additions to

savings plans as a part of their standard of living in determining amount and duration of alimony award).] However, "the purpose of alimony is not to allow a party to accumulate savings." [*Glass v. Glass*, 131 N.C. App. 784, 789, 509 S.E.2d 236, 239–40 (1998); *Collins v. Collins*, 243 N.C. App. 696, 706, 778 S.E.2d 854, 860 (2015) (trial court erred when it *sua sponte* added a lump sum figure to an alimony award "to allow Plaintiff to accumulate savings" without finding that the parties had a habit of regularly contributing to savings as part of their standard of living during the marriage).] The marital pattern of savings also may be considered as a reasonable expense of a party. See Section III.D.9.j.v, discussing this factor, below. Contributions to savings **must** be considered in calculating a party's total income. See Section III.D.9.d.i, above.

v. A spouse seeking alimony should not be required to deplete her estate to maintain her accustomed standard of living. [*Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980) (noting that, similarly, requiring a supporting spouse, through depletion of the supporting spouse's estate, to maintain the dependent spouse at the standard of living to which they were accustomed could soon lead to the supporting spouse's inability to provide for either party).]

vi. An alimony award should not result in a higher standard of living for the dependent spouse. [*Dodson v. Dodson*, 190 N.C. App. 412, 660 S.E.2d 93 (2008) (unclear whether move of the dependent spouse from manufactured housing in North Carolina during the marriage to a three-bedroom rental home in South Carolina after the marriage increased her standard of living, but if so, supporting spouse should not bear increased expense); *Kelly v. Kelly*, 167 N.C. App. 437, 606 S.E.2d 364 (2004) (by statute, trial court is to consider the parties' "accustomed standard of living," not the potential standard of living).]

vii. Trial court properly considered that wife intended to use her condominium as a home for her mother until the mother's death, even though the mother had no life estate or legal right to remain there. [*Phillips v. Phillips*, 185 N.C. App. 238, 647 S.E.2d 481 (2007) (the finding spoke to the wife's need for more space to maintain the standard of living to which she had become accustomed during the last several years prior to separation), *aff'd per curiam*, 362 N.C. 171, 655 S.E.2d 350 (2008).]

i. The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his reasonable economic needs. [G.S. 50-16.3A(b)(9).]

j. The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support. [G.S. 50-16.3A(b)(10).]

i. The court's comparison of the spouses' income and expenses is one of the most important considerations in setting the amount of the alimony award. [*Bryant v. Bryant*, 139 N.C. App. 615, 534 S.E.2d 230 (citing 2 Lee's North Carolina Family Law § 9.22 (5th ed. 1999)), *review denied*, 353 N.C. 261, 546 S.E.2d 91 (2000).]

ii. Expenses for emancipated children.

(a) A supporting spouse's reasonable expenses do not include mortgage payments and fees on an adult child's condominium that the supporting spouse

is under no legal obligation to provide, nor do they include the expenses of the supporting spouse's current spouse. [*Martin v. Martin*, 207 N.C. App. 121, 698 S.E.2d 491 (2010) (supporting spouse's request to decrease his alimony obligation properly denied).]

(b) Trial court abused its discretion by including in defendant supporting spouse's reasonable expenses payments for vehicles driven by two of the parties' children, both of whom had reached majority, and rent payments, for which he was contractually liable, for an apartment for one of the children. Defendant's assumption of those obligations, which was voluntary and not out of necessity, could not be used to reduce his income, and thus his obligation to his dependent spouse. [*Kelly v. Kelly*, 151 N.C. App. 748, 567 S.E.2d 468 (2002) (**unpublished**); *Clark v. Clark*, 231 N.C. App. 514, 753 S.E.2d 743 (2013) (**unpublished**) (trial court properly declined to include in defendant's reasonable monthly expenses a monthly payment of $1,000 on credit card debt totaling $56,000, which the trial court found was incurred in part to finance a son's college education; even if court erred in finding that the credit card debt arose from tuition payments, defendant failed to produce evidence that the payments were reasonable and necessary expenses when he presented no direct testimony or other evidence setting out the expenses that made up the credit debt).]

(c) The trial court did not err when it decided not to attribute half of a dependent spouse's monthly mortgage and utility expenses to her emancipated son who lived in a basement apartment rent-free. [*Brown v. Brown*, 192 N.C. App. 734, 666 S.E.2d 217 (2008) (**unpublished**) (trial court did not abuse its discretion when it indicated that it had considered the son's temporary living arrangements but nevertheless found the expenses of the dependent spouse for those categories reasonable and necessary).] **NOTE**: As noted by the court of appeals, this case considered whether a spouse's expenses should be reduced because an emancipated child lived with the spouse, as opposed to the above cases, where the court was considering whether a spouse's expenses should include, or be increased, because of the expenses the spouse incurred for an emancipated child.

iii. G.S. 50-16.3A(b)(10) does not require a recitation of the value of each of the assets, liabilities, and debts of the parties. [*Phillips v. Phillips*, 185 N.C. App. 238, 647 S.E.2d 481 (2007), *aff'd per curiam*, 362 N.C. 171, 655 S.E.2d 350 (2008).] A trial court is not required to give an exact value to the dollar of a party's total estate. [*Parsons v. Parsons*, 231 N.C. App. 397, 752 S.E.2d 530 (2013).] If the evidence as to value is conflicting, resolution of the conflict, and the weight and credibility of evidence, are for the trial court to determine. [*Clark v. Clark*, 231 N.C. App. 514, 753 S.E.2d 743 (2013) (**unpublished**) (when defendant submitted a financial statement to a bank that listed property valued at $150,000, defendant's argument that trial court should have reduced that value when determining his personal estate, based on his trial testimony, was rejected).] For findings that were sufficient under this statute, see Section III.G.3.e.i, below.

iv. When considering the parties' separate estates for purpose of alimony, the trial court is to consider the value of the property within a reasonable time before or after the commencement of an action seeking an award of permanent alimony. [*See Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980) (value of property during this time frame is "a proper subject of inquiry" for the court; otherwise, it would be difficult, if not completely impossible, to accurately assess the value of the parties' separate estates and make a fair determination of the ability of one spouse to provide, and the need of the other spouse to receive, such an award at the time the order is entered); *Kelly v. Kelly*, 151 N.C. App. 748, 567 S.E.2d 468 (2002) (**unpublished**) (citing *Clark*) (trial court erred in attributing to plaintiff an estate consisting of 75 percent of the marital estate based on date-of-separation values, and erred in denying plaintiff alimony based in part on the value of the property awarded to plaintiff in equitable distribution when the value was based on the date of separation, some seven years before entry of the alimony order).]

v. In calculating expenses, the trial court may include some amount reflecting the marital pattern of savings, if appropriate under the circumstances. [*Bryant v. Bryant*, 139 N.C. App. 615, 534 S.E.2d 230 (citing *Cunningham v. Cunningham*, 345 N.C. 430, 480 S.E.2d 403 (1997)) (no error in characterizing investment income, earned and reinvested during the course of the marriage, as an expense), *review denied*, 353 N.C. 261, 546 S.E.2d 91 (2000).] The marital pattern of savings also can be considered when determining the parties' standard of living. See Section III.D.9.h, discussing this factor, above. Also, a party's savings contributions are considered in determining income. See Section III.D.9.d.i, above.

vi. It is error to characterize investment income as an expense for one spouse but not for the other. [*Bryant v. Bryant*, 139 N.C. App. 615, 534 S.E.2d 230, *review denied*, 353 N.C. 261, 546 S.E.2d 91 (2000).]

vii. A supporting spouse may not intentionally increase his monthly expenditures by making unnecessary capital expenditures to avoid or minimize his alimony obligation to the dependent spouse. [*Friend-Novorska v. Novorska*, 131 N.C. App. 867, 509 S.E.2d 460 (1998) (court cannot consider future unnecessary expenditures that the supporting spouse desires to make, such as a new car, when determining amount of alimony).] However, it is appropriate for a trial court to make findings on, and to consider, reasonable future expenses in awarding or modifying alimony, including those relating to upkeep of the former marital residence. [*Parsons v. Parsons*, 231 N.C. App. 397, 752 S.E.2d 530 (2013) (wife's affidavit and testimony as to future expected costs for home maintenance and repair supported award of $198/month for those expected expenses).]

viii. In determining a spouse's reasonable and necessary living expenses, the trial court should consider contributions of others if those contributions are reliable and used for household support. [*Dodson v. Dodson*, 190 N.C. App. 412, 660 S.E.2d 93 (2008) (trial court erred in not making findings about rental payments the dependent spouse received from her adult children who resided with her).]

ix. In determining wife's medical expenses, the trial court did not err when it included expenses related to a surgical procedure without finding that it would be a reoccurring expense. Past medical expenses are a valid factor in determining future needs. [*Clark v. Clark*, 231 N.C. App. 514, 753 S.E.2d 743 (2013) (**unpublished**).]

x. Alimony should not include payment for the support and maintenance of a spouse's business ventures. [*Beaman v. Beaman*, 77 N.C. App. 717, 336 S.E.2d 129 (1985) (where wife had business in her home and had business expenses that duplicated her personal expenses, trial court was instructed to determine the extent of the duplication and consider the duplication when setting amount of alimony); *Barham v. Barham*, 127 N.C. App. 20, 28, 487 S.E.2d 774, 779 (1997) (citing *Beaman*) (stating that "[j]ust as a supporting spouse is not required to pay for the maintenance and support of a dependent spouse's business ventures, a dependent spouse also should not be made to bear the financial burden of a supporting spouse's business investment"; thus, in determining alimony, it was error to exclude from supporting spouse's income cash reserves of his Subchapter S corporation that he voluntarily pledged to a creditor bank), *aff'd per curiam*, 347 N.C. 570, 494 S.E.2d 763 (1998).]

xi. Ordinarily, the parties will not be required to deplete their estates to pay alimony or to meet personal expenses. [*Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980); *Beaman v. Beaman*, 77 N.C. App. 717, 336 S.E.2d 129 (1985) (citing *Williams*).]

xii. A spouse cannot be reduced to poverty in order to comply with an alimony decree. [*Quick v. Quick*, 305 N.C. 446, 457, 290 S.E.2d 653, 660 (1982) (based on the limited findings as to the supporting spouse's estate, it appeared to the appellate court that the trial court abused its discretion when it found that husband "can afford" to pay as alimony more than half of his monthly income when, given his expenses, he would deplete his estate in five years). *See also Dodson v. Dodson*, 190 N.C. App. 412, 660 S.E.2d 93 (2008) (court abused its discretion when the modified alimony payment it ordered left the husband with a negative cash flow); *Hudson v. Hudson*, 193 N.C. App. 454, 667 S.E.2d 340 (2008) (**unpublished**) (depletion of defendant's estate was not speculative but certain and would reduce him to poverty if continued, warranting reversal of alimony order; defendant had an income-expense deficit before alimony was considered, and even though plaintiff also had an income-expense deficit, defendant was currently depleting his already substantially diminished estate at a rate three times faster than plaintiff).]

xiii. But appellate courts have upheld alimony awards that left supporting spouses with a shortfall or very limited funds when the evidence showed that the supporting spouse received other substantial financial benefits. [*Walker v. Walker*, 143 N.C. App. 414, 546 S.E.2d 625 (2001) (trial court properly considered benefits defendant received from his solely-owned company, such as health insurance, use of a vehicle, and reimbursed living expenses); *Ahern v. Ahern*, 63 N.C. App. 728, 306 S.E.2d 140 (1983) (evidence showed that plaintiff's real earnings and income from his company greatly exceeded his designated salary).]

k. The property brought to the marriage by either spouse. [G.S. 50-16.3A(b)(11).]

l. The contribution of a spouse as homemaker. [G.S. 50-16.3A(b)(12).]

i. This was an unfavorable factor to a wife whose "ability to be a homemaker [wa]s in question as a result of the condition of the home." A finding that wife had hoarded items, accumulated a tremendous amount of clutter, and kept the former marital residence in total disarray was unchallenged. [*Works v. Works*, 217 N.C. App. 345, 351, 719 S.E.2d 218, 221 (2011).]

m. The relative needs of the spouses. [G.S. 50-16.3A(b)(13).]

i. A "trial judge may resort to his own common sense and every-day experiences in calculating the reasonable needs and expenses of the parties." [*Cunningham v. Cunningham*, 171 N.C. App. 550, 564, 615 S.E.2d 675, 685 (2005) (quoting *Bookholt v. Bookholt*, 136 N.C. App. 247, 250, 523 S.E.2d 729, 732 (1999)).]

ii. It is appropriate for a trial court to make findings on, and to consider, reasonable future expenses in awarding or modifying alimony, including those relating to upkeep of the former marital residence. [*Parsons v. Parsons*, 231 N.C. App. 397, 752 S.E.2d 530 (2013).]

iii. The trial court did not err by making certain reductions to the monthly expenses husband claimed in his affidavit. [*Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005) (rejecting husband's argument that reductions in expenses for cable, vacations, phone, food, gifts, and clothing were arbitrary). *See also Nicks v. Nicks*, 241 N.C. App. 487, 774 S.E.2d 365 (2015) (reduction of wife's monthly affidavit expenses by $1,750 upheld based on finding that claimed expenses for upkeep and maintenance on the home and savings for child, vacations, and a car were not reasonable); *Clark v. Clark*, 231 N.C. App. 514, 753 S.E.2d 743 (2013) (**unpublished**) (when financial affidavit that defendant filed with the court listed a $250/month warehouse debt but financial statement that defendant submitted to a bank did not, trial court did not have to include that debt in defendant's reasonable monthly expenses).]

iv. When a court exercises its common sense and experience to reduce a party's expenses, it must provide some explanation as to how it calculated the parties' incomes and expenses. [*Fennell v. Fennell*, 206 N.C. App. 329, 698 S.E.2d 557 (2010) (**unpublished**) (citing *Bookholt v. Bookholt*, 136 N.C. App. 247, 250, 523 S.E.2d 729, 731 (1999)) (case remanded for findings when trial court failed to indicate how it arrived at a monthly expense figure lower than that claimed by defendant in his affidavit).]

v. Trial court abused its discretion by including in defendant supporting spouse's reasonable expenses payments for vehicles driven by two of the parties' children, both of whom had reached majority, and rent payments, for which he was contractually liable, for one of the children. Defendant's assumption of those obligations, which was voluntary and not out of necessity, could not be used to increase his expenses. [*Kelly v. Kelly*, 151 N.C. App. 748, 567 S.E.2d 468 (2002) (**unpublished**).]

n. The federal, state, and local tax ramifications of the alimony award. [G.S. 50-16.3A(b)(14).]

i. Appellate courts have upheld consideration of the income tax consequences of an award of alimony. [*Squires v. Squires*, 178 N.C. App. 251, 631 S.E.2d 156 (2006) (citing *Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980)) (no abuse of discretion when court considered that dependent spouse's combined tax rate would be 15 percent). *See also Clark* (under prior law that did not include tax consequences of an award of alimony as a factor, court held that tax consequence of an alimony award is properly considered by a trial court in determining the amount of the award).]

ii. It is error to fail to make findings on the tax ramifications of an alimony award when evidence is presented on the ramifications. [*Nicks v. Nicks*, 241 N.C. App. 487, 505, 774 S.E.2d 365, 378 (2015) (dependent spouse presented expert testimony about the federal and state tax ramifications of various hypothetical alimony awards; the expert did not testify as to the tax ramifications on the amount of alimony awarded to the dependent spouse, $3,000/month or $36,000/year, but made clear that the dependent spouse would actually receive less than the amount awarded as a result of state and federal income taxes; while the expert testimony "does not necessarily require the trial court to increase its alimony award," G.S. 50-16.3A(c) and (b)(14) require the trial court to support its reasoning with specific findings; matter remanded).]

o. Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper. [G.S. 50-16.3A(b)(15).]

i. Under this factor, a trial court was authorized to consider wife's investment portfolio when calculating the amount of an alimony award. [*Francis v. Francis*, 169 N.C. App. 442, 612 S.E.2d 141 (opinion does not set out any facts about the investment portfolio), *review denied*, 359 N.C. 631, 616 S.E.2d 233 (2005).]

p. The fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution (ED) of the parties' marital or divisible property. [G.S. 50-16.3A(b)(16).]

i. G.S. 50-16.3A(b)(16) directs the trial court to consider ED as a factor for consideration. [*Myers v. Myers*, 177 N.C. App. 462, 628 S.E.2d 867 (2006) (**unpublished**) (where findings of fact in order awarding alimony failed to mention plaintiff's receipt in ED of $100,000 and fact that she retained $73,000 at the time of trial, matter was remanded for specific findings on this factor). *Cf. Rhew v. Rhew*, 138 N.C. App. 467, 531 S.E.2d 471 (2000) (in determining dependency, it was error for a court to "speculate" about the results of the parties' pending ED when there was no evidence presented as to the likely outcome).]

ii. For discussion on the relationship of alimony to ED, see Section III.B.7, above.

E. Duration of the Award

1. Alimony may be ordered for a specified or an indefinite term. [G.S. 50-16.1A(1).]

2. The court must set out the reasons for the duration of an alimony award. It is error not to do so. [G.S. 50-16.3A(c) (requiring the court to set forth the reasons for the duration of

an award of alimony); *Nicks v. Nicks*, 241 N.C. App. 487, 501, 774 S.E.2d 365, 376 (2015) (emphasis in original) (trial court erred when it failed to make sufficient findings of fact to support an award of permanent alimony to wife; on remand the trial court must weigh certain competing factors "in reaching and *explaining* its decision on the duration of the alimony award"); *Works v. Works*, 217 N.C. App. 345, 719 S.E.2d 218 (2011) (error to order alimony for eighty-four consecutive months without setting forth reasons for that duration); *Squires v. Squires*, 178 N.C. App. 251, 631 S.E.2d 156 (2006) (case remanded for findings on duration when court ordered alimony paid until death of a party or until wife's remarriage or cohabitation but failed to make findings about the reasons for that duration); *Friend-Novorska v. Novorska*, 131 N.C. App. 867, 509 S.E.2d 460 (1998) (error to limit alimony award to thirty months in duration without explaining why).] For findings as to duration of the award, see Section III.G.4.f, below.

3. Effective date of alimony award.
   a. Trial judge appears to have discretion to determine effective date of an alimony award.
   b. An award of alimony may be effective from the date of separation. [*Smallwood v. Smallwood*, 227 N.C. App. 319, 742 S.E.2d 814 (2013) (affirming award of alimony from date of separation to date postseparation support (PSS) payments began, and from date PSS payments terminated; rejecting defendant's argument that 1995 changes to alimony statute preclude award of retroactive alimony); *Stickel v. Stickel*, 58 N.C. App. 645, 294 S.E.2d 321 (1982) (upholding lump sum award of alimony for eighteen-month period from date of separation to date of hearing). See also 2 Lee's North Carolina Family Law § 9.50 (5th ed. 1999) and cases cited therein; *Austin v. Austin*, 12 N.C. App. 390, 393, 183 S.E.2d 428, 430 (1971) (noting that a dependent spouse may recover support "not only from the time she instituted her action, but from the time her husband wrongfully separated himself from her").]
   c. An award of alimony may be effective the month after a claim for alimony was made. [*Burger v. Burger*, 790 S.E.2d 683 (N.C. Ct. App. 2016) (husband's answer in December 2010 asserted claim for alimony; order entered in August 2015 awarding husband alimony effective Jan. 1, 2011, upheld).]
   d. An award ordering alimony to begin some two years after the filing of the complaint has been upheld. [*Francis v. Francis*, 169 N.C. App. 442, 612 S.E.2d 141 (complaint seeking alimony filed in May 2000, order for alimony entered in November 2003 providing that monthly alimony payments would begin in June 2003; opinion gives no reasons for denying alimony for period between filing of the complaint and start of alimony payments), *review denied*, 359 N.C. 631, 616 S.E.2d 233 (2005).]
4. For more on findings generally, see Section III.G.2, below.

F. Defenses

1. Waiver.
   a. A party cannot waive alimony in a postnuptial agreement unless it is a separation agreement, or, for agreements entered on or after June 19, 2013, unless the waiver is made in an agreement executed during a period of separation pursuant to G.S. 52-10(a1).

b. Waiver by marital contract generally.

i. Alimony, postseparation support, and attorney fees may be barred by an express provision in a valid separation agreement, premarital agreement, or marital contract made pursuant to G.S. 52-10(a1) so long as the agreement is performed. [G.S. 50-16.6(b), *amended by* S.L. 2013-140, § 2, effective June 19, 2013 (amendment added reference to G.S. 52-10(a1)); *Napier v. Napier*, 135 N.C. App. 364, 367, 520 S.E.2d 312, 314 (1999) (citing dictionary definition of "express" to mean "[d]efinitely and explicitly stated. . . . [p]articular; specific"), *review denied*, 351 N.C. 358, 543 S.E.2d 132 (2000).]

c. Waiver by contract pursuant to G.S. 52-10(a1).

i. For contracts entered into on or after June 19, 2013, spouses who are separated but contemplating reconciliation may provide for support rights or for the waiver of support rights that will apply upon the occasion of any future separation. [G.S. 52-10(a1).] This statute does not authorize agreements regarding support rights and obligations while the parties live together as husband and wife. [*See In re Estate of Tucci*, 94 N.C. App. 428, 380 S.E.2d 782 (1989) (recognizing that the state supreme court in *Motley v. Motley*, 255 N.C. 190, 120 S.E.2d 422 (1961), established as public policy that married parties may not shirk their spousal duties of support and alimony and yet live together as a married couple), *aff'd per curiam*, 326 N.C. 359, 388 S.E.2d 768 (1990).]

ii. A contract between a husband and wife made, with or without a valuable consideration, during a period of separation to waive, release, or establish rights and obligations to postseparation support, alimony, or spousal support is valid and not inconsistent with public policy. [G.S. 52-10(a1), *added by* S.L. 2013-140, § 1, effective June 19, 2013.]

iii. A provision in a contract between a husband and wife waiving, releasing, or establishing rights and obligations to postseparation support, alimony, or spousal support shall remain valid following a period of reconciliation and subsequent separation if the contract is in writing, the provision waiving the rights or obligations is clearly stated in the contract, and the contract was acknowledged by both parties before a certifying officer. [G.S. 52-10(a1), *added by* S.L. 2013-140, § 1, effective June 19, 2013.]

iv. A release made pursuant to G.S. 52-10(a1) may be pleaded in bar of any action or proceeding for the recovery of the rights released. [G.S. 52-10(a1), *added by* S.L. 2013-140, § 1, effective June 19, 2013.]

d. Case law on waiver.

i. The waiver provision must specifically refer to alimony. A general release will not be sufficient. [*Napier v. Napier*, 135 N.C. App. 364, 365–66, 366, 520 S.E.2d 312, 313 (1999) (emphasis in original) (blanket release of "*all causes of action, claims, rights or demands whatsoever, at law or in equity*" did not release or settle wife's alimony claims since it did not specifically refer to the waiver, release, or settlement of "alimony" or use some other similar language; nor did language that stated agreement was "an *agreement settling their* property and *marital rights*" and that it was "*in full satisfaction of all obligations which each of them*

now has or might hereafter or otherwise have toward the other"), *review denied*, 351 N.C. 358, 543 S.E.2d 132 (2000); *Jones v. Jones*, 162 N.C. App. 134, 590 S.E.2d 308 (2004) (citing *Napier*) (marital dissolution agreement entered into after execution of a separation agreement, which contained no specific mention of alimony or of statutory provisions regarding alimony, did not waive alimony due wife under the separation agreement). *But see Stewart v. Stewart*, 141 N.C. App. 236, 240, 541 S.E.2d 209, 212 (2000) (holding that a premarital agreement that waived "any right or claim of any kind, character, or nature whatsoever" of a spouse pursuant to G.S. Chapter 50 was sufficiently express to constitute a valid waiver of postseparation support and alimony).]

ii. Any waivers or agreements made during the marriage concerning the right of spousal support must be made in the context of a separation agreement and executed pursuant to G.S. 52-10.1. [*Napier v. Napier*, 135 N.C. App. 364, 520 S.E.2d 312 (1999) (citing *Williams v. Williams*, 120 N.C. App. 707, 463 S.E.2d 815 (1995)) (the validity of an agreement as it relates to the waiver of alimony is not to be judged in the context of G.S. 52-10, even though case law has found that the "right of support" is in the nature of a property right), *review denied*, 351 N.C. 358, 543 S.E.2d 132 (2000). *Cf.* G.S. 52-10(a1), *added by* S.L. 2013-140, § 1, effective June 19, 2013, set out in Section III.F.1.c, above, allowing parties to waive spousal rights by marital contract pursuant to G.S. 52-10(a1).]

iii. An agreement between a husband and wife living together and not contemplating imminent separation that purports to quantify or limit the duty of support is void as against public policy. [*Gray v. Snyder*, 704 F.2d 709 (4th Cir. 1983) (recognizing that under North Carolina law, spouses must separate or intend to separate immediately to execute valid support waiver under G.S. 52-10.1); *Motley v. Motley*, 255 N.C. 190, 120 S.E.2d 422 (1961) (case involves agreement executed before marriage purporting to waive alimony, but opinion discusses duty of support that comes into existence upon the "moment" parties are married); *Williams v. Williams*, 120 N.C. App. 707, 463 S.E.2d 815 (1995) (agreement executed while parties were living separate and apart but contemplating a resumption of marital relations and providing for wife's support in that event and upon subsequent separation was a promise or contract looking to the future separation of a husband and wife and was void against public policy), *aff'd per curiam*, 343 N.C. 299, 469 S.E.2d 553 (1996). *See also In re Estate of Tucci*, 94 N.C. App. 428, 380 S.E.2d 782 (1989) (recognizing that the state supreme court in *Motley* established as public policy that married parties may not shirk their spousal duties of support and alimony and yet live together as a married couple), *aff'd per curiam*, 326 N.C. 359, 388 S.E.2d 768 (1990).]

e. For more on alimony provisions in separation agreements, see *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

2. Marital misconduct.

a. Illicit sexual behavior. [G.S. 50-16.1A(3)a.]

i. A court shall not award alimony if it finds that the dependent spouse participated in an act of illicit sexual behavior during the marriage and before or on the

date of separation. [G.S. 50-16.3A(a). See Section III.A.4.b, above, for definition of "illicit sexual behavior."] Illicit sexual behavior is the only type of marital misconduct that can bar a claim for alimony.

ii. If the court finds that both spouses participated in an act of illicit sexual behavior during the marriage and before or on the date of separation, then the court shall award or deny alimony in the discretion of the court after consideration of all of the circumstances. [G.S. 50-16.3A(a).]

iii. Any act of illicit sexual behavior by either party that has been condoned by the other party shall not be considered by the court. [G.S. 50-16.3A(a).]

(a) Condonation is the forgiveness of a marital offense constituting a ground for divorce from bed and board on the condition that the marital misconduct cease. [*Malloy v. Malloy*, 33 N.C. App. 56, 234 S.E.2d 199 (1977).]

(b) A spouse cannot condone an act of illicit sexual behavior if the party is not aware of the activity until trial. [*See Romulus v. Romulus*, 215 N.C. App. 495, 715 S.E.2d 308 (2011) (affirming trial court's conclusion that plaintiff's illicit sexual behavior was uncondoned).]

(c) Ordinarily, as an affirmative defense, condonation must be alleged in defendant's pleadings. [*Earp v. Earp*, 52 N.C. App. 145, 277 S.E.2d 877 (1981).]

(d) However, a party may be entitled to raise the issue of condonation at trial, even though the issue was not raised in the pleadings. [*Earp v. Earp*, 52 N.C. App. 145, 277 S.E.2d 877 (1981) (when plaintiff's pleadings allege cohabitation subsequent to defendant's misconduct, plaintiff's claim is properly demurrable for condonation even absent such allegations in defendant's pleadings); *Malloy v. Malloy*, 33 N.C. App. 56, 234 S.E.2d 199 (1977) (wife was entitled to present evidence of condonation of her alleged adultery notwithstanding that pleadings contained no allegation of condonation by husband).]

(e) Admitted resumption of cohabitation subsequent to alleged misconduct by both parties supported pretrial ruling that each party had condoned any and all misconduct of the other party prior to the date cohabitation resumed. [*Earp v. Earp*, 52 N.C. App. 145, 277 S.E.2d 877 (1981). *But see Privette v. Privette*, 30 N.C. App. 305, 227 S.E.2d 137 (1976) (finding no condonation when the parties continued to live under the same roof but did not have sexual intercourse).]

(f) When husband repeated indignities after the parties resumed cohabitation, wife's condonation was of no effect and her allegations of injury occurring before reconciliation were revived. [*Earp v. Earp*, 52 N.C. App. 145, 277 S.E.2d 877 (1981) (repetition of the injury takes away the condonation).]

(g) Voluntary sexual intercourse by the innocent spouse, with knowledge or reason to know that the other has committed adultery, usually operates as a condonation of the offense. [*Malloy v. Malloy*, 33 N.C. App. 56, 234 S.E.2d 199 (1977).]

(h) For more on condonation, see N.C.P.I.—Civil 815.71—Alimony—Issue of Condonation and N.C.P.I.—Civil 815.72—Alimony—Issue of Condonation—Violation of Condition.

iv. For recrimination and condonation, see *Divorce and Annulment*, Bench Book, Vol. 1, Chapter 5.

v. Regarding proof of adultery and a spouse's right to assert the privilege against self-incrimination, see Section III.A.4.b.viii, above.

b. G.S. 50-16.1A(3) sets out eight other types of marital misconduct that can be considered by the court when determining whether to award alimony and in determining amount, duration, and manner of payment of alimony. [*See Brannock v. Brannock*, 135 N.C. App. 635, 523 S.E.2d 110 (1999) (noting that after the wholesale revision of North Carolina alimony law pursuant to the 1995 amendments, as to those eight types of misconduct, fault merely constitutes a factor to be considered in resolving support eligibility and amount), *review denied, appeal dismissed*, 351 N.C. 351, 543 S.E.2d 123 (2000).] See Section III.A.4, above, for more on marital misconduct.

3. Statutes of limitation.

a. Statute of limitations for enforcement of an alimony judgment.

i. Statutes of limitation run between spouses as well as between strangers. [*Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561 (1977).]

ii. The ten-year statute of limitations for enforcement of judgments, G.S. 1-47, bars recovery of alimony that became due more than ten years before the enforcement action was filed. [*Elliott v. Estate of Elliott*, 163 N.C. App. 577, 596 S.E.2d 819 (wife entitled to enforce a California alimony judgment against the North Carolina estate of the supporting spouse for alimony payments accruing ten years before the date the enforcement action commenced), *cert. denied*, 358 N.C. 731, 601 S.E.2d 530 (2004); *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561 (1977) (statute of limitations barred periodic sums of alimony and child support that became due more than ten years before action was filed).]

b. Statute of limitations for presentation of a claim against a decedent's estate for unpaid alimony.

i. If a claim is presented to and rejected by the personal representative of an estate, the claimant must, within three months after written notice of such rejection, commence an action to recover the claim or be forever barred. [G.S. 28A-19-16.]

ii. To trigger the three-month statute of limitations in G.S. 28A-19-16, there must be a rejection of the claim and the rejection must be absolute and unequivocal. [*Elliott v. Estate of Elliott*, 163 N.C. App. 577, 596 S.E.2d 819 (rejection of claim form accompanied by a letter inviting negotiations did not constitute an unequivocal rejection, so wife's claim for unpaid alimony was not barred by G.S. 28A-19-16), *cert. denied*, 358 N.C. 731, 601 S.E.2d 530 (2004).]

4. Defenses found not valid.

a. Laches.

i. The doctrine of laches is not applicable to actions for the continuing obligation of spousal support. [*Elliott v. Estate of Elliott*, 163 N.C. App. 577, 596 S.E.2d 819,

cert. denied, 358 N.C. 731, 601 S.E.2d 530 (2004). *See also Webber v. Webber*, 32 N.C. App. 572, 232 S.E.2d 865 (1977) (wife not estopped from bringing subsequent action in North Carolina for divorce, alimony, and child support after agreeing that she would not contest divorce action filed by husband in Georgia).]

G. Judgment or Order

1. If allowance also is made for children, the alimony award must be stated separately and identified. [G.S. 50-16.7(a); 50-13.4(e).]
2. Findings of fact generally.
   a. In alimony cases where a trial court sits without a jury, the trial court must "find the facts specially and state separately its conclusions of law . . ." [G.S. 1A-1, Rule 52(a); *Pierce v. Pierce*, 188 N.C. App. 488, 655 S.E.2d 863 (2008). *See also Crocker v. Crocker*, 190 N.C. App. 165, 168, 660 S.E.2d 212, 214 (2008) (quoting *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982)) (G.S. 1A-1, Rule 52(a) requires in all nonjury trials that the trial court find specially "those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached").]
   b. Except where there is a motion before the court for summary judgment, judgment on the pleadings, or other motion for which the Rules of Civil Procedure do not require specific findings of fact, the court shall make a specific finding of fact on each of the sixteen factors in G.S. 50-16.3A(b) if evidence is offered on a factor. [G.S. 50-16.3A(c); *Langdon v. Langdon*, 183 N.C. App. 471, 644 S.E.2d 600 (2007); *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005).]
   c. While the court is not required to set out specific findings as to each factor listed in G.S. 50-16.3A(b), it must provide sufficient detail to satisfy a reviewing court that it has considered "all relevant factors." [*Rhew v. Rhew*, 138 N.C. App. 467, 470, 531 S.E.2d 471, 473 (2000).]
   d. While the trial court can incorporate by reference findings of fact made in a postseparation support (PSS) order to support an alimony decision, the alimony order must show that the court made its own independent findings of fact in the alimony case related to the factors in G.S. 50-16.3A(b). [*See Crocker v. Crocker*, 190 N.C. App. 165, 660 S.E.2d 212 (2008) (*Crocker I*) (court of appeals refused to consider findings of fact resulting from the general incorporation of other documents filed in the case, including a PSS order, an equitable distribution (ED) consent judgment, a child custody and support order, and various wage affidavits and amended alimony affidavits; the incorporated findings did not demonstrate that the trial court had properly considered the statutory factors for awarding alimony); *Kabasan v. Kabasan*, 810 S.E.2d 691 (N.C. Ct. App. 2018) (error for trial court to take judicial notice of, and to incorporate by reference, earlier orders in the case, including an order awarding postseparation support, rather than make specific findings of fact as to the needs of the dependent spouse); *cf. Crocker v. Crocker*, 206 N.C. App. 596, 698 S.E.2d 768 (2010) (**unpublished**) (on remand, trial court did not violate *Crocker I* by incorporating by reference its amended PSS order into its amended alimony order when the trial court also made its own independent findings of fact related to the statutory factors in G.S. 50-16.3A(a), even if the new findings were taken verbatim from prior

child custody and child support orders entered in the case; what *Crocker I* prohibits is the trial court's incorporation by reference of a prior order in lieu of making its own findings of fact).]

e. While the trial court is required to make a finding of fact on each of the factors set out in G.S. 50-16.3A(b) about which evidence is presented, the trial court has discretion as to the weight assigned to each factor. [*Robinson v. Robinson*, 210 N.C. App. 319, 707 S.E.2d 785 (2011) (citing *Hartsell v. Hartsell*, 189 N.C. App. 65, 657 S.E.2d 724 (2008)) (court is not required to make findings about the weight and credibility it assigned to evidence before it); *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 545 S.E.2d 788 (findings of fact need not set forth the weight given to the factors in G.S. 50-16.3A(b)), *aff'd per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001). *See also Megremis v. Megremis*, 179 N.C. App. 174, 633 S.E.2d 117 (2006) (noting that the trial court has discretion to determine the weight and credibility given to all evidence presented during trial); *cf. Kelly v. Kelly*, 151 N.C. App. 748, 567 S.E.2d 468 (2002) (**unpublished**) (not paginated on Westlaw) (under former statute, trial court found that parties' reasonable expenses were "not pertinent" to its decision to deny alimony; this express finding demonstrates that trial court failed to give any weight to parties' reasonable expenses, which was an abuse of discretion).]

f. A trial court's findings and conclusions in an order for PSS are not binding at the alimony hearing. [*Langdon v. Langdon*, 183 N.C. App. 471, 644 S.E.2d 600 (2007) (citing *Wells v. Wells*, 132 N.C. App. 401, 512 S.E.2d 468 (1999)).] See Section II.E.4, above.

g. Findings must be more than mere recitations of the evidence. [*Williamson v. Williamson*, 140 N.C. App. 362, 363–64, 536 S.E.2d 337, 338 (2000) (quoting *Montgomery v. Montgomery*, 32 N.C. App. 154, 156–57, 231 S.E.2d 26, 28 (1977)) (pursuant to G.S. 1A-1, Rule 52(a), findings must be "specific ultimate facts . . . sufficient for [an] appellate court to determine that the judgment is adequately supported by competent evidence"); *Greiner v. Greiner*, 151 N.C. App. 747, 567 S.E.2d 465 (2002) (**unpublished**) (citing *Williamson*) (court's finding as to plaintiff's ability to find employment was deficient when it was "merely a recitation of an evidentiary fact" based on plaintiff's testimony with no indication that the finding was "a final resulting effect reached through processes of legal or logical reasoning"); *Solzsmon v. Solzsmon*, 150 N.C. App. 437, 563 S.E.2d 641 (2002) (**unpublished**) (quoting *Williamson*, 140 N.C. App. at 364, 536 S.E.2d at 339) (many findings were not ultimate facts but rather were "mere recitations of the evidence" and did not reflect the "processes of logical reasoning" as indicated by language in the findings stating that plaintiff or defendant "testified" to certain facts).]

h. The court must make findings of fact in support of all conclusions of law. [*Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982) (conclusions must be based upon factual findings sufficiently specific to indicate that the trial judge properly considered the statutory factors for alimony and the applicable case law); *Williamson v. Williamson*, 217 N.C. App. 388, 719 S.E.2d 625 (2011) (citing *Oakley v. Oakley*, 165 N.C. App. 859, 599 S.E.2d 925 (2004)) (when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts).]

i. Findings of fact used to support conclusions of law must be supported by competent evidence presented at trial. [*See Alvarez v. Alvarez*, 134 N.C. App. 321, 517 S.E.2d 420 (1999) (reversing and remanding judgment when at least three findings of fact were not supported by evidence presented at trial).]

j. Actual ability to pay an award, though relevant to the court's determination of fairness to the parties, is not a factor requiring findings of fact under G.S. 50-16.3A(b). [*Swain v. Swain*, 179 N.C. App. 795, 635 S.E.2d 504 (2006) (omission of a specific finding of actual ability to pay was not error when the court clearly had considered the supporting spouse's actual ability to pay), *review denied*, 361 N.C. 437, 649 S.E.2d 897 (2007); *Robinson v. Robinson*, 210 N.C. App. 319, 707 S.E.2d 785 (2011) (citing *Swain*) (although actual ability to pay is relevant, a specific finding is not required when it is clear that court considered spouse's ability to pay). *Cf. Fennell v. Fennell*, 206 N.C. App. 329, 698 S.E.2d 557 (2010) (**unpublished**) (finding that defendant did not have present ability to pay alimony but would after he reduced his debt load was too general to allow appellate review; trial court did not identify monthly payments that would terminate over the next year, nor the amount thereof, and failed to indicate which, or how many, of defendant's debts it expected to be satisfied).]

k. The findings may be sufficient under G.S. 50-16.3A(b), setting out factors the court is to consider when determining the amount, duration, and manner of payment, but insufficient under G.S. 50-16.3A(c), requiring the court to set out the reasons for the amount and duration of an award and the manner of payment. [*Hudson v. Hudson*, 193 N.C. App. 454, 667 S.E.2d 340 (2008) (**unpublished**) (findings sufficient to support amount awarded under G.S. 50-16.3A(b) but remanded for further findings as to reasons for the duration of the award and the manner of payment); *Baker v. Baker*, 190 N.C. App. 822, 662 S.E.2d 37 (2008) (**unpublished**) (where trial court made extensive findings regarding the parties' status and needs but failed to set forth its reasons for the amount and duration of the award, remand necessary).]

3. Findings on specific factors in G.S. 50-16.3A(b).

a. Marital misconduct of either spouse. [G.S. 50-16.3A(b)(1).]

i. An award of alimony was reversed and remanded for further findings of fact when the order failed to specify the type of misconduct that had occurred. [*Lucas v. Lucas*, 209 N.C. App. 492, 706 S.E.2d 270 (2011) (appellate court unable to determine whether evidence was sufficient to support a finding of marital misconduct without knowing which form of marital misconduct the trial court believed occurred and the basic facts supporting that determination).]

ii. Findings were sufficient when the court fully addressed the question of wife's misconduct even though there was no specific finding on abandonment. [*Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005).]

b. Relative earnings and earning capacities of the spouses. [G.S. 50-16.3A(b)(2).]

i. Findings as to supporting spouse's earnings were insufficient when there was "abundant testimony in the record" concerning various sources of income; findings as to his earning capacity were inadequate where there was no finding on whether defendant's health problems would permit him to work again and

no finding on whether his corporate affairs could be arranged to increase his income. [*Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982).]

ii. Findings as to dependent spouse's earnings and earning capacity were inadequate when there were no findings as to whether she was employed and no findings at all concerning her earning capacity. [*Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982). *But see Broughton v. Broughton*, 58 N.C. App. 778, 294 S.E.2d 772 (a trial court does not have to consider in all cases the earning capacity of the dependent spouse), *review denied*, 307 N.C. 269, 299 S.E.2d 214 (1982).]

iii. Findings about dependent spouse's potential investment income and Social Security benefits did not address her earning capacity. [*Honeycutt v. Honeycutt*, 152 N.C. App. 673, 568 S.E.2d 260 (2002) (earning capacity typically refers to earning capacity from working).]

iv. In an order denying supporting spouse's motion to modify, findings as to his health were sufficient, even though not detailed, when supporting spouse did not show a decrease in his income, from worsening health or otherwise. [*Kelly v. Kelly*, 228 N.C. App. 600, 747 S.E.2d 268 (2013) (supporting spouse's health problems were potentially relevant because he contended they contributed to a decrease in his income; while worsening health may result in a decline in income, it is not automatic; finding that defendant's income was not substantially lower than when alimony was originally ordered was supported by evidence, so detailed findings as to defendant's health not required). *Cf. Miller v. Miller*, 192 N.C. App. 275, 664 S.E.2d 665 (2008) (**unpublished**) (findings were deficient when court (1) found that defendant's health had declined since entry of the prior order but made no findings on whether defendant's income had been reduced because of his declining health, (2) found that defendant had resigned from the military but made no findings regarding what change in income, if any, defendant would encounter post-retirement, and (3) found that defendant had changed duty stations but made no findings that his current station in Germany caused his living expenses to increase or decrease).]

v. On remand, the court was directed to make findings to explain its determination that the dependent spouse, previously employed as a school nurse, had a "reasonable earning potential" of $1,500 a month as a nurse in a hospital setting after completing a refresher course. [*Walker v. Walker*, 178 N.C. App. 235, 630 S.E.2d 743 (2006) (**unpublished**) (not paginated on Westlaw).]

vi. Finding of bad faith required to impute income.

(a) It was error to impute income to the dependent spouse based on a finding that she "has the ability to earn at least minimum wage" without first finding that she had depressed her income in bad faith. [*Works v. Works*, 217 N.C. App. 345, 347, 719 S.E.2d 218, 219 (2011) (citing 2 Lee's North Carolina Family Law § 9.26 (5th ed. 1999)) (even though court made findings on wife's limited recent work experience and her failure to complete training needed for her brief pursuits in real estate and in a clerical setting, without a finding of bad faith, findings were not sufficient to support trial court's decision to impute income to wife); *Nicks v. Nicks*, 241 N.C. App.

487, 774 S.E.2d 365 (2015) (citing *Works*) (trial court erred when it imputed income to voluntarily unemployed physician wife without finding that she had depressed her income in bad faith; wife left medical practice to care for child with severe emotional problems).]

(b) Trial court erred in determining alimony based on husband's earning capacity when it omitted an essential finding, that the husband's reduction in income was primarily motivated by a desire to avoid his reasonable support obligations. [*Spencer v. Spencer*, 70 N.C. App. 159, 319 S.E.2d 636 (1984) (citing *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982)) (finding that husband had intentionally depressed his income was not sufficient; the record contained evidence that husband structured his salary payments to reduce payment of income tax, rather than necessarily to avoid paying support; without the essential finding on intent, the trial court must determine alimony based on the supporting spouse's income, not his earning capacity; case decided under prior law but same findings required under new law). See Section III.D.9.b.iii, above; *see also Frey v. Best*, 189 N.C. App. 622, 628, 659 S.E.2d 60, 67 (2008) (quoting *Quick*, 305 N.C. at 453, 290 S.E.2d at 658) (court cannot impute income to a supporting spouse unless it finds that supporting spouse was "deliberately depressing his . . . income or indulging in excessive spending . . . [in] disregard of [his] marital obligation to provide support").]

(c) Order that used earning capacity to determine alimony without finding that defendant was deliberately suppressing his income to avoid family responsibilities was remanded for a specific finding on this issue. Trial court's failure to make the required finding was not cured by a separate postseparation order, based on the same evidence, that contained such a finding. [*Childers v. Childers*, 167 N.C. App. 370, 605 S.E.2d 266 (2004) (**unpublished**).]

vii. Finding of bad faith must be supported by the evidence.

(a) Evidence was insufficient to support conclusion that husband's change of circumstances was voluntarily effected by him in disregard of his marital and parental support obligations. [*Wachacha v. Wachacha*, 38 N.C. App. 504, 248 S.E.2d 375 (1978) (although husband voluntarily gave up job as a recreation director to pursue a degree in recreation, he met his support and alimony obligations from his income under the GI Bill; after husband failed two courses and decided not to return to school, he accepted a construction job at a lower salary and sought modification of the support award; remanded for rehearing on husband's motion to modify support award).]

(b) The following unchallenged findings of fact were "more than sufficient" to support the conclusion that defendant acted in bad faith: defendant committed marital misconduct by abandoning plaintiff and their three children; defendant, who had an earning capacity far greater than that of plaintiff, intentionally shut down his brokerage business and understated the business's corporate income; defendant filed falsified and inaccurate tax returns and forged plaintiff's signature on the returns; defendant provided support for his paramour and her children while refusing to provide support to

plaintiff and his children; and defendant engaged in voluntary unemployment or underemployment or hid income. [*Juhnn v. Juhnn*, 242 N.C. App. 58, 63, 775 S.E.2d 310, 314 (2015).]

(c) Finding that defendant appeared to be intentionally depressing his income to avoid paying postseparation support (PSS) was supported by evidence that defendant had not applied for any job between the date he was terminated, November 2002, and the date of the hearing, March 2003, and that his only effort to receive unemployment benefits after severance pay ended was an Internet search to determine the amount he would be entitled to if he applied. [*Childers v. Childers*, 167 N.C. App. 370, 605 S.E.2d 266 (2004) (**unpublished**) (defendant's motion to terminate PSS denied).]

c. Amount and sources of earned and unearned income of both spouses. [G.S. 50-16.3A(b)(4).]

i. Findings as to income must be supported by evidence. [*Glass v. Glass*, 131 N.C. App. 784, 509 S.E.2d 236 (1998) (error for court to find that defendant would replace lost business and restore earnings from commissions when no evidence in record to support the finding).]

ii. Award of alimony vacated when trial court made no findings with respect to wife's medical benefits or potential income from her IRA, although evidence of these additional sources of income was presented at the hearing. [*Phillips v. Phillips*, 185 N.C. App. 238, 647 S.E.2d 481 (2007), *aff'd per curiam*, 362 N.C. 171, 655 S.E.2d 350 (2008). *See also Phillips v. Phillips*, 206 N.C. App. 330, 698 S.E.2d 557 (2010) (**unpublished**) (after remand, award of alimony again vacated when trial court made a finding as to only one of two IRA accounts of the wife and found that wife had employer-paid health insurance but made no finding as to the value of that benefit).]

iii. Trial court directed on remand to make findings about income of both parties from retirement or other benefits when court found that both parties had individual retirement accounts, stock options, and financial assets. [*Crocker v. Crocker*, 190 N.C. App. 165, 660 S.E.2d 212 (2008) (findings limited to earned income of the parties and wife's health insurance benefits were insufficient).]

iv. A finding as to income that does not indicate how it was calculated is subject to remand as insufficient. [*Vadala v. Vadala*, 145 N.C. App. 478, 550 S.E.2d 536 (2001) (finding that set out wife's gross and net monthly income was insufficient without information as to its calculation).]

v. Findings as to income must not be based on speculative future events. [*Friend-Novorska v. Novorska*, 131 N.C. App. 867, 509 S.E.2d 460 (1998) (court cannot determine net income based on a spouse's "desire" to purchase a new house and car).]

d. The standard of living of the spouses established during the marriage. [G.S. 50-16.3A(b)(8).]

i. The point in evaluating the parties' accustomed standard of living is to consider the pooling of resources that marriage allows. [*Rice v. Rice*, 159 N.C. App. 487,

584 S.E.2d 317 (2003) (findings regarding the separate "estates" of the parties during the marriage did not equal a finding as to the parties' standard of living).]

ii. Detailed findings about standard of living are not necessary so long as the court can determine accustomed standard of living. [*Morris v. Morris*, 90 N.C. App. 94, 367 S.E.2d 408 (1988) (other findings sufficient to determine standard of living). *See also Adams v. Adams*, 92 N.C. App. 274, 374 S.E.2d 450 (1988) (requirement satisfied by findings regarding both spouse's monthly income and reasonable living expenses during the last year of marriage), *superseded on other grounds by statute as stated in Brannock v. Brannock*, 135 N.C. App. 635, 523 S.E.2d 110 (1999).]

iii. No error when court failed to make findings as to the standard of living to which the parties were accustomed during the marriage when the court made ultimate findings as to the amount wife needed to pay her current expenses and anticipated needs. [*Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 588 S.E.2d 517 (2003) (trial court made sufficient ultimate findings of fact to support its award of alimony).]

iv. Findings as to standard of living were sufficient even without findings as to the parties' expenditures during the marriage. [*Barrett v. Barrett*, 140 N.C. App. 369, 536 S.E.2d 642 (2000) (citing *Adams v. Adams*, 92 N.C. App. 274, 374 S.E.2d 450 (1988)) (trial court's "listing" of various bills regularly paid by husband, in addition to findings about the parties' respective incomes during the marriage, the type of home in which they lived, and the types of family vacations they enjoyed, were sufficient for an overall portrayal of the parties' accustomed standard of living).]

v. Although the court did not make any specific findings as to the amount of marital expenditures, it listed various bills that defendant regularly paid prior to separation, including utilities, cable and television, telephone, newspaper, pest control, and yard service, which, with other findings as to the parties' respective incomes during the marriage, the type of home in which they lived, and the types of family vacations they enjoyed, provided an overall portrayal of the parties' accustomed standard of living. [*Brown v. Brown*, 192 N.C. App. 734, 666 S.E.2d 217 (2008) (**unpublished**) (rejecting argument that court should not consider marital home in making standard of living determination when parties had lived there only two years before separating).]

vi. Trial court directed on remand to make findings about the parties' standard of living when it failed to do so in original order. [*Crocker v. Crocker*, 190 N.C. App. 165, 660 S.E.2d 212 (2008).]

e. The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support. [G.S. 50-16.3A(b)(10).]

i. The following findings were sufficient to satisfy the requirement in G.S. 50-16.3A(b)(10): that wife owned a condominium, had approximately $20,000 in assets, and was paying $196 per month for storage and that husband owned 50 percent of a commercial building, owned the marital home subject to an equity line of credit, had approximately $18,000 in assets, and owed $300

per month to a former law partner. [*Phillips v. Phillips*, 185 N.C. App. 238, 647 S.E.2d 481 (2007), *aff'd per curiam*, 362 N.C. 171, 655 S.E.2d 350 (2008).]

ii. The trial court erred when it made no findings as to the total value of either the husband's or wife's estate or the liquidity or income-producing potential of those estates. [*Spencer v. Spencer*, 70 N.C. App. 159, 319 S.E.2d 636 (1984) (rejecting wife's argument that since value of their estates was undisputed, no findings were required).]

iii. Trial court was directed on remand to make findings about husband's real estate assets when it failed to do so in original order. [*Crocker v. Crocker*, 190 N.C. App. 165, 660 S.E.2d 212 (2008).]

f. The relative needs of the spouses. [G.S. 50-16.3A(b)(13).]

i. The trial court can find (1) that a party's listed expenses are excessive and reduce them or (2) that they are inadequate and increase them. [*Pierce v. Pierce*, 188 N.C. App. 488, 655 S.E.2d 863 (2008) (affirming trial court's findings that some shared family expenses listed by plaintiff were excessive and that some of her individual expenses were inadequate).]

ii. Where the trial court made no findings regarding the parties' respective living expenses since separating, other than a finding that "defendant . . . has had minimal expenses," case was remanded for proper findings. [*Rhew v. Rhew*, 138 N.C. App. 467, 472, 531 S.E.2d 471, 474 (2000).]

iii. Finding as to husband's reasonable needs and expenses based on his amended financial affidavit upheld. [*Megremis v. Megremis*, 179 N.C. App. 174, 633 S.E.2d 117 (2006).]

iv. Trial court was directed on remand to make findings about the relative needs of the spouses when it failed to do so in original order. [*Crocker v. Crocker*, 190 N.C. App. 165, 660 S.E.2d 212 (2008).]

4. Findings required by G.S. 50-16.3A(c).

a. The court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment. [G.S. 50-16.3A(c); *Crocker v. Crocker*, 190 N.C. App. 165, 660 S.E.2d 212 (2008) (trial court was directed on remand to make findings as to the amount of alimony awarded, its duration, and the manner of payment when it failed to do so in original order); *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005) (trial court made sufficient findings as to amount and manner of payment but failed to make findings regarding the reasons for the duration of alimony ordered, which violated G.S. 50-16.3A(c)); *Greiner v. Greiner*, 151 N.C. App. 747, 567 S.E.2d 465 (2002) (**unpublished**) (trial court's order was remanded for findings of fact and conclusions of law to support the denial of alimony).]

b. The requirement in G.S. 50-16.3A(c) of specific findings is mandatory, and it is a vital part of the trial court's order. [*Vadala v. Vadala*, 145 N.C. App. 478, 550 S.E.2d 536 (2001) (citing *Rhew v. Rhew*, 138 N.C. App. 467, 531 S.E.2d 471 (2000)) (findings of fact must be sufficiently detailed to allow review). *See also Williamson v. Williamson*, 140 N.C. App. 362, 536 S.E.2d 337 (2000) (trial court erred in failing to explain the

amount of the award, why it was permanent, and why it was made payable directly to the clerk of court).]

c. Findings of fact required to support the amount, duration, and manner of payment of an alimony award are sufficient if findings have been made on the ultimate facts at issue in the case and the findings of fact show the trial court properly applied the law in the case. [*Friend-Novorska v. Novorska*, 143 N.C. App. 387, 545 S.E.2d 788, *aff'd per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001).]

d. One way to demonstrate that findings of fact are inadequate under G.S. 50-16.3A(c) is to show that the trial court failed to make a finding as to a particular factor upon which a party offered evidence. [*See Langdon v. Langdon*, 183 N.C. App. 471, 644 S.E.2d 600 (2007).]

e. Amount of the award.

   i. Amount must be supported by findings sufficiently specific to indicate that the trial judge properly considered the statutory factors set out in the relevant statute (now G.S. 50-16.3A(b)). [*Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982); *Ellinwood v. Ellinwood*, 94 N.C. App. 682, 318 S.E.2d 162 (1989) (citing *Quick*).] See Section III.D.9, above, setting out the statutory factors.

   ii. Court must explain why it concluded that a dependent spouse was entitled to a specific amount of alimony. [*Hartsell v. Hartsell*, 189 N.C. App. 65, 657 S.E.2d 724 (2008) (trial court found only that plaintiff had the ability to pay a certain amount but made no findings regarding the basis for that amount); *Davis v. Davis*, 233 N.C. App. 598, 758 S.E.2d 902 (2014) (**unpublished**) (not paginated on Westlaw) (citing *Hartsell)* (trial court's reference to the "respective estates, earnings, conditions and accustomed standard of living of the parties" in its finding that $1,000 is "a reasonable sum of monthly alimony" did not provide proper insight into the trial court's reasoning as to the amount awarded; nor did trial court state a rationale for the amount and manner of payment of its alternative alimony award, a one-time payment of $400,000 in lieu of $1,000/month for twenty years).]

   iii. Case was remanded when trial court failed to provide any reasoning for an award of alimony in the amount of $1,500 per month. [*Williamson v. Williamson*, 140 N.C. App. 362, 536 S.E.2d 337 (2000).]

   iv. After remand for explanation of amount ordered, award affirmed on second appeal when findings added on remand, in conjunction with previous findings, showed that amount of alimony was based on wife's reasonable monthly expenses and husband's gross monthly income, after deductions for taxes, child support, and personal living expenses. [*Ritchie v. Ritchie*, 228 N.C. App. 282, 748 S.E.2d 774 (2013) (**unpublished**).]

f. Duration of the award.

   i. Order awarding alimony for eighteen years was upheld when it was supported with "numerous and thorough findings of fact and conclusions of law." [*Juhnn v. Juhnn*, 242 N.C. App. 58, 65, 775 S.E.2d 310, 315 (2015) (findings included those that supported decision to impute income to defendant based on his bad faith and fact that defendant had engaged in marital misconduct, was always the

sole means of support for the family, and had a greater earning capacity than plaintiff; that plaintiff was absent from the workplace for more than sixteen years while she raised their children, lacked English language skills, education, and training, which made her functionally unemployable and unable to meet her reasonable economic needs; plaintiff had to borrow money from, or rely on, her sisters for housing, food, and other assistance; and was in debt with no prospect of working her way out of it).]

ii. Order that failed to include findings explaining why alimony was to continue until terminated by one of the statutory events in G.S. 50-16.9(b) (death of either spouse, remarriage, or cohabitation) was remanded for proper findings. [*Lucas v. Lucas*, 209 N.C. App. 492, 706 S.E.2d 270 (2011); *Collins v. Collins*, 243 N.C. App. 696, 778 S.E.2d 854 (2015) (order which provided that alimony terminated upon death of either party or upon dependent spouse's remarriage or cohabitation reversed and remanded for findings required by G.S. 50-16.3A(c)).]

iii. Case remanded when trial court failed to explain why the alimony award was permanent. [*Williamson v. Williamson*, 140 N.C. App. 362, 536 S.E.2d 337 (2000).]

iv. It was error to limit an alimony award to thirty months' duration without explaining why. [*Friend-Novorska v. Norvorska*, 131 N.C. App. 867, 509 S.E.2d 460 (1998); *Works v. Works*, 217 N.C. App. 345, 719 S.E.2d 218 (2011) (error to order alimony for eighty-four months without setting forth reasons for that duration).]

v. Alimony order was remanded for findings on the duration of the alimony award when court failed to make any such findings. [*Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005) (findings sufficient as to amount and method of payment).]

vi. Alimony order was remanded for findings as to the reasons for making the duration of the alimony continuous until the wife died, remarried, or cohabited. [*Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 588 S.E.2d 517 (2003) (findings sufficient as to amount of alimony); *Hartsell v. Hartsell*, 189 N.C. App. 65, 657 S.E.2d 724 (2008) (trial court erred by not including findings to explain its rationale for ordering alimony until the death or remarriage of dependent spouse).]

vii. Alimony order was remanded when trial court ordered alimony for sixteen years with no explanation as to the duration ordered other than to note that the parties were married sixteen years. [*Crocker v. Crocker*, 206 N.C. App. 596, 698 S.E.2d 768 (2010) (**unpublished**); *Davis v. Davis*, 233 N.C. App. 598, 758 S.E.2d 902 (2014) (**unpublished**) (citing *Lucas v. Lucas*, 209 N.C. App. 492, 706 S.E.2d 270 (2011)) (matter remanded for specific finding explaining the court's reasoning behind an award of alimony for twenty years).]

viii. On remand for explanation of duration of nearly fifteen years, award affirmed when findings added on remand, in conjunction with previous findings, showed that alimony was to continue until children reached majority so that custodial parent could maintain relatively low-wage employment at children's private school, which had the benefit of free tuition and allowed mother to be primary

caretaker on a teacher's salary. [*Ritchie v. Ritchie*, 228 N.C. App. 282, 748 S.E.2d 774 (2013) (**unpublished**) (trial court within its discretion when deciding alimony to consider caregiving obligations of the children's primary caregiver).]

g. Manner of payment.

i. Alimony order was remanded for findings as to why payment was to be made directly to the clerk of superior court. [*Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 588 S.E.2d 517 (2003) (citing *Williamson v. Williamson*, 140 N.C. App. 362, 536 S.E.2d 337 (2000)).]

5. Findings required by G.S. 50-16.3A(a).

a. To award alimony the court must find that:

i. One spouse is a dependent spouse;

ii. The other spouse is a supporting spouse; and

iii. An award of alimony is equitable after considering all relevant factors.

b. Dependency.

i. Court must find that spouse is either actually substantially dependent on the other spouse or is substantially in need of maintenance and support from the other spouse. [G.S. 50-16.1A(2); *Rhew v. Rhew*, 138 N.C. App. 467, 470, 531 S.E.2d 471, 473 (2000) (if court finds that spouse is not actually dependent, trial court must consider "second test" of whether spouse is substantially in need).] See Section III.A.2, above, for definition of dependent spouse.

ii. Conclusion that spouse is dependent must be supported with findings of fact regarding the expenses of that spouse. [*Kabasan v. Kabasan,* 810 S.E.2d 691, 712 (N.C. Ct. App. 2018) (statements in alimony order that trial court took "judicial notice" and "incorporated . . . by reference" all previous orders in the case, some of which made findings regarding dependent spouse's expenses, not sufficiently specific to support alimony order).]

iii. Findings as to dependency must resolve issues raised by the evidence. [*Taylor v. Taylor*, 219 N.C. App. 402, 722 S.E.2d 211 (2012) (**unpublished**) (case was remanded for trial court to address evidence that spoke to substantially in need prong of dependency analysis, specifically, husband's ability to continue to provide for his needs after parties' business, from which husband derived income at time of the hearing, was awarded to wife in equitable distribution, possible termination of husband's income from disability insurance upon turning age 65, and husband's access to other sources of income).]

iv. Actually substantially dependent.

(a) Finding that spouse is actually substantially dependent requires finding that spouse seeking alimony is without means for providing accustomed standard of living. [*Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980); *Caldwell v. Caldwell*, 86 N.C. App. 225, 356 S.E.2d 821 (citing *Williams*), *cert. denied*, 320 N.C. 791, 361 S.E.2d 72 (1987).] See Section III.A.2.k, above.

(b) Finding that spouse is actually substantially dependent requires supporting findings of the parties' incomes and expenses and the standard of living of the family unit. [*Crocker v. Crocker*, 190 N.C. App. 165, 660 S.E.2d 212 (2008) (citing *Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980)) (finding of fact as to the parties' incomes insufficient to show husband was actually substantially dependent).]

v. Substantially in need of maintenance and support.

(a) Finding that spouse is substantially in need of maintenance and support requires that the court follow additional guidelines and make supporting findings about:

(1) Standard of living as a family unit before separation;

(2) Present earnings, prospective earning capacity, and any other condition, such as health of parties, at time of hearing;

(3) Whether spouse seeking alimony has need for financial contribution from other party in order to maintain accustomed standard of living, considering reasonable expenses;

(4) Total value of estate of both parties;

(5) Fault, length of marriage, contribution of each spouse to financial status of marriage; and

(6) Any other relevant facts of the particular case. [*Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980); *Crocker v. Crocker*, 190 N.C. App. 165, 660 S.E.2d 212 (2008) (citing *Williams*); *Hunt v. Hunt*, 112 N.C. App. 722, 436 S.E.2d 856 (1993) (citing *Williams*).]

(b) Findings insufficient to show husband substantially in need of maintenance and support where no findings made as to standard of living of the parties, the husband's need for financial contribution, or the parties' estates. [*Crocker v. Crocker*, 190 N.C. App. 165, 660 S.E.2d 212 (2008). *See also Solzsmon v. Solzsmon*, 150 N.C. App. 437, 563 S.E.2d 641 (2002) (**unpublished**) (when trial court found only that defendant husband engaged in marital misconduct on the three grounds alleged by plaintiff wife, and then listed the parties' current incomes and expenses, findings insufficient to find plaintiff a dependent spouse and defendant a supporting spouse).]

(c) The trial court's findings describing the real property owned by each of the parties, as well as their personal savings, satisfied the requirement to consider the parties' estates. [*Phillips v. Phillips*, 185 N.C. App. 238, 647 S.E.2d 481 (2007), *aff'd per curiam*, 362 N.C. 171, 655 S.E.2d 350 (2008).]

c. Supporting spouse.

i. Just because one spouse is dependent does not automatically mean the other is supporting. [*Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980); *Barrett v. Barrett*, 140 N.C. App. 369, 536 S.E.2d 642 (2000) (citing *Williams*). *Cf. Hunt v. Hunt*, 112 N.C. App. 722, 436 S.E.2d 856 (1993) (failing to conclude that plaintiff was the dependent spouse, after finding defendant to be a supporting spouse, was not fatal because it "naturally follows" that a spouse who has a supporting

spouse is a dependent spouse; noting, however, that the better practice would be to enter such a conclusion).]

ii. When there are no findings with respect to the parties' accustomed standard of living prior to separation, the contribution of each party to the marriage's financial status, or the value of the parties' relative estates, the trial court's findings cannot support a conclusion that plaintiff is the dependent spouse or that defendant is the supporting spouse. [*Greenleaf v. Greenleaf*, 163 N.C. App. 610, 594 S.E.2d 257 (2004) (**unpublished**) (court had made findings as to the relative income and expenses of the parties).]

d. Equity of the award after consideration of all relevant factors.

i. The list of factors shall not be construed as exhaustive, since the overriding principle in cases determining the correctness of alimony is "fairness to all parties." [*Marks v. Marks*, 316 N.C. 447, 460, 342 S.E.2d 859, 867 (1986) (quoting *Beall v. Beall*, 290 N.C. 669, 679, 228 S.E.2d 407, 413 (1976)); *Pierce v. Pierce*, 188 N.C. App. 488, 655 S.E.2d 863 (2008) (quoting *Marks*); *Harris v. Harris*, 188 N.C. App. 477, 656 S.E.2d 316 (2008) (citing *Fink v. Fink*, 120 N.C. App. 412, 462 S.E.2d 844 (1995)) (trial court's determination that an increase in alimony was fair was not an abuse of discretion).]

ii. An alimony award must be "fair" and "just" to all parties. [*Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982) (quoting *Beall v. Beall*, 290 N.C. 669, 674, 228 S.E.2d 407, 410 (1976)); *Swain v. Swain*, 179 N.C. App. 795, 799, 635 S.E.2d 504, 507 (2006) (quoting *Quick*, 305 N.C. at 453, 290 S.E.2d at 658), *review denied*, 361 N.C. 437, 649 S.E.2d 897 (2007).]

iii. An alimony order that requires the supporting spouse to exhaust her entire income and apply her accumulated capital to its satisfaction imposes too great a burden and is unfair. [*Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976) (calling payments ordered by trial court unrealistic and beyond defendant's ability to pay).]

iv. An alimony order may be fair even though it requires a supporting spouse to pay a large part of his monthly income as alimony when the supporting spouse has a substantial estate and the estate of the dependent spouse is less substantial. [*Swain v. Swain*, 179 N.C. App. 795, 635 S.E.2d 504 (2006) (order that required supporting spouse to pay essentially his entire monthly income as alimony was fair, considering that his estate was substantially larger than dependent spouse's estate and that the award required both parties to deplete their estates to some extent to meet their living expenses), *review denied*, 361 N.C. 437, 649 S.E.2d 897 (2007).]

v. An alimony order may be fair even though it leaves the supporting spouse with a monthly shortfall when the supporting spouse receives other substantial financial benefits. [*Walker v. Walker,* 143 N.C. App. 414, 546 S.E.2d 625 (2001) (alimony payments that left defendant with a monthly shortfall were fair when defendant received other financial benefits from his solely-owned company, such as health insurance, use of a vehicle, and reimbursed living expenses).]

vi. A trial court's determination that alimony was equitable can be inferred from its findings on at least nine of the factors set out in G.S. 50-16.3A(b), even when the court's order "failed to include . . . the magic words that 'an award of alimony would be equitable.'" [*Fennell v. Fennell*, 206 N.C. App. 329, 698 S.E.2d 557 (2010) (**unpublished**) (not paginated on Westlaw).]

6. Findings on remand.
   a. When an appellate court vacates a portion of an order, the trial court, upon remand, is free to reconsider the evidence before it and to enter new and/or additional findings of fact based on the evidence, even if it takes no new evidence on remand, except that the court is bound on remand by any portions of the order affirmed upon appeal. [*Friend-Novorska v. Novorska*, 143 N.C. App. 387, 545 S.E.2d 788 (where portion of order finding wife to be a dependent spouse and husband to be a supporting spouse was affirmed, trial court on remand was bound by those findings but could make new findings regarding contribution needed to meet wife's monthly expenses, since that portion of order was vacated), *aff'd per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001).]
7. Conclusions of law.
   a. The court must make conclusions of law that:
      i. A party seeking alimony is a dependent spouse and that the other spouse is a supporting spouse;
      ii. An award of alimony is equitable after considering all relevant factors;
      iii. The supporting spouse is able to pay the designated amount; and
      iv. The amount is fair and just to all parties. [G.S. 50-16.3A(a) (first two factors); *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982) (citing *Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980)) (last two factors).]
   b. Unless the supporting spouse is "deliberately depressing his or her income or indulging in excessive spending [in] disregard of the marital obligation to provide support for the dependent spouse, the ability of the supporting spouse to pay is ordinarily determined by his or her income at the time the award is made." [*Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982); *Frey v. Best*, 189 N.C. App. 622, 628–29, 659 S.E.2d 60, 67 (2008) (quoting *Quick*, 305 N.C. at 453, 290 S.E.2d at 658); *Whedon v. Whedon*, 58 N.C. App. 524, 294 S.E.2d 29 (citing *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976)), *review denied*, 306 N.C. 752, 295 S.E.2d 764 (1982).]
8. Delay in entry of the order.
   a. Defendant supporting spouse failed to show prejudice from a twenty-month delay in the entry of the alimony order. Defendant argued that delayed entry of the order caused him to be subject to substantial arrearages, but the appellate court found that the arrearages arose from defendant's failure to pay postseparation support pursuant to an order in effect while the alimony claim was pending. Defendant also failed to show prejudice from the loss of trial court materials during the delay, as the appellate court found the record on appeal sufficient to permit a satisfactory review. [*Juhnn v. Juhnn*, 242 N.C. App. 58, 775 S.E.2d 310 (2015).]

H. Forms of Payment

1. Applicable statutes.
   a. The court may order alimony to be paid by lump sum, periodic payments, income withholding, transfer of title or possession of personal property or any interest therein, or a security interest in or possession of real property. [G.S. 50-16.1A(1); 50-16.7(a).]
   b. The court also may order the transfer of title to real property solely owned by the obligor in payment of lump sum alimony or postseparation support (PSS) or in payment of arrearages of alimony or PSS as long as the net value of the interest in the property being transferred does not exceed the amount of the arrearage being satisfied. [G.S. 50-16.7(a).]
   c. If the court orders a supporting spouse to transfer title to real or personal property under G.S. 50-16.7(a) and the supporting spouse fails to execute the necessary documents, the court may enter an order transferring title to the property pursuant to G.S. 1A-1, Rule 70 and G.S. 1-228 or directing another person to execute the documents required to transfer title. [G.S. 50-16.7(c).] For an example of language deemed sufficient to transfer title from one spouse to another pursuant to Rule 70, see *Ellis v. Ellis*, 68 N.C. App. 634, 315 S.E.2d 526 (1984).
2. The court may order the supporting spouse to transfer title to or possession of real or personal property but is not required to do so. [*Spillers v. Spillers*, 25 N.C. App. 261, 264, 212 S.E.2d 676, 679 (1975) (noting that while G.S. 50-16.7(a) authorizes the trial court to order the transfer of certain property, the statute " in no way renders it mandatory or incumbent upon the trial court to order any transfer of property" as part of alimony).]
   a. The court may order alimony to be paid by:
      i. Granting possession of real property to the dependent spouse. [G.S. 50-16.7(a); 50-17. *See Yearwood v. Yearwood*, 287 N.C. 254, 214 S.E.2d 95 (1975) (affirming, as part of award of alimony pendente lite to wife, exclusive possession of the home and order requiring husband to make monthly mortgage payments; striking, however, language that attempted to award wife "the equity accruing" from husband's monthly payments on the mortgage).]
      ii. Transferring title to real property (located anywhere within North Carolina or in another state) solely owned by the supporting spouse in payment of lump sum alimony or postseparation support (PSS) or in payment of arrearages of alimony or PSS so long as the net value of the property does not exceed the amount of the arrearages. [G.S. 50-16.7(a).] The court does not have the power to order the sale of entirety property to procure funds to pay alimony or attorney fees. [*Porter v. Citizens Bank*, 251 N.C. 573, 111 S.E.2d 904 (1960).]
      iii. Transferring title or possession of personal property. [G.S. 50-16.7(a). Note, however, that in dicta the court of appeals has stated that "an alimony order should not (and cannot) be used as a tool to amend an earlier equitable distribution order." [*Orren v. Orren*, 800 S.E.2d 472, 474 (N.C. Ct. App. 2017) (making the quoted observation after vacating on other grounds an alimony order that required husband to pay wife part of a retirement incentive package husband had received after entry of an equitable distribution (ED) order after concluding

that the retirement package was marital property; while appellate court observed that husband's receipt of the retirement package "might be" considered a relevant factor under G.S. 50-16.3A(b), the alimony order could not amend the ED order entered in the case).]

b. When the court awards real property to the dependent spouse as part of the alimony award:

i. The court has power to issue a writ of possession when the court determines it is necessary, but the court is not required to do so. [G.S. 50-17; *Porter v. Citizens Bank*, 251 N.C. 573, 111 S.E.2d 904 (1960) (court may issue a writ of possession under G.S. 50-17 giving wife possession of entirety property so that she may apply any rents and profits to payment of alimony and attorney fees as fixed by the court); *Clark v. Clark*, 301 N.C. 123, 134 n.3, 271 S.E.2d 58, 67 n.3 (1980) (court not required to issue a writ of possession, as there was no automatic right to possession of the house; possession was not an inherent aspect of wife's standard of living).]

ii. The court may direct the supporting spouse to make mortgage, tax, and insurance payments on the house. [*Whedon v. Whedon*, 58 N.C. App. 524, 294 S.E.2d 29, *review denied*, 306 N.C. 752, 295 S.E.2d 764 (1982).]

c. For transfer of property in the enforcement context, see Section III.K.5.d, below.

3. The court may order a supporting spouse to provide health insurance for a dependent spouse as a form of "support and maintenance" if proper findings have been made. [*Lucas v. Lucas*, 209 N.C. App. 492, 706 S.E.2d 270 (2011).]

a. An order requiring a party to maintain health insurance on the other party must include proper findings. [*Lucas v. Lucas*, 209 N.C. App. 492, 501, 706 S.E.2d 270, 277 (2011) (order requiring supporting spouse to "continue to maintain health insurance coverage on the Plaintiff" was remanded for findings when it failed to set out the reason that plaintiff needed continued coverage, defendant's ability to maintain plaintiff on his policy after the divorce, what should occur if defendant is unable to maintain plaintiff on his policy, the cost of maintaining plaintiff on the policy or of providing alternative coverage, whether plaintiff would be able to obtain coverage if not covered under defendant's plan, what type of coverage would need to be provided, and whether defendant could afford to provide alternative coverage); *Myers v. Myers*, 177 N.C. App. 462, 628 S.E.2d 867 (2006) (**unpublished**) (not paginated on Westlaw) (finding and conclusion that defendant "has the financial resources to maintain the Plaintiff on his health insurance policy" was deficient in that it failed to mention the monetary cost of such a policy, as well as the reasons for why defendant should maintain his ex-wife on his health insurance policy).]

b. For another case upholding an order to provide insurance, see *Brown v. Brown*, 192 N.C. App. 734, 666 S.E.2d 217 (2008) (**unpublished**) (order requiring defendant to provide health insurance upheld upon findings that plaintiff was unable to pay for the insurance, that defendant had provided insurance during marriage, and that the temporary policy purchased by plaintiff was not as comprehensive as that offered through defendant's employer).]

c. For a case discussing health insurance in the context of a property settlement, see *Michael v. Michael*, 198 N.C. App. 703, 681 S.E.2d 866 (2009) (**unpublished**).

4. The court may order the supporting spouse to secure the payment of postseparation support or alimony by:

   a. A bond, mortgage, deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property or

   b. Executing an assignment of wages, salary, or other income due or to become due. [G.S. 50-16.7(b); 50-16.7(l1) (authorizing income withholding for current or delinquent payments of alimony or postseparation support); *Parker v. Parker*, 13 N.C. App. 616, 186 S.E.2d 607 (1972) (noting in dicta that requiring a bond was an appropriate method of enforcing the alimony order where defendant resided out of state and had no attorney of record); *Weaver v. Weaver*, 88 N.C. App. 634, 364 S.E.2d 706 (creation of trust to secure payment of alimony and child support was proper exercise of discretion), *review denied*, 322 N.C. 330, 368 S.E.2d 875 (1988).]

   c. For execution of a mortgage, deed of trust, or security interest in the enforcement context, see Section III.K.5.b, below.

5. Assignment of wages, salary, or other income due or to become due.

   a. The court may order a supporting spouse's military retirement pay assigned to a dependent spouse under 10 U.S.C. § 1408, the Uniform Services Former Spouses' Protection Act. [*Faught v. Faught*, 67 N.C. App. 37, 312 S.E.2d 504, *review denied*, 311 N.C. 304, 317 S.E.2d 680 (1984).]

   b. Employee Retirement Income Security Act (ERISA) and Social Security Act anti-alienation provisions do not preclude assignment of retirement and Social Security benefits to a spouse as alimony. [*Evans v. Evans*, 111 N.C. App. 792, 434 S.E.2d 856, *review denied*, 335 N.C. 554, 439 S.E.2d 144 (1993); 29 U.S.C. § 1056(d)(3)(A) (ERISA anti-alienation provisions not applicable to alimony provisions in a qualified domestic relation order); 42 U.S.C. § 659(a) (allowing Social Security benefits to be subject to legal process for a claim of alimony).]

   c. For assignment of wages, salary, or other income due or to become due in the enforcement context, see Section III.K.5.c, below.

6. Specific payment options upheld.

   a. A trial court may direct that payments for alimony and alimony pendente lite be made to a third party. [*Sloan v. Sloan*, 151 N.C. App. 399, 566 S.E.2d 97 (2002) (order requiring husband to pay alimony pendente lite directly to a lien holder was upheld).]

   b. No abuse of discretion when defendant was required to pay his alimony obligation through an automatic bank draft. [*Honeycutt v. Honeycutt*, 188 N.C. App. 164, 654 S.E.2d 834 (2008) (**unpublished**).]

I. Termination of an Order for Alimony

1. Court-ordered alimony terminates upon the death of either the supporting or the dependent spouse and upon the remarriage or cohabitation of the dependent spouse. [G.S. 50-16.9(b), *amended by* S.L. 1995-319, §§ 7 and 12, applicable to actions filed on or after Oct. 1, 1995.] Alimony provided for in a separation agreement approved by the

court and incorporated into a divorce decree or other order is court-ordered alimony. [*Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983) (applicable to judgments entered on or after Jan. 11, 1983) (a separation agreement approved by the court is treated as a court- ordered judgment); *Fucito v. Francis*, 175 N.C. App. 144, 148, 622 S.E.2d 660, 663 (2005) (for practical purposes, in *Walters*, the court fashioned a "one-size fits all" rule applicable to incorporated settlement agreements in the area of domestic law, holding that when parties present their separation agreement to the court for approval, the agreement will no longer be considered a contract between the parties, but rather a court-ordered judgment).]

2. Only "true alimony" terminates upon the happening of one of the events listed in Section III.I.1, immediately above. If payments required by consent order or incorporated agreement actually are property settlement rather than "alimony," the payments will not terminate except as expressly provided in the consent judgment or incorporated agreement. [*Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986).]
    a. Whether payments to a party in a consent order are "true alimony," subject to termination, or are payments exchanged for property settlement provisions.
        i. Support provisions exchanged for property settlement provisions are a nonmodifiable division of property and are not alimony. [*Underwood v. Underwood*, 365 N.C. 235, 717 S.E.2d 361 (2011) (citing *Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986)) (under *Marks*, such provisions, even if contained in a court-ordered consent judgment, are not alimony but instead are part of an integrated property settlement not modifiable by the courts).]
        ii. Merely labeling support payments as "alimony" does not make them alimony for purposes of G.S. 50-16.9(b). [*Underwood v. Underwood*, 365 N.C. 235, 717 S.E.2d 361 (2011) (citing *Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986), and *White v. White*, 296 N.C. 661, 252 S.E.2d 698 (1979)).]
        iii. When a consent order methodically enumerated stipulations and findings that established the essential elements of an alimony award, contained support provisions that complied with the statutory definition of "alimony" and which were listed separately from the order's property provisions, and frequently used the term "alimony," the support provisions in the order were alimony, which the trial court properly terminated pursuant to G.S. 50-16.9(b) upon wife's cohabitation. [*Underwood v. Underwood*, 365 N.C. 235, 717 S.E.2d 361 (2011) (consent order "unambiguously" demonstrated the parties' intent that payments to wife were alimony).]
        iv. A provision in the consent order that provided that support payments to wife were given in reciprocal consideration for the agreement of the parties as to equitable distribution and property settlement did not prevent the payments from being treated as alimony subject to termination under G.S. 50-16.9(b) upon cohabitation, even though the consent judgment provided that payments terminated upon wife's death or remarriage and did not speak to cohabitation. [*Underwood v. Underwood*, 365 N.C. 235, 717 S.E.2d 361 (2011) (parties cannot, by including a reciprocal consideration provision in their agreement, immunize alimony payments from modification or termination under applicable statutes).]

v. See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1 for discussion of the difference between property settlement agreements and separation agreements and for a discussion of integrated agreements.

3. Events that terminate true alimony.

a. Death of either the supporting or the dependent spouse.

i. Court-ordered support obligations terminate upon the death of either the supporting or the dependent spouse. [G.S. 50-16.9(b).]

ii. Trial court's failure to include a provision in its order that alimony terminated upon the supporting spouse's death was "without consequence" since G.S. 50-16.9(b) so provided. [*Webb v. Webb*, 207 N.C. App. 526, 700 S.E.2d 248 (2010) (**unpublished**), *review denied*, 365 N.C. 211, 709 S.E.2d 924 (2011).]

iii. A contractual support obligation may be enforced after the death of a spouse. [*See White v. Graham*, 72 N.C. App. 436, 325 S.E.2d 497 (1985) (noting that the death of husband did not terminate his obligation in an unincorporated separation agreement to support wife while she obtained a college degree, which his estate could satisfactorily perform).]

iv. The estate of the dependent spouse can recover alimony that was due and payable at the time of the dependent spouse's death. [*Briggs v. Briggs*, 215 N.C. 78, 1 S.E.2d 118 (1939) (finding that wife's administrator could recover payments of alimony that had matured and were due at the time of her death). *See also Mazzocone v. Drumond*, 42 N.C. App. 493, 256 S.E.2d 843 (action to enforce a Pennsylvania money judgment for alimony arrearages did not abate upon death of wife; action to collect a debt survives the death of the plaintiff), *cert. denied*, 298 N.C. 298, 259 S.E.2d 300 (1979).]

v. Payments that are part of a complete property settlement rather than alimony do not terminate upon a spouse's death. [2 Lee's North Carolina Family Law § 9.86 (5th ed. 1999) (death has no effect on the right to future payments of an award of property; the estate of the spouse has a claim for any portion of a property award that remains unpaid).] See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1 for discussion of the differences between property settlement agreements and separation agreements.

vi. Court-ordered support payments that are part of an integrated separation agreement should not terminate upon the death of the dependent spouse. [2 Lee's North Carolina Family Law § 9.86 (5th ed. 1999).] See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1 for discussion of integrated agreements.

vii. An alimony award cannot be made binding on the heirs of the supporting party. [*Squires v. Squires*, 178 N.C. App. 251, 631 S.E.2d 156 (2006) (statutory language that an alimony award terminates upon the death of either party bars such a provision and makes it of no effect).]

b. Remarriage of the dependent spouse.

i. Court-ordered support obligations terminate upon remarriage of the dependent spouse. [G.S. 50-16.9(b); *Garner v. Garner*, 88 N.C. App. 472, 363 S.E.2d 670 (1988) (construing unambiguous incorporated agreement that was silent

on effect of remarriage, alimony payments terminated pursuant to statute upon wife's remarriage). *See also Potts v. Tutterow*, 340 N.C. 97, 455 S.E.2d 156 (1995) (when alimony is being paid in periodic payments, payments not yet due and payable on the date of remarriage are terminated by the dependent spouse's remarriage).]

ii. An alimony award that has vested (i.e., is due but not yet paid) prior to the dependent spouse's remarriage survives the remarriage, whether lump sum or by periodic payment. [*Potts v. Tutterow*, 114 N.C. App. 360, 442 S.E.2d 90 (1994), *aff'd per curiam*, 340 N.C. 97, 455 S.E.2d 156 (1995).]

iii. Accrued support arrearages that are unpaid at the time of remarriage may still be recovered from the supporting spouse. [*Potts v. Tutterow*, 340 N.C. 97, 455 S.E.2d 156 (1995).]

iv. Court-ordered support payments that are part of an integrated separation agreement are not true alimony and do not terminate as a matter of law upon remarriage of the dependent spouse. [*Lemons v Lemons*, 112 N.C. App. 110, 434 S.E.2d 638 (1993), *review denied*, 335 N.C. 556, 441 S.E.2d 117 (1994); *Hayes v. Hayes*, 100 N.C. App. 138, 394 S.E.2d 675 (1990) (citing *Marks v. Marks,* 316 N.C. 447, 342 S.E.2d 859 (1986)).] See Section III.I.2, above, and *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

v. Payments that are part of a complete property settlement rather than alimony do not terminate upon the dependent spouse's remarriage. [*Allison v. Allison*, 51 N.C. App. 622, 277 S.E.2d 551 (periodic payments to wife that were part of a property settlement in which wife released rights to jointly held property did not terminate upon wife's remarriage), *review denied*, 303 N.C. 543, 281 S.E.2d 660 (1981); *Michael v. Michael*, 198 N.C. App. 703, 681 S.E.2d 866 (2009) (**unpublished**) (when plain language of an incorporated separation agreement clearly stated in the section of the agreement entitled "Property Settlement" that husband's monthly payments were intended to be part of the property settlement and not alimony or other spousal support, and when parties specifically waived alimony in the agreement, payments were part of a property settlement and did not terminate on wife's remarriage).] See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1 for discussion of the differences between property settlement agreements and separation agreements.

c. Cohabitation by the dependent spouse.

i. Law applicable to actions filed before Oct. 1, 1995, and to actions not subject to G.S. 50-16.9(b).

(a) Under the law in effect before Oct. 1, 1995, in the absence of a specific agreement between the parties, a trial court had no authority to include a provision in its alimony award that alimony could automatically terminate upon a spouse's cohabitation with someone of the opposite sex. [*Bookholt v. Bookholt*, 136 N.C. App. 247, 523 S.E.2d 729 (1999) (automatic termination of alimony for cohabitation under G.S. 50-16.9(b) only applicable to actions filed on or after Oct. 1, 1995).]

(b) Under this earlier law, a party was relieved of obligations under an unincorporated separation agreement based on the other party's cohabitation only if the separation agreement so provided. [*Sethness v. Sethness*, 62 N.C. App. 676, 303 S.E.2d 424 (1983) (the agreement here did not make cohabitation by wife a breach of the agreement or grounds for termination of husband's support obligation).]

(c) Upon sufficient showing of wife's cohabitation, husband's alimony obligation terminated pursuant to an incorporated separation agreement that provided alimony terminated on cohabitation. [*Rehm v. Rehm*, 104 N.C. App. 490, 409 S.E.2d 723 (1991).]

ii. In actions filed on or after Oct. 1, 1995, court-ordered support obligations terminate upon cohabitation of the dependent spouse. [G.S. 50-16.9(b), *amended by* S.L. 1995-319, §§ 7 and 12, applicable to actions filed on or after Oct. 1, 1995.]

iii. A consent order was an "order of a court" for the purposes of G.S. 50-16.9(b) when adopted by the trial court as its order. [*Underwood v. Underwood*, 365 N.C. 235, 717 S.E.2d 361 (2011) (neither party argued otherwise).]

iv. Cohabitation is:

(a) The act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if not solemnized by marriage, or in a private homosexual relationship and

(b) Is evidenced by the voluntary mutual assumption of those marital rights, duties, and obligations that are usually manifested by married people, and that include, but are not necessarily dependent on, sexual relations. [G.S. 50-16.9(b) (applicable to actions filed on or after Oct. 1, 1995).]

(1) To determine whether a couple has voluntarily assumed the rights, duties, and obligations of married people, the trial court must consider the totality of the circumstances. [*Setzler v. Setzler*, 781 S.E.2d 64 (N.C. Ct. App. 2015) (citing *Smallwood v. Smallwood*, 227 N.C. App. 319, 742 S.E.2d 814 (2013).]

v. Policy underlying termination of support upon cohabitation.

(a) The first sentence of G.S. 50-16.9(b) "reflects the goal of terminating alimony [when the dependent spouse is] in a relationship that probably has an economic impact." The goal of the second sentence of the statute is "to terminate postseparation support and alimony when the relationship has an economic effect and when someone is acting in bad faith to avoid termination." [*Smallwood v. Smallwood*, 227 N.C. App. 319, 322, 323, 742 S.E.2d 814, 817, 818 (2013) (quoting 2 Lee's North Carolina Family Law § 9.85 at 493–94, (5th ed. 1999) (quoting *Craddock v. Craddock*, 188 N.C. App. 806, 810, 656 S.E.2d 716, 719 (2008))); *Setzler v. Setzler*, 781 S.E.2d 64 (N.C. Ct. App. 2015) (citing *Smallwood*, 742 S.E.2d at 818.] Note, however, that in *Bird v. Bird*, 363 N.C. 774, 688 S.E.2d 420 (2010), determining that evidence of cohabitation was sufficient to overcome wife's motion for summary judgment on husband's motion to terminate alimony, the North Carolina Supreme Court did not mention "the economic impact of

the relationship." For more on *Setzler* and *Bird*, see Cheryl Howell, *Alimony: Cohabitation Is All About Money After All,* UNC Sch. of Gov't: On the Civil Side Blog (May 27, 2016), http://civil.sog.unc.edu/alimony-cohabitation-is-all-about-money-after-all.

(b) "[T]he primary legislative policy in making cohabitation, not just remarriage, grounds for termination of alimony was to evaluate the economic impact of a relationship on the dependent spouse and, consequently, avoid bad faith receipts of alimony." [*Setzler v. Setzler*, 781 S.E.2d 64, 70 (N.C. Ct. App. 2015).]

vi. Two methods have been used to determine whether parties have cohabitated:

(a) When there is objective evidence that is not conflicting that the parties have or have not held themselves out as man and wife, the court does not consider the subjective intent of the parties. [*Smallwood v. Smallwood*, 227 N.C. App. 319, 742 S.E.2d 814 (2013) (trial court not required to make a finding on issue of subjective intent when findings as to objective evidence were sufficient to support conclusion of no cohabitation).]

(b) When the objective evidence on cohabitation is conflicting, the parties are entitled to present evidence regarding subjective intent. [*Bird v. Bird*, 363 N.C. 774, 688 S.E.2d 420 (2010) (adopting approach of the court of appeals in *Oakley v. Oakley*, 165 N.C. App. 859, 599 S.E.2d 925 (2004)) (*Oakley* analysis addressed the voluntary assumption of marital rights and duties under G.S. 50-16.9 by considering the law applicable to resumption of the marital relationship and considering the totality of the circumstances); *Craddock v. Craddock*, 188 N.C. App. 806, 656 S.E.2d 716 (2008) (noting the two tests set out in *Oakley* and applying the second); *Russo v. Russo*, 217 N.C. App. 400, 720 S.E.2d 28 (2011) (**unpublished**) (not paginated on Westlaw) ("objective evidence" as used in *Oakley* and *Bird* does not place a limit on the source of the evidence that a trial may consider but directs the trial court to look at overt actions and behaviors rather than the parties' expressions of subjective intent regarding cohabitation).]

vii. Procedural issues.

(a) A supporting spouse cannot automatically cease paying support due to the dependent spouse's cohabitation or remarriage without a court order. The supporting spouse must first file a motion with the trial court, notify the dependent spouse, and obtain a court order terminating support as of a date certain. [*Williamson v. Williamson*, 142 N.C. App. 702, 543 S.E.2d 897 (2001) (trial court terminated obligation as of date cohabitation was found to exist). *See also Bookholt v. Bookholt*, 136 N.C. App. 247, 523 S.E.2d 729 (1999) (G.S. 50-16.9(b) provides that cohabitation automatically terminates alimony), *superseded on other grounds by statute as stated in Williamson*. *But see also* 2 Lee's North Carolina Family Law § 9.85 (5th ed. 1999) (alimony should not terminate earlier than date on which motion seeking termination was filed).]

(b) A motion to terminate alimony based on cohabitation should be made pursuant to G.S. 50-16.9, not G.S. 1A-1, Rule 60(b)(1). [*Oakley v. Oakley*, 165 N.C. App. 859, 599 S.E.2d 925 (2004) (incorporated separation agreement).]

viii. Cohabitation can be a defense in an initial action for alimony. [*Williamson v. Williamson*, 142 N.C. App. 702, 543 S.E.2d 897 (2001) (wife awarded postseparation support but was denied alimony based on her cohabitation; court rejected wife's argument that G.S. 50-16.9, which terminates alimony upon cohabitation, applies only to modification of an existing order for alimony; order finding that husband not obligated for alimony or postseparation support payments from the time wife's cohabitation began was affirmed); *Orren v. Orren,* 800 S.E.2d 472 (N.C. Ct. App. 2017) (citing *Williamson*) (cohabitation is a defense to alimony even if no order of postseparation support was entered).] See Cheryl Howell, *Cohabitation Is a Defense to Alimony,* UNC School of Gov't: On the Civil Side Blog (June 9, 2017), https://civil.sog.unc.edu/cohabitation-is-a-defense-to-alimony.

ix. Cases finding no cohabitation.

(a) While defendant and boyfriend had a monogamous sexual relationship and spent almost every night together at boyfriend's residence, they did not assume the rights and duties of married couples when they maintained separate homes, neither kept clothes or other personal items at the other's house, amounts provided to defendant or paid on her behalf by boyfriend were repaid by defendant from equitable distribution proceeds, and neither represented that they were married. Additionally, there was a reasonable inference arising from the parties' planned marriage, which would terminate four of the five years of alimony defendant was to receive, that defendant's cohabitation was not motivated by a desire to continue receiving alimony. [*Setzler v. Setzler*, 781 S.E.2d 64 (N.C. Ct. App. 2015).]

(b) While plaintiff and boyfriend engaged in some domestic activities, they did not assume marital rights and duties extending beyond those found in an intimate friendship in that they did not incur joint financial obligations, share a home, combine finances, pool resources, or consistently merge their families. [*Smallwood v. Smallwood*, 227 N.C. App. 319, 742 S.E.2d 814 (2013).]

(c) No cohabitation by wife when evidence did not show activities beyond a sexual relationship with a boyfriend and their occasional trips and dates. [*Oakley v. Oakley*, 165 N.C. App. 859, 599 S.E.2d 925 (2004) (objective evidence on cohabitation not conflicting, so subjective intent of parties not examined).]

(d) No cohabitation by wife when evidence did not show that wife and third party lived together "continuously and habitually" and "engaged in voluntary mutual assumption of those marital rights, duties and obligations usually manifested by married people." Third party's overnight visits were "sporadic," and except for a period of less than a month when third party helped wife with her son, third party did not move his belongings into wife's

home or contribute financially to wife's living expenses and throughout period at issue maintained a separate residence. [*Faulkenbury v. Faulkenbury*, 195 N.C. App. 459, 673 S.E.2d 168 (2009) (**unpublished**) (not paginated on Westlaw) (objective evidence on cohabitation not conflicting, so subjective intent of parties not examined), *review denied*, 363 N.C. 801, 690 S.E.2d 535 (2010).]

(e) Parties did not dwell together continuously or habitually when they had a mostly exclusive sexual relationship for fifteen months, boyfriend never moved in with wife and instead lived with his parents, he stayed overnight at wife's house infrequently except for two-month period when he stayed two to three nights per week, he called before going to wife's house, did not have keys to wife's house or car, and did not receive mail at wife's house. [*Russo v. Russo*, 217 N.C. App. 400, 720 S.E.2d 28 (2011) (**unpublished**).]

(f) Parties did not voluntarily assume rights, duties, and obligations of married persons when boyfriend did minor maintenance on wife's home and car, wife had occasional interaction with boyfriend's children and parents, parties did not share financial obligations or exchange gifts, and did not purchase items for each other without reimbursement. [*Russo v. Russo*, 217 N.C. App. 400, 720 S.E.2d 28 (2011) (**unpublished**).]

(g) No cohabitation by wife when findings primarily revealed that boyfriend assisted in some ways with wife's children, boyfriend and wife had a dating and sexual relationship, the two had dinners together when boyfriend was in town, and spent time together shopping, attending church, and traveling; and further that boyfriend maintained his own "lived in" residence and did not keep toiletries or clothing in wife's home, did not receive mail there, and did not pay household expenses; and finally that wife and boyfriend did not maintain financial accounts together. [*Shaw v. Shaw*, 182 N.C. App. 347, 641 S.E.2d 867 (2007) (**unpublished**) (not paginated on Westlaw) (facts did not show a mutual assumption of marital rights, duties, and obligations usually manifested by married persons).]

x. Summary judgment improper when evidence on cohabitation is conflicting.

(a) Affidavit of husband's private investigator stated that it "appeared as though no one lived" in third party's residence and that third party had been observed spending eleven consecutive nights in wife's residence; there was some evidence that wife and third party had voluntarily assumed some degree of marital rights, duties, and obligations by sharing in chores and participating in typical family activities like going out to dinner with wife's children and walking wife's dog, and unloading vehicle when she returned from trips. But affidavit of third party denied that he ever cohabitated with wife, wife also denied cohabitation, and evidence showed a genuine dispute regarding the subjective intent of wife and third party with respect to their relationship. [*Bird v. Bird*, 363 N.C. 774, 783, 688 S.E.2d 420, 425 (2010) (evidence of cohabitation sufficient to overcome wife's motion for summary judgment on husband's motion to terminate alimony).]

(b) Conflicting evidence was presented on number of nights per week third party stayed overnight at wife's residence, whether third party permanently kept his clothes at wife's residence, and the extent to which third party used wife's residence as the base for his appraisal business. [*Craddock v. Craddock*, 188 N.C. App. 806, 656 S.E.2d 716 (2008) (summary judgment reversed).]

xi. When unincorporated separation agreement is involved.

(a) While cohabitation will result in the termination of a support order entered by a court, either as the result of a contested hearing or by a consent order, cohabitation will not terminate a support obligation arising from an unincorporated separation agreement unless so specified in the contract. [*See Jones v. Jones*, 144 N.C. App. 595, 548 S.E.2d 565 (2001) (where parties were subject to a court-ordered consent judgment and an earlier unincorporated separation agreement, the provision in the consent order for alimony terminated upon the wife's cohabitation pursuant to G.S. 50-16.9 but her cohabitation did not terminate the contractual support provision in the agreement).]

(b) Whether a spouse's contractual obligation to pay alimony was dependent on the other spouse's compliance with provisions in the same agreement addressing visitation, nonharassment, or noncohabitation was a factual issue to be resolved by determining the intent of the parties when they signed the agreement. [*Nisbet v. Nisbet,* 102 N.C. App. 232, 402 S.E.2d 151 (unincorporated agreement was silent on the question of whether provisions were dependent; trial court erred in granting summary judgment on wife's claim for alimony arrearages), *review denied,* 329 N.C. 499, 407 S.E.2d 538 (1991).]

d. Except as noted in Section III.I.3.d.vii, below, reconciliation between parties who remain married terminates an obligation to pay alimony. [*O'Hara v. O'Hara*, 46 N.C. App. 819, 266 S.E.2d 59 (1980) (resumption of the marital relationship voided an award of permanent alimony entered in an action for alimony without divorce). *See also Schultz v. Schultz*, 107 N.C. App. 366, 420 S.E.2d 186 (1992) (citing *O'Hara*) (resumption of the marital relationship voids the executory portions of an order or separation agreement; duty to pay alimony pursuant to a consent judgment entered after separation ended upon resumption of marital relations), *review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993).]

i. Reconciliation is to be determined in accordance with G.S. 52-10.2. [G.S. 50-16.9(a).]

ii. "Resumption of marital relations" is defined as the voluntary renewal of the husband and wife relationship, as shown by the totality of the circumstances. [G.S. 52-10.2.]

iii. Isolated instances of sexual intercourse between the parties do not constitute resumption of marital relations. [G.S. 52-10.2.]

iv. Two methods have been used to determine whether the parties have reconciled:

(a) When there is substantial objective indicia of cohabitation, the trial court may find that the parties have reconciled as a matter of law.

(b) When the objective evidence on reconciliation is conflicting, the subjective mutual intent of the parties is considered. [*Schultz v. Schultz*, 107 N.C. App. 366, 420 S.E.2d 186 (1992), *review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993).]

v. Four hours on each of six evenings spent together in the former marital home eating dinner and visiting with the parties' children in combination with three or four "isolated acts" of sexual intercourse did not constitute resumption of marital relations under G.S. 52-10.2. [*Fletcher v. Fletcher*, 123 N.C. App. 744, 474 S.E.2d 802 (1996) (wife never "moved" back into or resumed cohabitation in the marital home but instead maintained her separate residence; time period involved was brief; no evidence that parties shared chores or household responsibilities, that they accompanied each other to public places or held themselves out as husband and wife, or indicated to others that their problems had been resolved or that they desired to terminate their separation), *review denied*, 345 N.C. 640, 483 S.E.2d 706 (1997).]

vi. Parties resumed marital relations as a matter of law under G.S. 52-10.2 where undisputed evidence showed they lived together for four months, had sexual relations, filed a joint tax return, and held themselves out as husband and wife. [*Schultz v. Schultz*, 107 N.C. App. 366, 420 S.E.2d 186 (1992) (because facts were undisputed, trial court should not have examined mutual intent of the parties), *review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993).]

vii. **EXCEPTION**: For contracts entered into on or after June 19, 2013, spouses who are separated but contemplating reconciliation may provide for support rights or for the waiver of support rights that will apply upon the occasion of any future separation. [G.S. 52-10(a1).] This statute does not authorize agreements regarding support rights and obligations while the parties live together as husband and wife. [*See In re Estate of Tucci*, 94 N.C. App. 428, 380 S.E.2d 782 (1989) (recognizing that the state supreme court in *Motley v. Motley*, 255 N.C. 190, 120 S.E.2d 422 (1961), established as public policy that married parties may not shirk their spousal duties of support and alimony and yet live together as a married couple), *aff'd per curiam*, 326 N.C. 359, 388 S.E.2d 768 (1990).] A provision in a contract between a husband and wife made, with or without a valuable consideration, during a period of separation waiving, releasing, or establishing rights and obligations to postseparation support, alimony, or spousal support shall remain valid following a period of reconciliation and subsequent separation if the contract is in writing, the provision waiving the rights or obligations is clearly stated in the contract, and the contract was acknowledged by both parties before a certifying officer. [G.S. 52-10(a1), *added by* S.L. 2013-140, § 1, effective June 19, 2013.]

viii. See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1 for effect of reconciliation on obligations in a separation agreement.

J. Modification of an Order for Alimony

1. Generally.

   a. An order for alimony, whether contested or entered by consent, may be modified or vacated at any time, upon a motion in the cause and a showing of changed circumstances by either party or anyone interested. [G.S. 50-16.9(a).]

   b. Once a North Carolina court enters an alimony order, North Carolina retains continuing, exclusive jurisdiction to modify the order. [G.S. 52C-2-211(a), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

   c. A North Carolina court may not modify an alimony order issued by another state or foreign country if that state or country has continuing, exclusive jurisdiction pursuant to its own law. [G.S. 52C-2-211(b).]

   d. Payments required by a consent judgment or incorporated agreement may not be modified if they are not "true" alimony. See Section III.I, above, for a discussion of termination of alimony, and *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

   e. The 1995 amendments to the alimony statutes do not apply to motions seeking to modify support orders entered before Oct. 1, 1995. [S.L. 1995-319, § 12.] However, former G.S. 50-16.9(a) also provided that "an order for alimony or alimony pendente lite, whether contested or entered by consent, may be modified or vacated at any time, upon a motion in the cause and a showing of changed circumstances by either party or anyone interested."

   f. It is unclear whether alimony can be modified if the motion to modify is filed after the term of alimony originally ordered has expired.

      i. Under the alimony statute before amendment in 1995, an award of lump sum alimony for a specified period, or a fixed-term alimony award, was subject to modification and termination prior to payment in full only if the modification or termination occurred before vesting of the last payment. [*Cathey v. Cathey*, 210 N.C. App. 230, 707 S.E.2d 638 (2011) (citing *Potts v. Tutterow*, 114 N.C. App. 360, 442 S.E.2d 90 (1994)) (because the pre-1995 alimony statute did not expressly authorize periodic payments for a set period of time, an award of alimony for forty-two months was considered a lump sum payment of support).]

      ii. Because the payment was considered lump sum alimony under the pre-1995 alimony statute, once paid in full, an award of alimony for a specified period, or a fixed-term alimony award, was not subject to modification. In other words, after the supporting spouse satisfied his court-ordered obligation, the original alimony award ceased to exist, and there was no longer an alimony award for the trial court to later modify. [*Cathey v. Cathey*, 210 N.C. App. 230, 707 S.E.2d 638 (2011) (1994 order awarding alimony for forty-two months not subject to modification pursuant to a motion filed in 2008, the 1994 award having been paid in full).]

      iii. There is no case law on whether the same is true under the statute as amended in 1995. The post-1995 statute expressly authorizes alimony for a limited duration. [See G.S. 50-16.7(a), authorizing periodic payments of alimony, and G.S. 50-16.3A, requiring the court to set forth reasons for duration ordered;

Kowalick v. Kowalick, 129 N.C. App. 781, 501 S.E.2d 671 (1998) (modification never results in loss of dependent status).]

g. The trial court's jurisdiction is limited to the specific issues properly raised by a party or interested person.

   i. It was error for trial court to modify child support and custody when only question before court was alimony. [*Smith v. Smith*, 15 N.C. App. 180, 189 S.E.2d 525 (1972).]

   ii. Court erred by addressing alimony when only motion before it was for modification of child support. [*Van Nynatten v. Van Nynatten*, 113 N.C. App. 142, 438 S.E.2d 417 (1993).]

h. A court does not have to find a substantial change of circumstances before awarding alimony in an amount different from the postseparation support order. [*Langdon v. Langdon*, 183 N.C. App. 471, 644 S.E.2d 600 (2007).]

i. Even when the moving party has shown changed circumstances, the trial court is not required to modify an alimony award but has discretion to do so. [*Honeycutt v. Honeycutt*, 152 N.C. App. 673, 568 S.E.2d 260 (2002) (citing *Kowalick v. Kowalick*, 129 N.C. App. 781, 501 S.E.2d 671 (1998)).]

j. Although G.S. 50-16.3A(b) sets forth sixteen factors to be considered in the establishment of alimony, a trial court need not address each of these upon a motion for modification. The trial court need address only those that are relevant to the motion to modify. [*Kelly v. Kelly*, 228 N.C. App. 600, 747 S.E.2d 268 (2013).]

k. A trial court may NOT reconsider issue of dependency at modification hearing. [*Cunningham v. Cunningham*, 345 N.C. 430, 480 S.E.2d 403 (1997) (amount can be modified or alimony terminated but dependency is conclusively established by first order); *Honeycutt v. Honeycutt*, 152 N.C. App. 673, 568 S.E.2d 260 (2002) (citing *Kowalick v. Kowalick*, 129 N.C. App. 781, 501 S.E.2d 671 (1998)) (even if amount of alimony is reduced to zero, modification does not result in loss of dependent spouse status).]

l. However, if receiving spouse is no longer dependent at time of hearing on motion to modify, power to modify includes power to terminate alimony obligation altogether. [*Marks v. Marks*, 316 N.C. 447, 461, 342 S.E.2d 859, 867 (1986) (findings fully supported trial judge's conclusion that "plaintiff is no longer a dependent spouse," which supported the order terminating defendant's alimony obligation); *Cathey v. Cathey*, 210 N.C. App. 230, 233, 707 S.E.2d 638, 640 (2011) (quoting *Sayland v. Sayland*, 267 N.C. 378, 383, 148 S.E.2d 218, 222 (1966)) (power to modify "includes the power to terminate 'absolutely' "); *Frey v. Best*, 189 N.C. App. 622, 625, 659 S.E.2d 60, 65 (2008) (quoting *Self v. Self*, 93 N.C. App. 323, 325, 377 S.E.2d 800, 801 (1989)) ("power to modify [under G.S. 50-16.9(a)] includes the power to terminate alimony altogether").]

m. Upon motion and required showing, a court may make modification effective as of date petition to modify is filed or any date thereafter. [*Hill v. Hill*, 335 N.C. 140, 435 S.E.2d 766 (1993) (order modifying alimony from the date the matter was first noticed for hearing was not a retroactive modification).]

n. Procedure when entering a new alimony order.

i. On the first remand of the case, the trial court erred by entering a lump sum award covering the period between the date of divorce (November 1997) and the hearing on remand (February 2003) without considering husband's motion alleging a change of circumstances since the original hearing (May 1998). [*Rhew v. Felton*, 178 N.C. App. 475, 631 S.E.2d 859 (lump sum award vacated), *review denied, appeal dismissed*, 360 N.C. 648, 636 S.E.2d 810 (2006).]

ii. On the second remand of the case, the trial court was instructed to:

(a) Allow husband to present evidence of a substantial change of circumstances between the time of the original hearing (May 1998) and the first hearing on remand (February 2003), to redetermine the amount of alimony and husband's ability to pay during that period, and to enter an appropriate award, depending on whether husband met his burden on changed circumstances, and

(b) Consider any motions for modification for the period from the first hearing on remand (February 2003) until the time the case was again heard on remand. [*Rhew v. Felton*, 178 N.C. App. 475, 631 S.E.2d 859 (unique facts of the case called for the unusual procedure), *review denied, appeal dismissed*, 360 N.C. 648, 636 S.E.2d 810 (2006).]

2. Changed circumstances.

a. ". . . [N]ot *any* change of circumstances will be sufficient to order modification of an alimony award; rather, the phrase is used as a term of art to mean a *substantial* change in conditions, upon which the moving party bears the burden of proving that the present award is either inadequate or unduly burdensome." [*Britt v. Britt*, 49 N.C. App. 463, 470, 271 S.E.2d 921, 926 (1980) (emphasis in original); *Dodson v. Dodson*, 190 N.C. App. 412, 660 S.E.2d 93 (2008) (citing *Britt*).]

b. "As a general rule, the changed circumstances necessary for modification of an alimony order must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay." [*Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982); *Parsons v. Parsons*, 231 N.C. App. 397, 399, 752 S.E.2d 530, 532–33 (2013), *Cunningham v. Cunningham*, 345 N.C. 430, 436, 480 S.E.2d 403, 406 (1997), and *Pierce v. Pierce*, 188 N.C. App. 488, 495, 655 S.E.2d 863, 867 (2008) (Parsons, Cunningham, and Pierce quoting language from *Rowe* set out above); *Kelly v. Kelly*, 228 N.C. App. 600, 612, 747 S.E.2d 268, 279 (2013) (quoting *Britt v. Britt*, 49 N.C. App. 463, 470–71, 271 S.E.2d 921, 926 (1980)) (change sufficient to modify alimony "must bear on the financial needs of the dependent spouse or the ability of the supporting spouse to pay, rather than post-marital conduct of either party.").]

c. Party requesting modification of the award has the burden of proving a change in circumstances by a preponderance of the evidence. [*Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986).]

i. The decision about modification must be based on comparison of facts existing at time of original order and at time when modification is sought. [*Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986) (present overall circumstances of the parties must be compared with the circumstances existing at the time of

the original award in order to determine if there has been a substantial change); *Dodson v. Dodson*, 190 N.C. App. 412, 660 S.E.2d 93 (2008) (modification should be founded upon a comparison of the present overall circumstances of the parties with circumstances existing at time of original alimony award). *See also Harris v. Harris*, 188 N.C. App. 477, 481, 656 S.E.2d 316, 318 (2008) (quoting Rowe v. Rowe, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982)), and *Sloan v. Sloan*, 151 N.C. App. 399, 406, 566 S.E.2d 97, 102 (2002) (quoting *Rowe*, 305 N.C. at 187, 287 S.E.2d at 846) ("[t]o determine whether a change of circumstances . . . has occurred, it is necessary to refer to the circumstances or factors used in the original" alimony determination); *Medlin v. Medlin*, 64 N.C. App. 600, 307 S.E.2d 591 (1983) (citing *Britt v. Britt*, 49 N.C. App. 463, 474, 271 S.E.2d 921, 928 (1980)) (extant overall circumstances of the parties must be compared with those at the time of the award to determine whether substantial change has occurred).] For the procedure used when a private agreement is involved, which may not contain findings as to the original circumstances, see Section III.J.5.b, below.

d. In deciding whether there has been a change of circumstances, the court should consider the same factors used to make the initial alimony award. [*Rowe v. Rowe*, 305 N.C. 177, 287 S.E.2d 840 (1982); *Cunningham v. Cunningham*, 345 N.C. 430, 480 S.E.2d 403 (1997) (citing *Rowe*); *Kelly v. Kelly*, 228 N.C. App. 600, 747 S.E.2d 268 (2013) (citing *Rowe* and *Pierce v. Pierce*, 188 N.C. App. 488, 655 S.E.2d 863 (2008)); *Pierce* (citing *Rowe*); *Kowalick v. Kowalick*, 129 N.C. App. 781, 785, 501 S.E.2d 671, 674 (1998) (quoting *Cunningham*, 345 N.C. at 435, 480 S.E.2d at 406) (only those changed circumstances that relate to the "factors used in the original determination of the amount of alimony awarded" are relevant).]

e. A change in circumstances warranting modification would not ordinarily be a change that was contemplated by the original agreement and for which a provision was made therein for appropriate adjustment. [*Cunningham v. Cunningham*, 345 N.C. 430, 480 S.E.2d 403 (1997) (citing *Britt v. Britt*, 49 N.C. App. 463, 271 S.E.2d 921 (1980)) (where separation agreement provided an automatic adjustment provision for fluctuations in supporting spouse's income, reduction in his income did not warrant modification absent a showing that the change hindered his ability to pay alimony). *See also Hightower v. Hightower*, 85 N.C. App. 333, 354 S.E.2d 743 (amount of alimony was clearly calculated on assumption that dependent spouse would secure a minimum wage job; that she did so did not justify modification), *cert. denied*, 320 N.C. 792, 361 S.E.2d 76 (1987); *Kelly v. Kelly*, 228 N.C. App. 600, 747 S.E.2d 268 (2013) (fluctuations in supporting spouse's income "occurred historically" and were known at time alimony order was entered; determination that defendant's income had not substantially decreased, even though it had decreased in the two most recent years, was not an abuse of discretion).]

f. Modification may be warranted when a foreseeable change is coupled with an unforeseeable change. [*See Harris v. Harris*, 188 N.C. App. 477, 656 S.E.2d 316 (2008) (modification allowed based on termination of child support payments upon child reaching majority, which was foreseeable, and on doubling of wife's living expenses, which was not necessarily foreseeable when original award was entered).]

g. If the supporting spouse diverts assets or voluntarily reduces income for the purpose of avoiding the payment of alimony, the court should consider imputing income on a motion to modify. [*Britt v. Britt*, 49 N.C. App. 463, 271 S.E.2d 921 (1980).] For more on imputing income, see Section III.D.9.b.iii, above.

h. Changes relating to supporting spouse.

i. Change of income of supporting spouse is not sufficient to establish substantial change in circumstances. [*Frey v. Best*, 189 N.C. App. 622, 659 S.E.2d 60 (2008) (inquiry is how a change in income affects a supporting spouse's ability to pay, or a dependent spouse's need for, support); *Harris v. Harris*, 188 N.C. App. 477, 656 S.E.2d 316 (2008) (citing *Britt v. Britt*, 49 N.C. App. 463, 271 S.E.2d 921 (1980)) (reduction in supporting spouse's salary or income does not automatically entitle supporting spouse to a reduction in alimony or maintenance); *Medlin v. Medlin*, 64 N.C. App. 600, 307 S.E.2d 591 (1983) (citing *Britt*); *Britt* (general view is that fluctuations in income alone do not comprise changed circumstances requiring modification); *Kelly v. Kelly*, 228 N.C. App. 600, 747 S.E.2d 268 (2013) (finding that supporting spouse's income from law practice, which normally fluctuated, had not substantially decreased since alimony was ordered was not an abuse of discretion based on trial court's comparison of the average yearly income for the six-year period prior to entry of alimony order ($380,000) and the six-year period after its entry ($618,000), even though average for most recent two years was $220,500; key was that supporting spouse's ability to pay had not changed; he had made monthly alimony payments in full and generally on time and had made substantial discretionary purchases and investments since entry of order).]

ii. A substantial reduction in income that the court finds to be based on a party's bad faith will not warrant modification. [*Wolf v. Wolf*, 151 N.C. App. 523, 566 S.E.2d 516 (2002) (trial court did not err when it refused to modify a husband's postseparation support payments based on a substantial reduction in his income when it found that he had in bad faith disregarded his marital obligations; husband's unemployment was voluntary because his actions at work irritated and embarrassed his employer, resulting in an "entirely predictable" termination); *Engelhard v. Engelhard*, 209 N.C. App. 750, 709 S.E.2d 602 (2011) (**unpublished**) (motion to modify alimony properly denied when defendant changed jobs in bad faith to suppress his income).]

iii. Remarriage of supporting spouse and voluntary assumption of additional obligations do not constitute a sufficient showing of changed circumstances. [*Sayland v. Sayland*, 267 N.C. 378, 148 S.E.2d 218 (1966) (stating rule but vacating judgment that denied motion to modify brought by husband, who had remarried, on other grounds); *Barham v. Barham*, 127 N.C. App. 20, 487 S.E.2d 774 (1997) (citing *Sayland*) (act of supporting spouse in pledging cash reserves of his Subchapter S corporation to a bank, thus precluding those funds from being income to him, placed the burden of his voluntarily-assumed business investment on the dependent spouse, which she should not be made to bear), *aff'd per curiam*, 347 N.C. 570, 494 S.E.2d 763 (1998).]

iv. A supporting spouse's financial irresponsibility is not a basis to reduce his alimony obligation. *Harris v. Harris*, 258 N.C. 121, 128 S.E.2d 123 (1962) (a finding that the defendant was a spendthrift whose expenditures had exceeded his income every year for a number of years did not warrant reduction in alimony), *superseded on other grounds by statute as stated in Wells v. Wells*, 132 N.C. App. 401, 512 S.E.2d 468 (1999).]

v. A supporting spouse's discharge in bankruptcy can constitute a change in circumstances warranting modification of an alimony award. [*Sloan v. Sloan*, 151 N.C. App. 399, 566 S.E.2d 97 (2002) (husband's continued use of an equity line of credit and his subsequent discharge of the line of credit debt constituted a substantial change).]

vi. Modification of alimony affirmed based on fact that defendant's situation had improved so that he was now able to pay plaintiff's entire monthly shortfall, while plaintiff's overall financial situation had worsened; even though her expenses had decreased, plaintiff still had a considerable shortfall between income and expenses, her credit card debt had increased, and she had exhausted funds received in equitable distribution to pay monthly expenses. [*Pierce v. Pierce*, 188 N.C. App. 488, 655 S.E.2d 863 (2008).]

i. Changes relating to dependent spouse.

i. Change in income of dependent spouse alone was not a sufficient change in circumstances to warrant modification. [*Frey v. Best*, 189 N.C. App. 622, 659 S.E.2d 60 (2008) (increase in wife's income from $200/month to $3,788/month not sufficient by itself to warrant modification); *Cunningham v. Cunningham*, 345 N.C. 430, 480 S.E.2d 403 (1997) (increase in wife's income from part-time work from about $2,400 a year to approximately $7,000 at the time of modification hearing not sufficient). *See also Dodson v. Dodson*, 190 N.C. App. 412, 660 S.E.2d 93 (2008) (court must consider how increase in wife's imputed income from $600/month to actual income of $1,725/month affects her need for support and must make findings as to her reasonable current financial needs and expenses and the ratio of those needs and expenses to her income).]

ii. That the dependent spouse has acquired a substantial amount of property, or that the property has increased in value, after entry of a decree for alimony or maintenance is an important consideration in determining modification. [*Sayland v. Sayland*, 267 N.C. 378, 148 S.E.2d 218 (1966) (stating rule but vacating judgment that denied motion to modify on other grounds); *Cunningham v. Cunningham*, 345 N.C. 430, 480 S.E.2d 403 (1997) (citing *Sayland*).]

iii. A substantial change in the dependent spouse's needs may warrant modification of an alimony award. [*Sayland v. Sayland*, 267 N.C. 378, 148 S.E.2d 218 (1966) (when dependent spouse was adjudged incompetent and committed to facility after alimony was awarded, which alimony was more than three times the cost of her care, denial of supporting spouse's motion to be relieved of further support obligations was vacated and matter was remanded).]

iv. A dependent spouse is not required to reduce her living expenses during the life of an alimony order, even if there may be the potential to do so. [*Kelly v. Kelly*,

228 N.C. App. 600, 747 S.E.2d 268 (2013) (noting there is no case law affirmatively requiring a dependent spouse to reduce living expenses over time; in this case, evidence supported findings that dependent spouse's needs had not decreased substantially, her expenses had increased slightly, and supporting spouse's ability to pay had not changed).]

v. Change in wife's financial need, coupled with loss of child support income after child reached majority and the resulting substantial increase in her housing and related expenses, sufficient to warrant a modification of alimony. [*Harris v. Harris*, 188 N.C. App. 477, 656 S.E.2d 316 (2008) (wife's reasonable housing and related expenses increased significantly upon cessation of child support because they were originally calculated with half of those expenses attributable to the minor child and paid by child support); *Clark v. Clark*, 231 N.C. App. 514, 753 S.E.2d 743 (2013) (**unpublished**) (not paginated on Westlaw) (citing *Harris*) (in appropriate circumstances, a trial court may consider the fact that the dependent spouse's expenses will increase when a child for whom support is being paid reaches majority; trial court did not increase wife's alimony but husband objected to a finding by that court which the appellate court, after considering related findings, characterized as a "general finding" that wife's financial situation would become more challenging after both children reached majority and that expressed the trial court's "general awareness" that the parties' economic circumstances and financial obligations were in a transitional period after one child had reached majority; no error in including a finding that acknowledged that termination of child support payments would increase wife's financial burden; no prejudice to supporting party when trial court retained jurisdiction and directed that matter be brought back before it for review when younger child reached majority).]

3. Amount of new award.

   a. Modified amount must be based upon the standard of living of the parties during the marriage and not on the standard of living subsequent to entry of the original alimony order. [*Barham v. Barham*, 127 N.C. App. 20, 487 S.E.2d 774 (1997), *aff'd per curiam*, 347 N.C. 570, 494 S.E.2d 763 (1998).]

   b. In deciding amount of new award, where a party's new spouse shares responsibility for that party's expenses and needs, it is proper for the trial court to consider income received by the new spouse in weighing the party's necessary and reasonable expenses and debts against his financial ability to pay. [*Harris v. Harris*, 188 N.C. App. 477, 656 S.E.2d 316 (2008) (citing *Broughton v. Broughton*, 58 N.C. App. 778, 294 S.E.2d 772 (1982)) (trial court properly restricted its consideration to the extent that defendant-husband's present wife's income reduced his reasonable expenses and increased his ability to pay).]

4. Findings of fact.

   a. Findings must show basis for amount of new award. [G.S. 50-16.8 (postseparation support) and 50-16.3A(c) (alimony).]

   b. The trial court is required to find specific ultimate facts to support its judgment that there has been a material and substantial change in circumstances to support

a modification of an alimony order, and the facts found must be sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence. [*Frey v. Best*, 189 N.C. App. 622, 659 S.E.2d 60 (2008) (citing *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E.2d 26 (1977)); *Kelly v. Kelly*, 228 N.C. App. 600, 747 S.E.2d 268 (2013) (rejecting supporting spouse's argument that a "bare bones" three-page order was insufficient when trial court found the ultimate facts raised by the motion to modify and the findings were supported by the evidence; moreover, given that 2004 alimony order set out detailed information as to the parties' assets and debts, finding that supporting spouse's assets and debts were "similar" in 2011 was sufficient without listing the assets and debts in detail).]

c. The trial court must make findings as to any of the factors in G.S. 50-16.3A(b) that have changed since entry of the alimony award that is being considered for modification, except that there is no need to make a finding as to the eighth factor, "[t]he standard of living of the spouses established during the marriage." [*Swain v. Swain*, 179 N.C. App. 795, 635 S.E.2d 504 (2006) (noting that the standard of living that the couple enjoyed while married will not change due to circumstances occurring after divorce and entry of an alimony award), *review denied*, 361 N.C. 437, 649 S.E.2d 897 (2007); *Kelly v. Kelly*, 228 N.C. App. 600, 747 S.E.2d 268 (2013) (no need for the trial court to address each of the sixteen factors in G.S. 50-16.3A(b); rather, trial court need address only those factors relevant to the motion to modify).]

d. A modifying court is not limited to only those findings of fact made by the court that entered the original alimony order, nor is it prohibited from making additional and independent findings of fact as to, in this case, the parties' health and financial needs existing at the time of the original alimony order based on evidence presented at the modification hearing. [*Self v. Self*, 93 N.C. App. 323, 377 S.E.2d 800 (1989).]

e. Where court in original alimony order considered the relative assets and liabilities of the spouses, trial court in modification proceeding was required to consider and make findings as to that factor. [*Harris v. Harris*, 188 N.C. App. 477, 656 S.E.2d 316 (2008).]

f. Even though evidence showed that supporting spouse's law practice had changed in the eight years since alimony order was entered, trial court needed to make detailed findings about the changes only to the extent they substantially reduced supporting spouse's income and ability to pay. [*Kelly v. Kelly*, 228 N.C. App. 600, 747 S.E.2d 268 (2013).]

g. Where trial court failed to make any findings regarding wife's current reasonable financial needs and expenses and the ratio of those needs and expenses to her income, its conclusion that there had been a substantial change of circumstances was not supported by findings of fact. [*Self v. Self*, 93 N.C. App. 323, 377 S.E.2d 800 (1989); *Dodson v. Dodson*, 190 N.C. App. 412, 660 S.E.2d 93 (2008), and *Frey v. Best*, 189 N.C. App. 622, 659 S.E.2d 60 (2008) (both *Dodson* and *Frey* citing *Self*) (both cases finding that failure to make findings regarding the dependent spouse's reasonable current financial needs and expenses and the ratio of those needs and expenses to that spouse's income constituted error).]

h. Matter remanded when findings did not make clear whether the increase in taxable income generated by wife's investments was less than, equal to, or more than necessary to support herself, while maintaining her accustomed standard of living, without depleting her estate. [*Cunningham v. Cunningham*, 345 N.C. 430, 480 S.E.2d 403 (1997).]

5. Modifiability of consent orders and incorporated separation agreements.

a. Once a separation agreement between the parties is incorporated into a court order, the agreement is treated as a court order for purposes of modification. [*Cunningham v. Cunningham*, 345 N.C. 430, 480 S.E.2d 403 (1997) (citing *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983)); *Frey v. Best*, 189 N.C. App. 622, 659 S.E.2d 60 (2008) (citing *Cunningham*).]

b. Because alimony orders originating from a private agreement between the parties may contain few, if any, findings of fact as to the factors in G.S. 50-16.3A(b), to determine whether there has been a change of circumstances sufficient to justify modification may require the trial court to make findings of fact as to what the original circumstances or factors were in addition to what the current circumstances or factors are. [*Cunningham v. Cunningham*, 345 N.C. 430, 480 S.E.2d 403 (1997); *Miller v. Miller*, 192 N.C. App. 275, 664 S.E.2d 665 (2008) (**unpublished**) (citing *Cunningham*).] If the consent order to be modified does not contain findings of fact, the trial court must take evidence and make findings about the circumstances existing at the time the initial order was entered for order to have a "base line" to determine whether there has been a substantial change warranting modification. [*Balawejder v. Balawejder*, 216 N.C. App. 301, 721 S.E.2d 679 (2011) (consent custody order was at issue).]

c. While true alimony payments in incorporated agreements are subject to modification, payments made pursuant to an integrated property settlement may not be modified, even if the agreement is incorporated into a court order. [*Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986).]

d. See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1 for more on the modification of alimony provisions contained in a separation or property settlement agreement.

6. Modifiability of unincorporated separation agreements.

a. Alimony provisions of a separation agreement that has not been incorporated into a court order cannot be modified by the court, absent the consent of both parties. [*Lasecki v. Lasecki*, 809 S.E.2d 296 (N.C. Ct. App. 2017); *DeGree v. DeGree,* 72 N.C. App. 668, 325 S.E.2d 36, *review denied,* 313 N.C. 598, 330 S.E.2d 607 (1985); *Condellone v. Condellone,* 129 N.C. App. 675, 501 S.E.2d 690 (unincorporated agreement could not be modified under G.S. Chapter 50 based upon changed circumstances), *review denied,* 349 N.C. 354, 517 S.E.2d 889 (1998). *See also* G.S. 50-16.9(a) (emphasis added) (stating that only "[a]n *order* of a court of this State for alimony or post separation support . . . may be modified or vacated").]

b. Order of specific performance enforcing an unincorporated separation agreement to pay alimony does not modify the underlying contract. Contractual liability remains the same even if the court orders lesser amount to be paid in the order of specific performance. [*Lasecki v. Lasecki*, 809 S.E.2d 296 (N.C. Ct. App. 2017).]

7. Modifiability of a foreign support order.
    a. Statutes potentially applicable to modification.
        i. When an order for alimony has been entered by a court of another jurisdiction, a court of this state, upon gaining jurisdiction over the person of both parties in a civil action instituted for that purpose, and upon a showing of changed circumstances, may enter a new order for alimony which modifies or supersedes such order for alimony to the extent that it could have been so modified in the jurisdiction where granted. [G.S. 50-16.9(c).]
        ii. A court of this state issuing a spousal support order retains continuing, exclusive jurisdiction to modify that order throughout the life of the order. [G.S. 52C-2-211(a), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]
        iii. A tribunal of this state may not modify a spousal support order issued by a tribunal of another state or a foreign country having continuing, exclusive jurisdiction over that order under the law of that state or foreign country. [G.S. 52C-2-211(b), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]
    b. The Uniform Interstate Family Support Act (UIFSA) provisions, G.S. 52C-2-205(f) and 52C-2- 206(c) control and prohibit modification of a spousal support order by a nonissuing state tribunal. [*Hook v. Hook*, 170 N.C. App. 138, 611 S.E.2d 869 (rejecting husband's argument that G.S. 50-16.9(c) authorizes a North Carolina court to modify a New Jersey alimony order, holding instead that G.S. 52C-2-205(f) and 52C-2- 206(c) control over any conflict created by G.S. 50- 16.9(c)), *review denied*, 359 N.C. 631, 616 S.E.2d 234 (2005).] Note that G.S. 52C-2-205(f) and 52C-2-206(c) have been recodified as G.S. 52C-2-211(b).
        i. The other state or foreign country retains continuing, exclusive jurisdiction over a spousal support order throughout the existence of the support obligation as long as the law of the state or foreign country provides for the state's or foreign country's continuing, exclusive jurisdiction. [*See* G.S. 52C-2-211(b).] This is so even when neither party resides in the other (or issuing) state. [*Hook v. Hook*, 170 N.C. App. 138, 611 S.E.2d 869, *review denied*, 359 N.C. 631, 616 S.E.2d 234 (2005).]
        ii. This is different from the UIFSA provisions on child support orders. [*See Hook v. Hook*, 170 N.C. App. 138, 611 S.E.2d 869 (recognizing that although UIFSA provides that a state loses continuing, exclusive jurisdiction over a **child** support order when the obligor and obligee no longer reside in that state, there is no parallel exception for **spousal** support orders), *review denied*, 359 N.C. 631, 616 S.E.2d 234 (2005).]
    c. When the issuing state has continuing, exclusive jurisdiction over a registered foreign support order, the jurisdiction of a responding state is limited to the ministerial function of enforcing the registered order. [*Hook v. Hook*, 170 N.C. App. 138, 611 S.E.2d 869, *review denied*, 359 N.C. 631, 616 S.E.2d 234 (2005).]
    d. A money judgment for alimony arrearages entered by a court of another state is entitled to full faith and credit and is not subject to modification. [*Barber v. Barber*, 323 U.S. 77, 65 S. Ct. 137 (1944) (North Carolina judgment for alimony arrearages was a "final judgment" entitled to full faith and credit in Tennessee, though North Carolina

statutes provided that alimony order could be modified or vacated at any time); *McGinnis v. McGinnis*, 44 N.C. App. 381, 261 S.E.2d 491 (1980) (judgment of another state may be collaterally attacked only for lack of jurisdiction, fraud in the procurement, or because it is against public policy).]

K. Enforcement of an Order for Alimony

1. Generally.
   a. Divorce actions awarding alimony always remain open for motions in the cause for enforcement of the alimony order. [*Barber v. Barber*, 216 N.C. 232, 4 S.E.2d 447 (1939); *Miller v. Miller*, 98 N.C. App. 221, 390 S.E.2d 352 (citing *Barber*), *review denied, appeal dismissed*, 327 N.C. 637, 399 S.E.2d 124 (1990).]
   b. A plaintiff seeking enforcement of an alimony order may serve the supporting spouse with notice of the motion for enforcement, but a new summons is not required. [*Barber v. Barber*, 216 N.C. 232, 4 S.E.2d 447 (1939); *Miller v. Miller*, 98 N.C. App. 221, 390 S.E.2d 352 (citing *Barber*), *review denied, appeal dismissed*, 327 N.C. 637, 399 S.E.2d 124 (1990).]
   c. G.S. 50-16.7(d)–(k) provide specific remedies applicable to both alimony and postseparation support. G.S. 50-16.7(j) provides that an alimony order is enforceable by civil contempt and that its disobedience may be punished by criminal contempt. However, G.S. 50-16.7(l) also provides that the "specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available." NOTE: Former G.S. 50-16.7 (*amended by* S.L. 1995-319, § 5 but applicable to all motions to modify support orders entered before Oct. 1, 1995) contains the same list of remedies available for the enforcement of support orders.
2. Contempt generally.
   a. For more on civil or criminal contempt generally, and for a checklist for use when finding a party in either civil or criminal contempt, see *Contempt of Court*, Bench Book, Vol. 2, Chapter 4.
   b. For an online module on contempt, see Michael Crowell, *Contempt of Court* (UNC School of Government, Nov. 2010), https://sog.adobeconnect.com/p30019876/.
   c. Generally.
      i. The nature of the proceeding does not determine whether contempt is civil or criminal. Both civil and criminal contempt are available in both civil and criminal proceedings.
         (a) A defendant may be charged criminally but be in civil contempt. [*See State v. Mauney*, 106 N.C. App. 26, 415 S.E.2d 208 (1992) (defendant charged with criminal nonsupport found in civil contempt for failing to comply with an order for blood testing).]
         (b) A person may be held in criminal contempt for willfully failing to comply with an order entered in a civil proceeding. [*See* G.S. 50-13.4(f)(9) (child support); 50-13.3(a) (custody); 50-16.7(j) (alimony).]
      ii. Although an obligor may be cited for both civil and criminal contempt for failing to pay court-ordered alimony, she may not be held in both civil and criminal

contempt with respect to a particular failure to pay court-ordered alimony. [*See* G.S. 5A-12(d), 5A-21(c), and 5A-23(g).].

iii. A trial court may determine the amount of an alimony arrearage and order payment without first finding the supporting spouse in contempt. [*Swain v. Swain*, 179 N.C. App. 795, 801, 635 S.E.2d 504, 508 (2006) (calling the argument that a court may enforce an alimony arrearage by ordering its payment only after finding contempt "decidedly untrue"), *review denied*, 361 N.C. 437, 649 S.E.2d 897 (2007).]

d. Distinction between civil and criminal contempt.

i. Importance of distinction. Distinguishing between civil and criminal contempt is important because whether the proceeding is for civil or criminal contempt determines in large part:

(a) The procedures that must be followed by the court;

(b) The legal rights accorded to the alleged contemnor;

(c) The elements that must be proved to establish contempt;

(d) The burden of proof;

(e) The available sanctions and remedies; and

(f) The appellate procedure. [John L. Saxon, *Using Contempt to Enforce Child Support Orders*, Special Series No. 17 (UNC School of Government, Feb. 2004); *Reynolds v. Reynolds*, 356 N.C. 287, 569 S.E.2d 645 (2002), *rev'g per curiam for reasons stated in dissenting opinion in* 147 N.C. App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting).] For examples of the different procedures and rights, see *Contempt of Court*, Bench Book, Vol. 2, Chapter 4.

ii. Civil contempt.

(a) Civil contempt is a civil remedy used exclusively to enforce compliance with court orders. [Official Commentary, G.S. 5A-21; *Reynolds v. Reynolds*, 356 N.C. 287, 569 S.E.2d 645 (2002), *rev'g per curiam for reasons stated in dissenting opinion in* 147 N.C. App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting); *Shippen v. Shippen*, 204 N.C. App. 188, 693 S.E.2d 240 (2010) (citing *Scott v. Scott*, 157 N.C. App. 382, 579 S.E.2d 431 (2003)) (purpose of civil contempt is not to punish, but rather to coerce the defendant to comply with an order of the court); *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988) (civil contempt is remedial in nature; its purpose is to compel an obligor to comply with a court order).]

(b) The length of time that a defendant can be imprisoned for civil contempt is not limited by law, since the defendant can obtain his release immediately upon complying with the court's order. [*Jolly v. Wright*, 300 N.C. 83, 92, 265 S.E.2d 135, 142 (1980) (quoting *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902)) (defendant, by virtue of his ability to comply with the court order, carries "the keys of (his) prison in (his) own pockets"), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993); *Brower v. Brower*, 70 N.C. App. 131, 318 S.E.2d 542 (1984) (citing *Jolly*); Official

Commentary, G.S. 5A-21, stating that "[i]n most cases, a person in civil contempt may be held for so long as his civil contempt continues; he holds the keys to his own jail by virtue of his ability to comply".]

iii. Criminal contempt.

(a) Criminal contempt is punitive in purpose, and the contemnor "cannot undo or remedy what has been done" nor "shorten the term by promising not to repeat the offense." [*Reynolds v. Reynolds*, 356 N.C. 287, 569 S.E.2d 645 (2002), *rev'g per curiam for reasons stated in dissenting opinion in* 147 N.C. App. 566, 577, 557 S.E.2d 126, 133 (2001) (John, J., dissenting) (quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442, 31 S. Ct. 492, 498 (1911)).]

(b) Criminal contempt is administered as punishment for acts already committed that have impeded the administration of justice in some way. The punishment that courts can impose, either a fine or imprisonment, is circumscribed by law. [*Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966); *Brower v. Brower*, 70 N.C. App. 131, 318 S.E.2d 542 (1984) (citing *Mauney*).]

iv. Appeal.

(a) Appeals in district court civil contempt matters are directly to the court of appeals pursuant to G.S. 5A-24. See Section III.K.3.g, below, for more on appeal of a civil contempt order.

(b) District court orders adjudicating criminal contempt are appealable to the superior court for hearing de novo. [G.S. 5A-17(a); 15A-1431(b).] Upon appeal in a case imposing confinement for criminal contempt, a bail hearing must be held within a reasonable time after imposition of the confinement, with the contemnor being retained in custody no more than twenty-four hours from the time of imposition of confinement without a bail determination being made by a superior court judge. If a superior court judge has not acted within twenty-four hours of the imposition of confinement, any judicial official shall hold a bail hearing. [G.S. 5A-17(b), (c), *added by* S.L. 2013-303, § 1, effective Dec. 1, 2013, and applicable to confinement imposed on or after that date.]

v. Standard of proof.

(a) The facts upon which the determination of criminal contempt is based must be established beyond a reasonable doubt. [G.S. 5A-15(f).]

(b) G.S. Chapter 5A does not clearly specify the standard of proof in civil contempt proceedings. In contempt proceedings pursuant to G.S. 5A-23(a) (order or notice issued by a judicial official), and in contempt proceedings pursuant to G.S. 5A-23(a1) (motion and affidavit of an aggrieved party), a court should not find a person in civil contempt unless there is sufficient proof of contempt. Standard of proof is probably preponderance of the evidence.

3. Civil contempt.
    a. A supporting spouse may be held in civil contempt for failure to comply with an alimony order if:
        i. The order remains in force;
        ii. The purpose of the order may still be served by the supporting spouse's compliance with the order;
        iii. The supporting spouse's failure to comply with the order is willful; and
        iv. The supporting spouse has the present ability to comply with the order (in whole or in part) or to take reasonable measures that would enable her to comply with the order (in whole or in part). [G.S. 5A-21(a); *Oakley v. Oakley*, 165 N.C. App. 859, 599 S.E.2d 925 (2004); *Thompson v. Thompson*, 223 N.C. App. 515, 519, 735 S.E.2d 214, 217 (2012) (citing *McMiller v. McMiller*, 77 N.C. App. 808, 336 S.E.2d 134 (1985)) (reversing contempt portion of an order when the trial court failed to make findings regarding subsections (1) and (2) of G.S. 5A-21(a); additionally, finding that "Defendant has had the ability and means to pay the Post Separation Support previously ordered, or at least a substantial portion of that amount" was insufficient because it spoke to past ability to pay and was not a finding about defendant's present ability to pay).]
    b. Order remains in force.
        i. If the alimony award is vacated, the supporting spouse cannot be held in contempt for violating it. [*Rhew v. Felton*, 178 N.C. App. 475, 631 S.E.2d 859 (when appellate court vacated the lump sum alimony award, it vacated the order finding plaintiff in contempt), *review denied, appeal dismissed*, 360 N.C. 648, 636 S.E.2d 810 (2006).]
    c. Present ability to comply.
        i. The present ability to comply includes not only the present means to comply, but also the ability to take reasonable measures to comply. [G.S. 5A-21(a)(3); *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991). *See also Shumaker v. Shumaker*, 137 N.C. App. 72, 527 S.E.2d 55 (2000) (trial court found that defendant, sole owner of a body repair shop, was also a certified mechanic but made no effort to supplement his income with mechanic work).]
        ii. The court must determine a party's ability to comply during two periods of time. A trial court must find that the party:
            (a) Possessed the means to comply during the period the party was in default [*Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966) (requiring a finding that defendant possessed the means to comply with alimony and child support orders during the period when he was in default).] and
            (b) Has the present means to comply with the purge conditions set out in the order. [*Shippen v. Shippen*, 204 N.C. App. 188, 191, 693 S.E.2d 240, 244 (2010) (quoting *McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985)) ("[t]o justify conditioning defendant's release from jail for civil contempt upon payment of a large lump sum of arrearages, the district

court must find as fact that defendant has the present ability to pay those arrearages"); *Gordon v. Gordon*, 233 N.C. App. 477, 481, 757 S.E.2d 351, 354 (2014) (emphasis in original) (citing *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990)) (findings taken as a whole showed that court considered husband's present ability to comply with an order requiring him to pay alimony arrearages, even though contempt order stated that husband "*had* the present ability to comply" with the order; rejecting husband's argument that trial court's use of "had" was fatal to its judgment).] For more cases on this point, see *Contempt of Court*, Bench Book, Vol. 2, Chapter 4.

iii. Plaintiff husband had the ability to pay $20,000 of unpaid alimony within sixty days of entry of order finding him in contempt, even though there was no finding as to the cash available to him as of that date or as of the date of the hearing. Plaintiff had sixty days to pay, plaintiff's personal debts and expenses were paid by his business, a closely held corporation, and plaintiff could take reasonable measures to comply by using a portion of his $15,000 monthly income to pay the amount ordered, by accessing cash from lines of credit associated with credit cards, and by ceasing to voluntarily make monthly mortgage and rent payments for his adult children and mother. [*Gordon v. Gordon*, 233 N.C. App. 477, 757 S.E.2d 351 (2014).]

iv. Defendant had the ability to pay $10,000 toward his alimony arrearages when, at the time of the hearing, he had a $2,000 cashier's check, a boat, and a car that could readily be converted to cash, and at least $6,200 from his 401(k) plan. [*Tucker v. Tucker*, 197 N.C. App. 592, 679 S.E.2d 141 (2009) (payment of $10,000 in alimony arrearages required for defendant to purge himself of contempt).]

v. Defendant ordered to pay attorney fees in alimony order was properly found in contempt when he failed to make a required installment payment of $7,000. Defendant held stock solely in his name valued in excess of $30,000 which, had defendant sold it, could have been used to pay the required installment as well as the entire amount owed on the debt. [*Hudson v. Hudson*, 193 N.C. App. 454, 667 S.E.2d 340 (2008) (**unpublished**).]

vi. Where defendant did not take a salary after receipt of a garnishment notice from the IRS in connection with his temporary alimony obligation, defendant had the ability to pay, so the failure to pay was willful. [*Sloan v. Sloan*, 151 N.C. App. 399, 566 S.E.2d 97 (2002) (evidence that defendant's closely held business paid his medical bills and his mortgage supported court's findings on ability to pay and willfulness); *Gordon v. Gordon*, 233 N.C. App. 477, 757 S.E.2d 351 (2014) (citing *Foy v. Foy*, 69 N.C. App. 213, 316 S.E.2d 315 (1984)) (trial court may consider how a contemnor pays his expenses; here, expenditures by husband's closely held corporation for his personal expenses and debts related directly to his ability to pay alimony arrearages).]

vii. A contempt order must include a definite date by which a defendant may purge the contempt. [*Spears v. Spears,* 245 N.C. App. 260, 784 S.E.2d 485 (2016) (contempt order vacated as impermissibly vague when it did not set an ending date for defendant's alimony purge payments); *Lueallen v. Lueallen,* 790 S.E.2d 690 (N.C. Ct. App. 2016) (contempt order requiring purge payments to be applied to

child support arrears was impermissibly vague when ending date for the payments was uncertain).]

viii. Contempt order was reversed when no finding had been made as to husband's present ability to comply with the alimony obligations in an incorporated separation agreement. [*Oakley v. Oakley*, 165 N.C. App. 859, 599 S.E.2d 925 (2004) (trial court's only finding of fact addressed husband's failure to pay alimony as willful). *But see Shumaker v. Shumaker*, 137 N.C. App. 72, 527 S.E.2d 55 (2000) (order sufficient if it is implicit in the court's findings that the delinquent obligor both possessed the means to comply and willfully refused to do so; explicit findings as to ability to pay preferable but not absolutely essential if findings otherwise indicate contempt is warranted); *Patton v. Patton*, 88 N.C. App. 715, 364 S.E.2d 700 (1988) (citing *Daugherty v. Daughterty*, 62 N.C. App. 318, 302 S.E.2d 664 (1983)) (if the evidence plainly shows that the supporting spouse was capable of complying with the alimony order, the absence of a specific finding on ability to pay is immaterial); *Medlin v. Medlin*, 64 N.C. App. 600, 307 S.E.2d 591 (1983) (citing *Daugherty*) (while an explicit finding of present ability to comply would have been preferable, contempt order nevertheless was upheld where it was implicit from the findings made that plaintiff had the ability to comply).] For other cases finding a general finding of present ability to comply sufficient, see *Contempt of Court*, Bench Book, Vol. 2, Chapter 4.

d. Willful failure to pay.

i. Willfulness is, in the context of civil contempt, an ability to comply with the court order and a deliberate and intentional failure to do so. [*Clark v. Gragg*, 171 N.C. App. 120, 614 S.E.2d 356 (2005) (child support case). *See also Mauney v. Mauney*, 268 N.C. 254, 268, 150 S.E.2d 391, 393 (1966) (the "willfulness" necessary to find a party in civil contempt requires "knowledge and a stubborn resistance"); *Shippen v. Shippen*, 204 N.C. App. 188, 693 S.E.2d 240 (2010) (citing *Forte v. Forte*, 65 N.C. App. 615, 309 S.E.2d 729 (1983)) (willfulness involves more than deliberation or conscious choice; it imports a bad faith disregard for authority and the law).]

ii. A party who has the ability to pay court-ordered support when a support order is entered but later becomes unable to pay after voluntarily taking on additional financial obligations or divesting assets or reducing income, engages in willful conduct and may be held in civil contempt. [*See Shippen v. Shippen*, 204 N.C. App. 188, 693 S.E.2d 240 (2010) (citing *Faught v. Faught*, 67 N.C. App. 37, 312 S.E.2d 504, *review denied*, 311 N.C. 304, 317 S.E.2d 680 (1984)) (reviewing well-established line of cases so providing; father, (1) who admitted that he was physically and mentally able to be employed, who was in fact employed full-time when the support order was entered, but who voluntarily quit his job after entry of the support order to become a member of a religious community that prohibited its members from earning outside income and (2) who testified that he would not take outside employment under any circumstances, willfully failed to pay support and was properly held in civil contempt); *cf. Spears v. Spears*, 245 N.C. App. 260, 278, 784 S.E.2d 485, 497 (2016) (trial court found defendant in contempt of alimony order for a six-month period based on a finding that

defendant could have paid "more" or taken reasonable measures to enable him to "pay more" toward his court-ordered obligation, even if he could not have paid in full, and further found that defendant showed "disregard for his familial and legal obligations" by quickly remarrying and having four additional children; court of appeals found that defendant's exercise of his fundamental right to marry and procreate, in this particular situation, did not demonstrate disregard of obligations to his family).]

e. Sanctions for civil contempt.

i. Imprisonment is the only authorized sanction for civil contempt. [G.S. 5A-21(b).]

ii. A person who is found in civil contempt is not subject to the imposition of a fine. [G.S. 5A-21(d), *added by* S.L. 2015-210, § 1, effective Oct. 1, 2105, and applicable to civil contempt orders entered on or after that date.] The 2015 amendment to G.S. 5A-21 changed the result in *Tyll v. Berry*, 234 N.C. App. 96, 758 S.E.2d 411, *review denied*, *appeal dismissed,* 367 N.C. 532, 762 S.E.2d 207 (2014) (a fine is a "statutorily permitted" sanction for civil contempt proceedings).]

iii. A person who is incarcerated for civil contempt may be imprisoned as long as the civil contempt continues, subject to the limitations set out in G.S. 5A-21(b1) and (b2). [G.S. 5A-21(b).]

iv. There is no limitation on the term of imprisonment when a person is held in civil contempt for failing to pay court-ordered child support or for failing to comply with a court order that does not involve the payment of money. [G.S. 5A-21(b).]

v. A person found in civil contempt for failure to pay money other than child support (such as alimony) may not be imprisoned for more than 90 days for the same act of disobedience or refusal to comply with a court order but may be recommitted for successive 90-day periods, with the total period of imprisonment not to exceed 12 months. [G.S. 5A-21(b2).]

vi. When contempt is not purged within 90 days by a person imprisoned for civil contempt for the failure to pay money other than child support, the court must conduct a de novo hearing before recommitting the person for a successive 90-day term. [G.S. 5A-21(b2).]

vii. The 12-month maximum period of imprisonment includes the initial period of imprisonment and any additional period of imprisonment. [G.S. 5A-21(b2).]

f. When civil contempt should not be used.

i. Civil contempt may not be used to enforce a support order unless the supporting spouse has the **present ability** to pay at least part of the support that he owes and, despite his present ability to do so, stubbornly, recalcitrantly, deliberately, willfully, or intentionally refuses to pay support to the extent he is able to do so. [*See* G.S. 5A-21(a).]

ii. Civil contempt may not be the most appropriate remedy to enforce an alimony order if the supporting spouse has identifiable income or property from which

support can be paid and other remedies (for example, income withholding, execution of judgment or liens, etc.) can be used to enforce the order against the supporting spouse's income or property. [See Section III.K.5.k, below, on income withholding, Section III.K.5.j, below, on execution, and Section III.K.5.i, below, on liens.]

iii. Alimony provisions in an unincorporated separation agreement may not be enforced through civil contempt. [*See Jones v. Jones*, 144 N.C. App. 595, 601, 548 S.E.2d 565, 569 (2001) (citing *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983)) and stating that "[w]here a separation agreement is neither submitted, by one or both parties thereto, to the trial court for its approval, nor specifically incorporated into a court order or judgment, the separation agreement is preserved as a contract and remains enforceable and modifiable only under traditional contract principles").] Note, however, that an order requiring a party to specifically perform her obligations under an unincorporated separation agreement is enforceable by contempt. [*Gen. Motors Acceptance Corp. v. Wright*, 154 N.C. App. 672, 573 S.E.2d 226 (2002) (citing *McDowell v. McDowell*, 55 N.C. App. 261, 284 S.E.2d 695 (1981)) (if a party to an unincorporated separation agreement does not perform her obligations under the agreement, the other party may obtain a decree of specific performance of the separation agreement, which is enforceable through contempt proceedings).] See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1 and *Contempt of Court*, Bench Book, Vol. 2, Chapter 4.

iv. For more instances when civil contempt is not available, see *Contempt of Court*, Bench Book, Vol. 2, Chapter 4.

g. Appeal of a civil contempt order.

i. To whom directed.

(a) An aggrieved party may appeal the district court's order in a civil contempt proceeding to the court of appeals by filing a notice of appeal within thirty days after the order is entered. [N.C. R. App. P. 3(c); G.S. 5A-24 and 7A-27(b)(2).]

(b) A motion to stay an obligor's incarceration under a civil contempt order must be directed initially to the district court. [N.C. R. App. P. 8(a).]

ii. Contempt order as interlocutory.

(a) Appeal of a contempt order affects a substantial right and is immediately appealable. [*Thompson v. Thompson*, 223 N.C. App. 515, 735 S.E.2d 214 (2012) (citing *Guerrier v. Guerrier*, 155 N.C. App. 154, 574 S.E.2d 69 (2002)) (appeal allowed of order finding defendant in civil contempt for failing to pay postseparation support (PSS), but appeal of PSS order itself was interlocutory and not appealable, even after defendant found in contempt of it); *Hamilton v. Johnson*, 228 N.C. App. 372, 747 S.E.2d 158 (2013) (appeal of contempt order for failure to comply with a temporary child support order affected a substantial right).]

iii. Standard of review on appeal.

(a) The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law. [*Thompson v. Thompson*, 223 N.C. App. 515, 735 S.E.2d 214 (2012); *Oakley v. Oakley*, 165 N.C. App. 859, 599 S.E.2d 925 (2004); *Sloan v. Sloan*, 151 N.C. App. 399, 566 S.E.2d 97 (2002).]

(b) In a contempt proceeding, the facts found by the judge are not reviewable by an appellate court except for the purpose of passing upon their sufficiency to warrant the judgment. [*Gordon v. Gordon*, 233 N.C. App. 477, 757 S.E.2d 351 (2014) (citing *Tucker v. Tucker*, 197 N.C. App. 592, 679 S.E.2d 141 (2009)); *Wolf v. Wolf*, 151 N.C. App. 523, 566 S.E.2d 516 (2002) (citing *Green v. Green*, 130 N.C. 578, 41 S.E. 784 (1902)).]

h. Contempt after appeal of alimony order filed.

i. Pursuant to G.S. 1-294, when an appeal is perfected, the trial court is divested of jurisdiction "upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure." [G.S. 1-294, *amended by* S.L. 2015-25, § 2, effective May 21, 2015. *See Guerrier v. Guerrier*, 155 N.C. App. 154, 159 n.4, 574 S.E.2d 69, 72 n.4 (2002) (noting in dicta that appeal of an order finding father in contempt of an equitable distribution (ED) judgment for removing funds from children's investment accounts left the trial court without jurisdiction to address issues in an enforcement order such as reimbursement of the funds removed or removal of father as custodian of the accounts; enforcement order was vacated on other grounds, but court noted that unlike child support, child custody, and alimony, no statute provides that an ED order remains enforceable pending appeal).]

ii. Notwithstanding G.S. 1-294 or 1-289, an order for the periodic payment of alimony may be enforced through civil contempt pending an appeal of the order. [G.S. 50-16.7(j). *See Cox v. Cox*, 92 N.C. App. 702, 376 S.E.2d 13 (1989) (reading G.S. 1-294 and 50-16.7(j) together, the trial court had jurisdiction to issue a show cause order and subsequent criminal contempt order for defendant's failure to appear at the hearing on the show cause order).]

iii. G.S. 50-16.7(j) does not appear to allow an action to recover postseparation arrearages after an alimony award has been appealed. [*See Harris v. Harris*, 173 N.C. App. 232, 617 S.E.2d 723 (2005) (**unpublished**) (without considering the application of G.S. 50-16.7(j), appeal from an order awarding wife alimony divested the trial court of jurisdiction to consider wife's motion for civil contempt for failure to pay postseparation support (PSS) because alimony award "affected" PSS as that term is used G.S. 1-294).]

iv. When the trial court enters an order of contempt while the alimony order is on appeal, the appellate court in which the appeal is pending may, upon motion of the supporting spouse, stay any order for civil contempt entered for alimony until the appeal is decided, if justice requires. [G.S. 50-16.7(j); N.C. R. App. P. 23.]

i. For more on civil contempt, including procedure, fundamentals of an order and findings, right to and appointment of an attorney in civil contempt proceedings, and award of attorney fees, see *Contempt of Court*, Bench Book, Vol. 2, Chapter 4. For contempt in the context of child support, see *Enforcement of Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 4.

j. Award of attorney fees in contempt proceeding to enforce alimony.

i. Attorney fees have been allowed in a contempt proceeding involving alimony. [*See Shumaker v. Shumaker*, 137 N.C. App. 72, 527 S.E.2d 55 (2000) (upholding an award of fees when a defendant was in contempt for failing to comply with a temporary alimony order); *Martin v. Martin*, 202 N.C. App. 372, 690 S.E.2d 767 (2010) (**unpublished**) (upholding order finding defendant in civil contempt for failure to pay alimony as ordered and requiring defendant to pay plaintiff's attorney fees incident to the contempt proceeding); *Hudson v. Hudson*, 193 N.C. App. 454, 667 S.E.2d 340 (2008) (**unpublished**) (defendant properly found in civil contempt for his failure to comply with an alimony order that required payment of attorney fees).] *But see Blackburn v. Bugg*, 723 S.E.2d 585 (N.C. Ct. App. 2012) (**unpublished**) (reversing an award of attorney fees against a defendant found in civil contempt for failure to pay alimony as ordered in a prior proceeding enforcing the parties' premarital agreement; appellate court stated that attorney fees generally are not allowed in civil contempt proceedings except in the context of contempt proceedings to enforce child support or ED orders; without express statutory authority to support the trial court's award of fees and when neither recognized exception applied, award of attorney fees was vacated).] For more on attorney fees in contempt proceedings generally, see *Contempt of Court*, Bench Book, Vol. 2, Chapter 4.

4. Criminal contempt.

a. G.S. 5A-11(a) sets out the exclusive grounds for criminal contempt. The ground most relevant when enforcing an order for alimony is G.S. 5A-11(a)(3), which provides that the willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, instruction, or its execution is a criminal contempt.

b. Direct vs. indirect criminal contempt.

i. Willful failure to pay support as required by court order constitutes **indirect** criminal contempt, rather than **direct** criminal contempt. [*See* G.S. 5A-13(a) (direct criminal contempt is committed within the sight or hearing of a judicial official and in, or in immediate proximity to, the courtroom; any other criminal contempt is indirect criminal contempt pursuant to G.S. 5A-13(b)).]

ii. The court therefore must follow the plenary procedures applicable to indirect criminal contempt under G.S. 5A-15, rather than the summary procedures applicable to direct criminal contempt under G.S. 5A-14, when faced with a willful failure to pay court-ordered alimony. [*See* G.S. 5A-15.]

iii. Defendant's failure to appear personally at a show cause hearing for failure to pay alimony was classified as indirect criminal contempt. [*Cox v. Cox*, 92 N.C. App. 702, 376 S.E.2d 13 (1989) (finding of contempt vacated when defendant

was not provided a hearing pursuant to G.S. 5A-13(b) and 5A-15 and because facts were not established beyond a reasonable doubt).]

iv. For more on indirect and direct contempt, and summary and plenary proceedings, see *Contempt of Court*, Bench Book, Vol. 2, Chapter 4.

c. Willfullness required by G.S. 5A-11.

i. "Willfulness" in G.S. 5A-11 means an act "done deliberately and purposefully in violation of law, and without authority, justification, or excuse." The term has also been defined as "more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law." [*State v. Phair*, 193 N.C. App. 591, 594, 668 S.E.2d 110, 112 (2008) (quoting *State v. Chriscoe*, 85 N.C. App. 155, 158, 354 S.E.2d 289, 291 (1987), and *Forte v. Forte*, 65 N.C. App. 615, 616, 309 S.E.2d 729, 730 (1983), respectively)).]

ii. The word "willful" when used in a criminal statute means that the act was "done deliberately and purposefully in violation of law, and without authority, justification or excuse." [*State v. Chriscoe*, 85 N.C. App. 155, 158, 354 S.E.2d 289, 291 (1987); *State v. Evans*, 193 N.C. App. 455, 667 S.E.2d 340 (2008) (**unpublished**) (citing *Chriscoe*).]

iii. A failure to pay may be willful if a spouse voluntarily takes on additional financial obligations or divests himself of assets or income after entry of alimony order. [*Faught v. Faught*, 67 N.C. App. 37, 312 S.E.2d 504 (defendant in criminal contempt for willful failure to pay when, after the original alimony award, he obligated himself to pay for automobiles for himself, his adult daughter, and his new wife, as well as other obligations for his new family), *review denied*, 311 N.C. 304, 317 S.E.2d 680 (1984).]

d. Procedure.

i. The judge is the trier of facts at the criminal contempt hearing. [G.S. 5A-15(d).] There is no constitutional right to a jury trial for criminal contempt. [*Blue Jeans Corp. v. Amalgamated Clothing Workers*, 275 N.C. 503, 169 S.E.2d 867 (1969) (no constitutional right to a jury trial when the prescribed punishment is imprisonment for less than 6 months or a fine of less than $500; punishment for criminal contempt at the time was a fine of $250, imprisonment for 30 days, or both). *See also Bloom v. Illinois*, 391 U.S. 194, 88 S. Ct. 1477 (1968) (criminal contempt conviction in a nonjury trial could not be sustained when a 24-month prison sentence was imposed). *But cf. Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 114 S. Ct. 2552 (1994) (serious noncompensatory contempt fines were criminal and constitutionally could not be imposed absent a jury trial).]

ii. The person charged with criminal contempt may not be compelled to be a witness against herself. [G.S. 5A-15(e).] Thus, a person who asserts the privilege upon a reasonable belief that her answer could be used against her in a criminal prosecution cannot be held in criminal contempt for the refusal to answer. [*See In re Jones*, 116 N.C. App. 695, 449 S.E.2d 221 (1994).]

iii. For more on the procedure in a criminal contempt proceeding generally, and when the supporting spouse fails to appear as required by a show cause order, see *Enforcement of Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 4.

iv. A supporting spouse has the right to be represented by counsel in criminal contempt proceedings. [See *Enforcement of Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 4.]

e. Punishment that may be imposed for criminal contempt.

i. A supporting spouse who is found in criminal contempt is subject to censure, a fine not to exceed $500, imprisonment for a **definite** and **fixed** term not to exceed 30 days, or any combination of the three, subject to certain exceptions set out in the statute. [G.S. 5A-12(a).]

ii. An order sentencing a defendant to six consecutive 30-day terms of imprisonment based on six findings of direct criminal contempt has been affirmed in a case of first impression. [*State v. Burrow*, 789 S.E.2d 923 (N.C. Ct. App. 2016) (neither G.S. 5A-12 nor any other statute in G.S. Chapter 5A prohibits consecutive sentences for multiple findings of contempt; a criminal contempt adjudication is not a misdemeanor for which consecutive sentences may not be imposed).] Note that stacked sentences that exceed 180 days could trigger a defendant's Sixth Amendment right to a jury trial as discussed in Jamie Markham, *Consecutive Sentences for Criminal Contempt,* UNC Sch. of Gov't: N.C. Crim. L. Blog (Aug. 11, 2016), https://nccriminallaw.sog.unc.edu/consecutive-sentences-criminal-contempt.

iii. For more, including the punishment for a person in contempt for failure to pay child support, see *Contempt of Court*, Bench Book, Vol. 2, Chapter 4 and *Enforcement of Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 4.

5. Remedies other than contempt.

a. Arrest and bail. [G.S. 1-410(5) (arrest); 1-420 *et seq*. (bail).]

i. Arrest and bail is available in actions for alimony or postseparation support to the same extent as in other cases. [G.S. 50-16.7(d).]

ii. Arrest and bail under G.S. Chapter 1, Article 34 is a prejudgment remedy.

iii. A defendant in an alimony action may not be arrested and held for bail under G.S. Chapter 1, Article 34 unless the court finds, based on an affidavit filed by the plaintiff, that the defendant has removed or disposed of her property, or is about to do so, with the intent of defrauding a dependent spouse who claims alimony, and the plaintiff posts an adequate, written undertaking, with sufficient surety, to pay damages incurred by the defendant if the order for arrest is vacated. [*See* G.S. 1-410(5), 1-411, 1-412, 1-417.]

iv. An indigent defendant who is arrested under G.S. Chapter 1, Article 34 is entitled to a court-appointed attorney. [*See* G.S. 1-413; 7A-451(a)(7).]

v. A defendant who is arrested under G.S. Chapter 1, Article 34 may be released by posting bail as provided under G.S. 1-420 or by making a deposit in lieu of bail under G.S. 1-426.

b. Execution of a mortgage, deed of trust, or security interest.

i. The court may, at the time it enters an alimony or postseparation support (PSS) order or upon motion in a proceeding to enforce such orders, require the supporting spouse to execute a mortgage, deed of trust, or security interest with

respect to real or personal property owned by the supporting spouse to secure the supporting spouse's **future** payment of alimony or PSS. [G.S. 50-16.7(b).]

ii. If the supporting spouse fails to execute a mortgage or deed of trust as required by the court, the court may enter an order transferring title to the property pursuant to G.S. 1A-1, Rule 70 and G.S. 1-228 or directing another person to execute the documents required to transfer title. [G.S. 50-16.7(c).] G.S. 1A-1, Rule 70 allows a court in an order to "direct" another to execute on behalf of the party who failed to act, but the order must be written, signed, and filed to be effective. [*Dabbondanza v. Hansley*, 791 S.E.2d 116 (N.C. Ct. App. 2016).]

iii. A mortgage, deed of trust, or security interest in property required under G.S. 50-16.7(b) must be filed, recorded, and perfected in accordance with other applicable law. It may then be enforced by the dependent spouse, upon the supporting spouse's default in paying court-ordered alimony or PSS, in accordance with the terms of the mortgage, deed of trust, or security interest and other applicable law without further order of the court in the support action.

iv. For this remedy as a form of payment used to facilitate collection of support, see Section III.H.4, above.

c. Assignment of wages, salary, or other income due or to become due.

i. The court may order the supporting spouse to secure the payment of alimony or postseparation support by requiring an assignment of wages, salary, or other income due or to become due. [G.S. 50-16.7(b).]

ii. Under 10 U.S.C. § 1408(d), the Uniform Services Former Spouses' Protection Act, a supporting spouse's military retirement pay may be assigned to a dependent spouse under a valid court order. [*Faught v. Faught*, 67 N.C. App. 37, 312 S.E.2d 504, *review denied*, 311 N.C. 304, 317 S.E.2d 680 (1984).]

iii. For this remedy as a form of payment used to facilitate collection of support, see Section III.H.5, above.

d. Transfer of property.

i. A court may order the supporting spouse to transfer title to real property (located anywhere within North Carolina or in another state) in payment of arrearages of alimony or postseparation support as long as the net value of the property does not exceed the amount of the arrearage. [G.S. 50-16.7(a).]

ii. A court may order a supporting spouse to pay alimony by transferring title or possession of personal property. [G.S. 50-16.7(a).]

iii. If the court orders a supporting spouse to transfer title to real or personal property under G.S. 50-16.7(a) and the supporting spouse fails to execute the necessary documents, the court may enter an order transferring title to the property pursuant to G.S. 1A-1, Rule 70 and G.S. 1-228 or directing another person to execute the documents required to transfer title. [G.S. 50-16.7(c).] G.S. 1A-1, Rule 70 allows a court in an order to "direct" another to execute on behalf of the party who failed to act, but the order must be written, signed, and filed to be effective. [*Dabbondanza v. Hansley*, 791 S.E.2d 116 (N.C. Ct. App. 2016).]

iv. For this remedy as a form of payment used to facilitate collection of support, see Section III.H.2, above.

e. Attachment and garnishment. [G.S. 1-440.1 *et seq*. and 110-128 *et. seq*.]

i. Attachment and garnishment are available as remedies in alimony and postseparation support actions to the same extent as in other cases. [G.S. 50-16.7(e); 1-440.2.]

ii. For purposes of attachment and garnishment, the dependent spouse is deemed a creditor of the supporting spouse. [G.S. 50-16.7(e).]

iii. Attachment and garnishment are ancillary proceedings, not independent civil actions. [G.S. 1-440.1(a) (attachment ancillary to the pending principal action); 1-440.21(a) (garnishment ancillary to attachment).]

iv. Attachment and garnishment under G.S. Chapter 1, Article 35 are prejudgment remedies; they cannot be used after an alimony order has been entered to collect past due support owed under the order. [*See* G.S. 1-440.1, 1-440.6(b), 1-440.22(a)(2); *cf. Holt v. Holt*, 41 N.C. App. 344, 255 S.E.2d 407 (1979) (where wife obtained an order of attachment against husband's North Carolina real property after entry of divorce decree in Missouri).]

v. For more on attachment, see *Enforcement of Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 4 and Joan Brannon & Ann Anderson, North Carolina Clerk of Superior Court Procedures Manual Vol. 1, Pt. III (Civil Procedures), ch. 34 (Attachments) (UNC School of Government, 2012).

f. Injunction. [G.S. 1-494 and 1A-1, Rule 65.]

i. A district court judge may issue an injunction in an action for alimony or postseparation support (PSS). [G.S. 50-16.7(f).]

ii. A temporary restraining order or preliminary injunction must be issued in accordance with the requirements set forth in G.S. 1A-1, Rule 65 and G.S. Chapter 1, Article 37.

iii. A judge may issue a preliminary injunction in an alimony case when, during the pendency of the action, it appears by affidavit that the supporting spouse threatens to, or is about to, remove or dispose of her property with intent to defraud the dependent spouse. [G.S. 1-485(3); *Hinnant v. Hinnant*, 258 N.C. 509, 128 S.E.2d 900 (1963) (injunction affirmed based on defendant's threats to remove his property from the state); *Spencer v. Spencer*, 70 N.C. App. 159, 319 S.E.2d 636 (1984) (trial court injunction against disposition of certain marital assets).]

iv. An injunction against disposition of certain marital assets contained in an order for PSS should not be incorporated by reference in the order for permanent alimony. The court must enter a new order setting out in reasonable detail the actions enjoined. [*See Spencer v. Spencer*, 70 N.C. App. 159, 319 S.E.2d 636 (1984).]

g. Appointment of receivers.

i. A receiver may be appointed in an action for alimony or postseparation support to the same extent as in other cases. [G.S. 50-16.7(g); 1-502.]

ii. A district court judge may appoint a receiver to take possession of a supporting spouse's property or income when necessary to enforce a court-ordered support obligation. [*See* G.S. 1-502; *Lambeth v. Lambeth*, 249 N.C. 315, 106 S.E.2d 491 (1959) (court was authorized to order the sale of husband's nonincome-producing real estate and the investment of the proceeds thereof so that sufficient income would be generated for the receiver to pay certain expenses and alimony awarded to the plaintiff wife).]

iii. For more on receivers, see *Enforcement of Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 4.

h. Setting aside a voidable transaction.

i. A district court may enforce an order for alimony or postseparation support pursuant to the Uniform Voidable Transactions Act (G.S. Chapter 39, Article 3A). [G.S. 50-16.7(h).]

ii. The dependent spouse shall be a creditor within the meaning of the Uniform Voidable Transactions Act (G.S. 39-23.1 *et. seq*.). [G.S. 50-16.7(h).]

iii. For more on setting aside voidable transactions, see *Enforcement of Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 4.

i. Lien against real property.

i. Judgment for postseparation support or alimony shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected. [G.S. 50-16.7(i).]

ii. Past due periodic payments may, by motion in the cause or by separate action, be reduced to judgment which shall be a lien the same as other judgments. [G.S. 50-16.7(i); *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561 (1977).]

iii. Past due periodic payments may be reduced to judgment without finding that a supporting spouse's failure to pay was willful, i.e., that he possessed the means to comply with the support order during period of default. [*Bogan v. Bogan*, 134 N.C. App. 176, 516 S.E.2d 641 (1999) (trial court may reduce child support arrearage to judgment without finding that the obligor willfully failed to pay the support owed). *But see Wade v. Wade*, 63 N.C. App. 189, 303 S.E.2d 634 (1983) (holding that in actions for judgments on a sum certain under G.S. 50-16.7(i), and in actions for civil contempt, the moving party must show, and the court must find as fact, that a supporting spouse's failure to pay was willful).]

j. Execution on a judgment for alimony or postseparation support (PSS), execution sales and supplemental proceedings.

i. The remedies in G.S. 1-302 *et seq*. (execution), 1-339.41 *et seq*. (execution sales), and G.S. 1-352 *et seq*. (supplemental proceedings) are available to enforce judgments for alimony and PSS to the same extent as in other cases. [G.S. 50-16.7(k).]

ii. When the supporting spouse under a judgment for alimony is in arrears, the court may, upon motion in the cause, judicially determine the amount then due and enter final judgment therefor, and execution may issue. [*Lindsey v. Lindsey*,

34 N.C. App. 201, 237 S.E.2d 561 (1977) (decree for periodic payment of alimony, in the absence of a provision in the decree itself stating that it constitutes a specific lien upon the property of the obligor, is not enforceable by execution until the arrearages are reduced to judgment). *Cf. Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982) (orders for periodic payment of alimony and child support are money judgments within the meaning of G.S. 1-289 and, therefore, are subject to execution); *Romulus v. Romulus*, 216 N.C. App. 28, 715 S.E.2d 889 (2011) (citing *Quick*) (state supreme court in *Quick* recognized that judgments directing the payment of alimony or child support are "judgments directing the payment of money" under G.S. 1-289).] For effect of an appeal of the underlying order on the execution process, see Section III.K.5.j.v, below.

iii. The statute of limitations in G.S. 1-306, providing that execution cannot issue on a judgment requiring the payment of money more than ten years from the date the judgment was entered, does not apply to a judgment directing the payment of alimony. [G.S. 1-306.] For the statute of limitations applicable to alimony judgments, see Section III.F.3, above.

iv. Alimony is not subject to a debtor's exemptions.

(a) The amount payable as support is not a debt exempt from execution under G.S. Chapter 1C, Article 16. [G.S. 50-16.7(k); 1C-1601(e)(9) (the personal exemptions provided a debtor in Article 16 do not apply to execution on a judgment for alimony); *Barber v. Barber*, 217 N.C. 422, 8 S.E.2d 204 (1940) (homestead exemption cannot be used to defeat an allowance of alimony).]

(b) Husband's retirement account was not exempt from execution by wife seeking to enforce alimony order. [*Rhew v. Felton*, 178 N.C. App. 475, 631 S.E.2d 859 (pursuant to G.S. 1C-1601(e)(9), the exemption for retirement accounts does not apply to claims for alimony), *review denied, appeal dismissed*, 360 N.C. 648, 636 S.E.2d 810 (2006). *See also* 29 U.S.C. §§ 1056(d)(1), (3)(A), excepting qualified domestic relations orders.]

v. Effect of an appeal of the alimony order on execution.

(a) An order for the payment of alimony is a judgment directing the payment of money under G.S. 1-289. [*Romulus v. Romulus*, 216 N.C. App. 28, 715 S.E.2d 889 (2011) (citing *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982)).]

(b) A judgment directing the payment of money is subject to execution even while the judgment is on appeal, unless the party against whom the execution will issue posts a bond to stay execution pursuant to G.S. 1-289. [G.S. 1-289(a); *Romulus v. Romulus*, 216 N.C. App. 28, 715 S.E.2d 889 (2011) (citing *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982), and *Joyner v. Joyner*, 256 N.C. 588, 124 S.E.2d 724 (1962)) (orders for the payment of alimony or child support, as judgments under G.S. 1-289, may be enforced by execution during an appeal, unless stay or supersedeas is ordered).]

(c) However, as to the amount for which execution may issue after notice of appeal of the underlying order, when alimony is payable over time the trial

court does not have jurisdiction during the pendency of the appeal (1) to determine the amount of periodic payments that have come due and remain unpaid since notice of appeal was given and (2) to reduce that sum to a judgment enforceable by execution. [*Romulus v. Romulus*, 216 N.C. App. 28, 715 S.E.2d 889 (2011) (citing *Carpenter v. Carpenter*, 25 N.C. App. 307, 212 S.E.2d 915 (1975)) (treating past due distributive award payments and past due alimony payments the same for purposes of G.S. 1-289); *Carpenter* (husband's appeal of an order entered in June 1974 finding him in arrears of provisions in a separation agreement for support of his wife and children divested the trial court of jurisdiction to determine in an order entered in November 1974 the amounts owed by husband).] Thus, while an alimony order is "theoretically" enforceable by execution during appeal when the appealing spouse does not post an execution bond, a trial court may not reduce to judgment, and execution may not issue for, amounts that come due during the appeal, making contempt a "more satisfactory answer" during appeal. [*See Romulus v. Romulus*, 216 N.C. App. 28, 38, 715 S.E.2d 889, 895 (2011) (discussing execution for payments due under a distributive award payable over time).]

vi. For more on execution, including execution against personal property of the supporting spouse, execution against personal property of the supporting spouse in the hands of a third party, or execution against real property of the supporting spouse, see *Enforcement of Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 4.

vii. For more on execution and proceedings supplemental to execution, see Brannon & Anderson, Clerk of Superior Court Procedures Manual, at Vol. 1, Pt. III (Civil Procedures), ch. 38 (Execution), ch. 36 (Proceedings Supplemental to Execution).

k. Income withholding.

i. A dependent spouse may apply to the court for an order of income withholding for current or delinquent payments of alimony or PSS. [G.S. 50-16.7(l1).]

l. Other.

i. The remedy of criminal nonsupport is available pursuant to G.S. 14-322(d).

ii. A child support collection agency can, under certain circumstances, pursue collection of spousal support in conjunction with the collection of child support pursuant to G.S. 110-130.2.

iii. For enforcement of alimony provisions contained in a spousal agreement, see *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

L. Enforcement of Foreign Support Orders

1. For orders registered in North Carolina before Jan. 1, 1996, see the Uniform Reciprocal Enforcement of Support Act (URESA), G.S. 52A-1 through 52A-32; *Blake v. Blake*, 34 N.C. App. 160, 237 S.E.2d 310 (1977). URESA was repealed effective Jan. 1, 1996. [S.L. 1995-538, §§ 7(a), 8; see *Enforcement of Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 4.]

2. For orders registered in North Carolina on or after Jan. 1, 1996, the Uniform Interstate Family Support Act (UIFSA), G.S. Chapter 52C, provides for the enforcement of spousal support orders, regardless of when the order was entered. [G.S. 52C-1-101(21), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (definition of "support order" includes a judgment, decree, order, decision, or directive, whether temporary, final, or subject to modification, issued in a state or a foreign country for the benefit of a spouse or a former spouse providing for monetary support, health care, arrearages, retroactive support, or reimbursement for financial assistance provided to an individual obligee in place of child support); *Foreman v. Foreman*, 144 N.C. App. 582, 550 S.E.2d 792 (North Carolina trial court had jurisdiction under UIFSA to award payments accrued under a British spousal support order prior to the effective date of UIFSA when order was registered after Jan. 1, 1996), *review denied*, 354 N.C. 68, 553 S.E.2d 38 (2001).]
    a. An order does not have to use the term "alimony" to be a "support order" under G.S. 52C-1-101(21). [*Marshall v. Marshall*, 233 N.C. App. 238, 757 S.E.2d 319 (2014) (**unpublished**) (not paginated on Westlaw) (order that referred to twelve monthly payments by defendant to his former spouse as "structured payments" rather than "alimony" constituted "monetary support").]
        i. A foreign support order is a support order, as defined in G.S. 52C-1-101(21) set out in Section III.L.2, above, of a court, administrative agency, or quasi-judicial entity of a foreign country which is authorized to establish, enforce, or modify support orders. [G.S. 52C-1-101(3b, 3c).]
3. UIFSA establishes a procedural mechanism through which an obligee who resides in another state or in a foreign country may use the North Carolina courts to enforce a support order issued by a court of another state or a foreign support order against an obligor who resides in North Carolina. [*See Hook v. Hook*, 170 N.C. App. 138, 611 S.E.2d 869, *review denied*, 359 N.C. 631, 616 S.E.2d 234 (2005); G.S. 52C-6-603, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]
4. A support order issued in another state or in a foreign country registered for enforcement pursuant to G.S. 52C-6-602 is enforceable in North Carolina in the same manner and is subject to the same procedures as an order entered by a tribunal of this state. [G.S. 52C-6-603(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; *Marshall v. Marshall*, 233 N.C. App. 238,757 S.E.2d 319 (2014) (**unpublished**) (emphasis in original) (not paginated on Westlaw) (once a foreign support order is registered and confirmed in North Carolina, it becomes "an *order* of our State's courts, explicitly enforceable as such").] See Section III.K, above, on enforcement.
5. Registration does not give North Carolina jurisdiction to modify a support order entered in another state. [G.S. 52C-2-211(b), *added by* S.L. 2015-117, § 1, effective June 24, 2015 (a tribunal of this state may not modify a spousal support order issued by a tribunal of another state or a foreign country having continuing, exclusive jurisdiction over that order under the law of that state or foreign country); G.S. 52C-6-603(c), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (a tribunal of this state shall recognize and enforce, but may not modify, a registered support order if the issuing tribunal had jurisdiction). *See Hook v. Hook*, 170 N.C. App. 138, 611 S.E.2d 869 (denying request for modification and noting that unless the responding state has "continuing, exclusive jurisdiction" over a

registered foreign support order, its jurisdiction is limited to the ministerial function of enforcing the registered order), *review denied*, 359 N.C. 631, 616 S.E.2d 234 (2005).]

6. Except as otherwise provided in G.S. 52C-6-604(d), the law of the issuing state or foreign country governs the nature, extent, amount, and duration of current payments under a registered support order, the computation and payment of arrearages and accrual of interest on the arrearages under the support order, and the existence and satisfaction of other obligations under the support order. [G.S. 52C-6-604(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015. *See also* G.S. 52C-6-604(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (in a proceeding for arrearages under a registered support order, the statute of limitations of the issuing state or foreign country, or of North Carolina, whichever is longer, applies).]
7. While an order is registered when filed pursuant to G.S. 52C-6-603(a), the nonregistering party can contest the validity or enforcement of the registered order by complying with the procedure set out in G.S. 52C-6-606 (party seeking to contest must request a hearing within twenty days of notice of registration, unless the registered order is under G.S. 52C-7-707). [G.S. 52C-6-606(a), 52C-6-605(b), *both amended by* S.L. 2015-117, § 1, effective June 24, 2015.]
8. Confirmation of a registered support order—either by the nonregistering party's failure to contest registration within the time allowed by G.S. 52C-6-605(b) or as the result of a court order entered following a contest of the registration—precludes the assertion of any defense to enforcement that could have been asserted at the time of registration. [G.S. 52C-6-608, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]
9. A trial court has authority to enforce by contempt all paragraphs and provisions in a foreign support order registered and confirmed in North Carolina, not just those related to support. [*Marshall v. Marshall*, 233 N.C. App. 238, 757 S.E.2d 319 (2014) (**unpublished**) (trial court properly found defendant in contempt of provisions requiring support payments to wife, as well as provisions in the order restraining defendant from harassing her).]
10. Other statutes relating to judgments for alimony issued by courts of other states or foreign countries.
    a. North Carolina Uniform Foreign-Country Money Judgments Recognition Act. [G.S. 1C-1850 *et seq*.]
        i. A foreign-country judgment is a judgment of a court of a foreign country. [G.S. 1C-1851(2).] A foreign country is a government other than the United States, a state, district, commonwealth, territory, or insular possession of the United States, or any other government with regard to which the decision in this state as to whether to recognize a judgment of that government's courts is initially subject to determination under the Full Faith and Credit Clause of the U.S. Constitution. [G.S. 1C-1851(1).] This act does not apply to recognition of sister-state judgments. [Official Comment, G.S. 1C-1851.]
        ii. A foreign-country judgment for alimony may **not** be recognized in North Carolina pursuant to the North Carolina Uniform Foreign-Country Money Judgments Recognition Act. [G.S. 1C-1852(b)(3), *added by* S.L. 2009-325, § 2, effective Oct. 1, 2009, and applicable to all actions commenced on or after that date in which the issue of recognition of a foreign-country judgment is raised

(excluding from recognition judgments for alimony, support, or maintenance in matrimonial or family matters).] For a case recognizing a foreign-country money judgment for attorney fees and expenses awarded to plaintiff at the conclusion in his favor of an action for support under the Family Law (Scotland) Act, see *Savage v. Zelent*, 777 S.E.2d 801 (N.C. Ct. App.), *review denied*, 782 S.E.2d 898 (N.C. 2016) (rejecting defendant's assertion that attorney fees awarded in a family law matter are in fact a judgment for support or alimony not subject to recognition under G.S. 1C-1852; even though the Scottish judgment for attorney fees arose from defendant's unsuccessful claim for maintenance, the judgment itself was for attorney fees, which may be recognized in North Carolina).]

iii. This act does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment to which this act does not apply. [G.S. 1C-1852(d).]

b. Uniform Enforcement of Foreign Judgments Act. [G.S. 1C-1701 *et seq*.]

i. A foreign judgment under this act means any judgment, decree, or order of a court of the United States or a court of any other state which is entitled to full faith and credit in this state, except a "child support order," as defined in G.S. 52C-1-101 (The Uniform Interstate Family Support Act); a "custody decree," as defined in G.S. 50A-102 (The Uniform Child-Custody Jurisdiction and Enforcement Act); or a domestic violence protective order, as provided in G.S. 50B-4(d). [G.S. 1C-1702(1).]

ii. Not being excluded by G.S. 1C-1702(1), a money judgment of a sister state for alimony may be enforced in North Carolina pursuant to the Uniform Enforcement of Foreign Judgments Act.

IV. Effect of Bankruptcy

Important Note: Except as noted, this section describes provisions of the federal bankruptcy law effective Oct. 17, 2005.

A. Bankruptcy Reform Legislation

1. On Apr. 20, 2005, the federal Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [Pub. L. No. 109-8, 119 Stat. 23 (2005) (hereinafter the Bankruptcy Reform Act).] was signed into law. It amended certain provisions of the Bankruptcy Code. The amendments relating to family law were effective Oct. 17, 2005, and apply to bankruptcy cases commenced on or after that date.
2. For an overview of the Bankruptcy Reform Act in the area of family law, see John L. Saxon, *Impact of the New Bankruptcy Reform Act on Family Law in North Carolina*, Fam. L. Bull. No. 20 (UNC School of Government, June 2005) (hereinafter 2005 Saxon Bulletin).

3. The provisions of the Bankruptcy Code in effect before passage of the Bankruptcy Reform Act relating to alimony and other family law matters continue to apply in bankruptcy cases filed before Oct. 17, 2005, and pending on or after that date.
4. Additionally, provisions of the Bankruptcy Code in effect before passage of the Bankruptcy Reform Act that were not amended or repealed continue to apply in bankruptcy cases that are filed on or after Oct. 17, 2005.
5. For the effect of bankruptcy in an equitable distribution proceeding, see *Equitable Distribution Overview and Procedure*, Bench Book, Vol. 1, Chapter 6, Part 1.
6. For the effect of bankruptcy in child support enforcement proceedings, see *Enforcement of Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 4.
7. For the effect of bankruptcy on provisions in spousal agreements, see *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

B. Definitions

1. Domestic support obligation.
   a. A "domestic support obligation" is a debt that:
      i. Accrues before, on, or after the date of the order for relief in the bankruptcy case, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of Title 11 of the U.S. Code; [11 U.S.C. § 101(14A).]
      ii. Is owed to or recoverable by the debtor's spouse, former spouse, or child, the child's parent, legal guardian, or responsible relative, or a governmental unit; [11 U.S.C. § 101(14A)(A).]
      iii. Is in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) for a debtor's spouse, former spouse, or child, or for the child's parent; [11 U.S.C. § 101(14A)(B).]
      iv. Has been established or is subject to establishment before, on, or after the date of the order for relief by a court order, divorce decree, separation agreement, property settlement agreement, or a determination by a governmental unit in accordance with applicable nonbankruptcy law; [11 U.S.C. § 101(14A)(C).] and
      v. Has not been assigned to a nongovernmental entity, unless the assignment is voluntary and for the purpose of collecting the debt. [11 U.S.C. § 101(14A)(D).]
2. Debts arising from a separation or divorce other than those that qualify as domestic support obligations.
   a. 11 U.S.C. § 523(a)(15) identifies a second type of divorce-related debt, that is, a debt to a spouse, former spouse, or child of the debtor that is not a domestic support obligation and is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree, or other order of a court of record.
   b. Debts under 11 U.S.C. § 523(a)(15) commonly are referred to as being in the form of a property settlement, while debts under § 523(a)(5) commonly are referred to as alimony or support. [*See In re Zeitchik*, 369 B.R. 900 (Bankr. E.D.N.C. 2007) (not subject

to the Bankruptcy Reform Act).] A § 523(a)(15) debt is generally referred to herein as "a divorce-related debt that that does not qualify as a domestic support obligation" or as "a divorce-related debt that is not a domestic support obligation".

c. Whether debts are classified under § 523(a)(5) as domestic support obligations (DSOs) or under § 523(a)(15) as divorce-related debts that do not qualify as DSOs is significant because DSOs generally receive preferential treatment under the Bankruptcy Code. [See 2005 Saxon Bulletin and Sections IV.D and E, below.]

d. The following qualified as domestic support obligations (DSOs).

   i. Debtor's court-ordered obligation in Georgia divorce decree to pay 70 percent of a home equity line of credit secured by the parties' marital home and an award of attorney fees to the nondebtor spouse were DSOs. [*In re Baker*, No. 12-01090-8-SWH, 2012 WL 6186683 (Bankr. E.D.N.C. Dec. 12, 2012) (obligation to pay equity line was a DSO, given nature of the obligation, fact that parties had a dependent adult child living with wife in marital home, the disparity in earning power between the spouses, and the inadequacy of other support; fact that obligation provided shelter for wife and son, a necessity of life, strongly weighed in favor of finding a DSO; award of fees was Georgia state court judge's attempt to balance the financial needs of the parties, which is sufficient basis for finding it in the nature of support, even if a portion of the fees was unrelated to wife's support).]

   ii. Award by state court to wife of the marital percentage of 42.775 percent of debtor husband's Weyerhauser pension benefits was a DSO and was nondischargeable in husband's Chapter 13 proceeding. [*In re Bowen*, No. 09-06106-RDD, 2010 WL 1855871 (Bankr. E.D.N.C. May 7, 2010) (classification of award as a DSO based on state court orders that made specific findings that wife was unable to meet her needs without husband's assistance; that described at great length the disparity of the parties' income and the wife's financial condition; that provided for monthly payments, as opposed to a lump sum, which were to assist with wife's basic living expenses; and that specifically found that wife "is, and was through the marriage, actually and substantially dependent" on husband).]

   iii. Chapter 13 debtor husband's obligation to pay certain marital debts from proceeds from sale of marital residence, pursuant to provision in marital separation agreement that such payments would be in lieu of alimony or spousal support, was intended by parties to serve as support for wife and was in nature of nondischargeable "domestic support obligation," payable on a priority basis. [*In re Deberry*, 429 B.R. 532 (Bankr. M.D.N.C. 2010) (the division of other debts, consisting of credit cards and loans, was in the nature of a property settlement). *Cf. In re Wood*, No. 11-06583-8-JRL, 2012 WL 14270 (Bankr. E.D.N.C. Jan. 4, 2012) (where parties' agreement provided for debtor husband to be primarily liable for mortgage debts and provided that each spouse forever gave up the right to spousal support, the agreement did not create a DSO).]

e. The following did not qualify as domestic support obligations (DSOs).

   i. Language in an incorporated separation agreement that specifically assigned certain marital debt to each party for payment and waived child support and

spousal support was an equitable division of property and was not a DSO. [*In re Ludwig*, 502 B.R. 466 (Bankr. W.D. Va. 2013).]

ii. An award of $10,020 for wife's one-half share of the equity in the marital residence that was depleted postseparation, and an award of $12,973 representing one-half of the insurance funds received for the loss of marital assets in a fire, were not DSOs but were part of equitable distribution. [*In re Mobley*, No. 08-50255, 2009 WL 3754251 (Bankr. M.D.N.C. Nov. 4, 2009).]

iii. Wife's payment of a home equity line of credit, which Chapter 13 debtor husband in a separation agreement had agreed to pay and to hold his former spouse harmless thereon, was not a DSO. Rather, the hold-harmless agreement was part of the parties' property settlement and, as such, was allowed as a general unsecured claim. [*In re Siegel*, 414 B.R. 79 (Bankr. E.D.N.C. 2009). *See also In re Sewell*, No. 07-00777-5-ATS, 2008 WL 8130029, *3 (Bankr. E.D.N.C. Jan. 3, 2008) (Chapter 13 debtor husband's agreement to reimburse wife for her payment of an equity line of credit was not a DSO, even though separation agreement provided that in the event of bankruptcy by either party, "all provisions contained herein, whether enumerated as support or property, shall be considered as in the nature of support for spouse and shall not be discharged in bankruptcy"); *cf. In re Johnson*, 397 B.R. 289 (Bankr. M.D.N.C. 2008) (Chapter 13 debtor husband's obligation in a separation agreement to pay a home equity line of credit and to hold wife harmless thereon was found to be a DSO; obligation that enables one's family to maintain shelter is in the nature of support, and an agreement to indemnify and hold the former spouse harmless on that debt is a nondischargeable DSO).]

3. Property of the bankruptcy estate.

a. Chapter 7 bankruptcy case.

i. In a Chapter 7 bankruptcy case, the bankruptcy estate generally includes property that the debtor owned at the time he filed for bankruptcy (as well as certain property previously owned by the debtor) and excludes most, **but not all**, income and property acquired by the debtor **after** he filed for bankruptcy. [*See* 11 U.S.C. § 541.]

ii. Property of the estate does not include property that the debtor is allowed to keep as exempt from bankruptcy. [*See* 11 U.S.C. § 522 on exemptions.] For other property that is not included as property of the estate, including but not limited to funds placed in education individual retirement accounts, 529 college savings plans, and amounts withheld or placed in certain pension or retirement plans, see 11 U.S.C. § 541(b).

b. In a Chapter 13 bankruptcy case, property of the estate includes the property included in the estate of a Chapter 7 debtor, described above, as well as property (including wages and income) acquired by the debtor **after** she files for bankruptcy. [*See* 11 U.S.C. § 1306(a); *In re Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007) (when the debtor's postconfirmation wages are provided for in, and used to fund, his Chapter 13 plan, they are considered property of the estate).]

C. Automatic Stay

1. When a debtor files a bankruptcy petition, federal law automatically and immediately imposes a stay precluding the debtor's creditors (including spouses and former spouses) and others (including state courts) from taking certain actions against the debtor, the debtor's property, or property of the bankruptcy estate. [*See* 11 U.S.C. § 362(a).] *See* Cheryl Howell, *Bankruptcy and the Application of the Automatic Stay to Family Law Cases*, UNC Sch. of Gov't: On the Civil Side Blog (May 12, 2017), https://civil.sog.unc.edu/bankruptcy-and-the-application-of-the-automatic-stay-to-family-law-cases.
    a. The automatic stay applies to:
        i. Any act to collect, assess, or recover a claim against the debtor that arose before the debtor filed for bankruptcy. [11 U.S.C. § 362(a)(6).]
        ii. The setoff of any prebankruptcy debt owed to the debtor against any claim against the debtor (regardless of whether the claim against the debtor arose before or after the debtor's bankruptcy). [11 U.S.C. § 362(a)(7).]
        iii. The commencement or continuation of any legal proceeding to recover a claim against the debtor that arose before the debtor's bankruptcy. [11 U.S.C. § 362(a)(1).] This provision stays:
            (a) The commencement or continuation of a civil contempt proceeding against a debtor for failure to pay a prepetition domestic support obligation, even if the proceeding does not involve property of the bankruptcy estate. [2005 Saxon Bulletin.]
            (b) A proceeding to attach or garnish a debtor's bank account or other property to collect a prepetition domestic support obligation. [2005 Saxon Bulletin.]
        iv. The enforcement against the debtor or against property of the estate of a judgment obtained before the debtor's bankruptcy. [11 U.S.C. § 362(a)(2).] This provision stays:
            (a) The issuance or execution of a writ of execution or the commencement or continuation of supplemental proceedings to enforce a judgment for a prepetition domestic support obligation. [2005 Saxon Bulletin.]
            (b) The commencement of a civil contempt proceeding against a debtor for failure to pay a postpetition domestic support obligation **unless** the support will be paid from property that is not property of the estate. [2005 Saxon Bulletin.]
        v. Any act to create, perfect, or enforce any lien against property of the estate. [11 U.S.C. § 362(a)(4).] This provision stays:
            (a) The enforcement or collection of a postpetition domestic support obligation through the creation, perfection, or enforcement of a lien on property of the estate. [2005 Saxon Bulletin.]
        vi. Any act to create, perfect, or enforce against property of the debtor any lien to the extent the lien secures a claim that arose before the commencement of the case. [11 U.S.C. § 362(a)(5).] This provision stays:

(a) The creation, perfection, or enforcement of a lien against the debtor's property or property of the estate that secures a prepetition domestic support obligation. [2005 Saxon Bulletin.]

b. Any action taken in violation of the automatic stay is void, and a creditor who willfully violates the automatic stay may be liable for actual damages, including costs and attorney fees, and, in appropriate circumstances, may recover punitive damages. [11 U.S.C. § 362(k); *In re Gruntz*, 202 F.3d 1074, 1082 n.6 (9th Cir. 2000) (because judicial proceedings in violation of the stay are void *ab initio*, the bankruptcy court is not obligated to extend full faith and credit to such judgments).]

2. Actions to which the automatic stay is not applicable or that do not violate the automatic stay. The automatic stay does not apply to:

a. "[T]he commencement or continuation of a civil action or proceeding . . . for the establishment or modification of an order for [a] domestic support obligation[.]" [11 U.S.C. § 362(b)(2)(A)(ii).]

i. Relief from the stay is not needed to seek an order in state court establishing or modifying the amount of the debtor's permanent spousal support obligation. [11 U.S.C. § 362 (b)(2)(A)(ii).]

ii. Orders for alimony and equitable distribution entered eleven days after the debtor husband filed his Chapter 13 petition did not violate the automatic stay, as the orders established a domestic support obligation to wife based on debtor husband's Weyerhaeuser pension benefits. [*In re Bowen*, No. 09-06106-RDD, 2010 WL 1855871 (Bankr. E.D.N.C. May 7, 2010).]

b. The collection of a domestic support obligation (DSO) from property that is not property of the bankruptcy estate. [11 U.S.C. § 362(b)(2)(B); *In re Hilton*, No. 05-53796, 2006 WL 4458699 (Bankr. M.D.N.C. Feb. 21, 2006) (automatic stay does not apply to the collection of debts for alimony, maintenance, or support from property that is not property of the bankruptcy estate). See Section IV.B.3, above, for definition of property of the estate.] Conversely, the collection of a DSO from property of the bankruptcy estate **is** subject to the automatic stay.

i. Since debtor husband's Weyerhaeuser pension benefits were not property of the estate under the Bankruptcy Code, the automatic stay did not stay wife from seeking to have a qualified domestic relations order entered by the state court. [*In re Bowen*, No. 09-06106-RDD, 2010 WL 1855871 (Bankr. E.D.N.C. May 7, 2010).]

c. The continuation or commencement of income withholding against property of the bankruptcy estate or property of the debtor for payment of a domestic support obligation (DSO) under a judicial or administrative order or statute. [11 U.S.C. § 362(b)(2)(C).] This authorizes income withholding against a debtor's postpetition wages for current and past due spousal support after a debtor files a Chapter 13 bankruptcy case. [2005 Saxon Bulletin.]

i. This exception is broader than the exception in 11 U.S.C. § 362(b)(2)(B), set out above, in that it allows for withholding of income that is property of the estate and, therefore, includes postpetition property such as the postpetition earnings of a Chapter 13 debtor. [*In re Miller*, 501 B.R. 266, 279 n.15 (Bankr. E.D. Pa.

2013) (calling the revision by the Bankrtupcy Reform Act of this provision to allow withholding from property of the estate "significant" but noting in footnote 15 a division regarding the scope of this exception to the automatic stay; some courts have construed the exception broadly to allow "virtually any creditor action to enforce a DSO," including effectuating withholding through contempt, while other courts have construed the provision more narrowly, allowing only actions to withhold income in order to collect on a DSO).]

ii. The state of Florida's continued collection through wage garnishment of a prepetition DSO did not violate the automatic stay. [*In re Fort,* 412 B.R. 840 (Bankr. W.D. Va. 2009) (however, Florida's post-confirmation continuation of a wage deduction order, in excess of the amount provided in the debtor's confirmed plan, violated 11 U.S.C. § 1327(a), which makes the provisions in a confirmed plan binding upon each creditor).]

d. The collection or enforcement of a domestic support obligation through the interception of a tax refund in accordance with federal and state law. [11 U.S.C. § 362(b)(2)(F).] A child support agency is authorized to attach a debtor's state or federal tax refund to enforce a debtor's spousal support obligation. [2005 Saxon Bulletin.]

e. The commencement or continuation of a criminal action or proceeding against the debtor. [11 U.S.C. § 362(b)(1); for cases decided under this section, see *Enforcement of Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 4.]

3. Duration of the stay.

a. The automatic stay against actions against the debtor or the debtor's property remains in effect until:

i. The bankruptcy court grants relief from the stay for cause; [11 U.S.C. § 362(d)(1).]

ii. The debtor's bankruptcy case is closed or dismissed; [11 U.S.C. § 362(c)(2).] or

iii. The debtor is denied or granted a discharge (usually about sixty days after the creditors meeting in a Chapter 7 case or, in a Chapter 13 case, after the debtor completes his Chapter 13 plan, generally within three to five years of the debtor's bankruptcy). [11 U.S.C. § 362(c)(2).]

b. The automatic stay against actions against property of the bankruptcy estate remains in effect until the bankruptcy court grants relief from the stay or the property is no longer property of the bankruptcy estate. [*See* 11 U.S.C. § 362(c)(1); see Section IV.B.3, above, for definition of property of the estate.]

c. The duration of the stay is limited in cases where the debtor has multiple filings. [*See* 11 U.S.C. § 362(c)(3).]

4. Effect of confirmation of a Chapter 13 plan on the automatic stay.

a. A debtor's Chapter 13 plan generally (but not always) provides that property of the bankruptcy estate becomes the debtor's property upon confirmation of the plan, except to the extent necessary to fund the plan. [*See* 11 U.S.C. § 1327(b).]

b. When the property of the bankruptcy estate becomes the debtor's property following confirmation of the debtor's Chapter 13 plan, it is no longer subject to the automatic

stay as it applies to property of the bankruptcy estate but remains subject to the automatic stay under 11 U.S.C. § 362(a)(5) and, notwithstanding 11 U.S.C. § 362(b)(2)(B), is held by the debtor free and clear of the interest of a support creditor to the extent that the support claim is provided for in the debtor's Chapter 13 plan. [*See* 11 U.S.C. § 1327(c); *In re McGrahan*, 459 B.R. 869, 874 (B.A.P. 1st Cir. 2011) (upon confirmation, "a creditor's rights and interests are defined within the boundaries of the plan, and proceedings that are inconsistent with the confirmed plan are improper, even if they fall within an exception to the automatic stay").]

5. Relief from the stay.
   a. A North Carolina district court lacks jurisdiction to grant relief from the automatic stay. Only the federal bankruptcy court can grant relief from the automatic stay. [*See* 11 U.S.C. § 362(d); see Section IV.C.6, below, for state court's authority to determine applicability of the automatic stay to a state court proceeding.]
   b. A dependent spouse may file a motion with the federal bankruptcy court seeking relief from the automatic stay. [*See* Fed. R. Bankr. P. 4001(a).]
   c. A motion for relief from the automatic stay is automatically granted thirty days after the motion is filed, unless the bankruptcy court, after hearing, orders that it be continued. [11 U.S.C § 362(e).]
   d. A supporting spouse generally may stipulate to relief from the automatic stay for enforcement of spousal support if it is approved by the bankruptcy court on the debtor's motion after notice to creditors. [Fed. R. Bankr. P. 4001(d).]
   e. A bankruptcy court may grant relief from the stay to allow the nondebtor spouse to file a motion in a North Carolina district court seeking classification under 11 U.S.C. § 523(a)(5) or 523(a)(15) of the debtor's obligation in a divorce decree to pay the mortgages on the marital residence and to pay the nondebtor spouse's attorney fees. [*See In re Smith*, Case No. 07-01509-8-JRL (E.D.N.C. Sept. 13, 2007).]
6. A state district court judge may determine whether a matter pending before the court is stayed by a party's bankruptcy.
   a. If a supporting spouse asserts the automatic stay as a defense in a support enforcement proceeding in state court, the district court judge in the pending support action may determine whether enforcement of the support order violates the automatic stay, and the state court's decision regarding the applicability of the automatic stay is res judicata in the pending bankruptcy case. [*See In re Singleton*, 230 B.R. 533 (B.A.P. 6th Cir. 1999) (stating that the debtor confused jurisdiction to grant relief from the stay under 11 U.S.C. § 362(d), over which the bankruptcy court has exclusive jurisdiction, with jurisdiction to determine whether the stay applies in the first place, which a nonbankruptcy court may determine).]
   b. In *In re Singleton*, 230 B.R. 533 (B.A.P. 6th Cir. 1999), the state court determined that the debtor's personal Chapter 13 bankruptcy did not stay the foreclosure sale of property owned by the debtor's corporation, a decision which the Bankruptcy Appellate Panel determined was within the jurisdiction of the state court.

D. Status, Priority, and Payment of Support Claims

1. Priority of domestic support obligations.
   a. An allowed unsecured claim for a domestic support obligation, including one assigned to a government agency or owed directly to a governmental unit, is entitled to payment as a first priority claim. [11 U.S.C. § 507(a)(1); *In re Smith*, Case No. 07-01509-8-JRL (E.D.N.C. Sept. 13, 2007) (under § 507(a)(1), a domestic support obligation is elevated ahead of all administrative costs, including attorney fees).]
   b. A divorce-related debt that does not qualify as a domestic support obligation is a general unsecured claim with no priority. [11 U.S.C. § 507(a) (no priority for § 523(a)(15) debt in the general priority provision). *See also In re Bornemann*, No. 07-cv-528-JPG, 2008 WL 818314 (S.D. Ill. Mar. 21, 2008) (noting that a debt that results from a property settlement is a general unsecured claim with no priority).]
   c. Language in an incorporated separation agreement that specifically assigned certain marital debt to each party for payment and waived child support and spousal support was an equitable division of property and was not a domestic support obligation entitled to priority. [*In re Ludwig*, 502 B.R. 466 (Bankr. W.D. Va. 2013).]
   d. Language in a judgment that awarded debtor wife the marital business in exchange for $104,500 payable to husband at the rate of $800/month was part of an equitable distribution award, not a domestic support obligation entitled to priority. The 2009 judgment, which provided only for the distribution of marital property, stated that it "resolves all claims by either party for equitable distribution;" the judgment did not, by its terms, address any debt in the nature of alimony, maintenance, or support; the court found that this unambiguously indicated that the judgment was a distributive award intended to be a marital property settlement and, thus, was a general unsecured claim not entitled to priority. [*In re Clark*, 441 B.R. 752 (Bankr. M.D.N.C. 2011).]
2. Treatment of domestic support obligations (DSOs) in a Chapter 13 plan.
   a. Prebankruptcy DSOs (arrearages).
      i. With two exceptions, a Chapter 13 plan must provide for full payment of all claims entitled to priority under 11 U.S.C. § 507, which includes prebankruptcy domestic support obligations. [11 U.S.C. § 507(a)(1); 11 U.S.C. § 1322(a)(2).] Full payment is required unless:
         (a) The claim holder consents to different treatment [11 U.S.C. § 1322(a)(2).] or
         (b) The unsecured claim for a DSO has been assigned to a government agency (other than a voluntary assignment for collection purposes only) and the debtor's plan commits all of the debtor's disposable income to plan payments required for the five-year period allowed to complete the plan. [11 U.S.C. § 1322(a)(4); 11 U.S.C. § 507(a)(1)(B).]
      ii. A Chapter 13 plan may provide for payment of secured or unsecured prebankruptcy spousal support arrearages through the bankruptcy trustee, regardless of whether the claim is entitled to priority under 11 U.S.C. § 507(a).
      iii. To the extent that a debtor's Chapter 13 plan provides for payment of prebankruptcy spousal support arrearages, no action may be taken in state court to

enforce the arrearage against the debtor's income or property following confirmation of the Chapter 13 plan. [*See* 11 U.S.C. § 1327(c).]

b. Postbankruptcy domestic support obligations (current support obligations).

i. In a Chapter 13 case, spousal payments that become due after a debtor files for bankruptcy must be paid "outside" the debtor's Chapter 13 plan rather than through the bankruptcy trustee.

ii. A nondebtor spouse, however, may object to confirmation of the debtor's Chapter 13 plan if the debtor's disposable income is insufficient to pay the debtor's current support obligation plus the debtor's necessary living expenses and payments under the Chapter 13 plan. [*See* 11 U.S.C. § 1325(a)(6); *In re Dorf*, 219 B.R. 498 (Bankr. N.D. Ill. (1998) (debtor's Chapter 13 plan not feasible when, after paying for personal needs, funds were sufficient to pay only the prebankruptcy support arrearage, leaving nothing to make the postbankruptcy monthly spousal support obligation).]

c. Safeguards to ensure payment of pre- and postbankruptcy domestic support obligations (DSOs).

i. A Chapter 13 plan may not be confirmed if the debtor has not paid all DSOs that have accrued after the filing of the petition, if the debtor is required to do so by a judicial or administrative order or by statute. [11 U.S.C. § 1325(a)(8).]

ii. A Chapter 13 case may be dismissed if the debtor fails to pay any DSOs that have accrued after the filing of the petition. [11 U.S.C. § 1307(c)(11).]

iii. A court may refuse to grant a discharge if the debtor has failed to pay all prebankruptcy and postbankruptcy DSOs in accordance with a judicial or administrative order and, with respect to prebankruptcy DSOs, in accordance with the Chapter 13 plan. [11 U.S.C. § 1328(a).]

3. Jurisdiction to determine amount, status, and priority of a claim.

a. If the debtor or trustee files an objection to the dependent spouse's claim for support, the bankruptcy court has jurisdiction to determine the amount, status, and priority of the claim. [*See* 11 U.S.C. § 502(b); Fed. R. Bankr. P. 3007.]

b. A prior decision by a state court determining the validity of a support claim or the amount of support arrearages owed by a spouse who files for bankruptcy is res judicata and may not be collaterally attacked by the debtor spouse in the pending bankruptcy case. [*See In re Sullivan*, 122 B.R. 720 (Bankr. D. Minn. 1991) (res judicata precluded Chapter 7 debtor from contesting the existence, validity, and amount of debt arising from default judgment of $20,000 for unlawful battery); *see also In re Audre, Inc.*, 202 B.R. 490 (Bankr. S.D. Cal. 1996) (federal district court lacks jurisdiction to review final determinations of state court decisions), *aff'd*, 216 B.R. 19 (B.A.P. 9th Cir. 1997).]

c. A bankruptcy court may abstain from determining the amount of a support claim in the pending bankruptcy case and allow a state court to determine the amount of the arrearage. [28 U.S.C. § 1334(c). *See In re Kriss*, 217 B.R. 147 (Bankr. S.D.N.Y. 1998) (listing seven factors used to determine whether to remand matter to state court), and *In re Franklin*, 179 B.R. 913 (Bankr. E.D. Cal. 1995) (balancing twelve factors when considering discretionary abstention).]

E. Dischargeability of Support and Other Divorce-Related Claims

1. Procedure and jurisdiction to determine the dischargeability of a claim.
    a. The debtor or any creditor may file an adversary proceeding in bankruptcy court at any time to determine the dischargeability of a support claim. [Fed. R. Bankr. P. 4007(a) and (b).]
    b. If an adversary proceeding regarding the dischargeability of a support claim has not been filed and decided by the bankruptcy court, a state court has concurrent jurisdiction with the federal bankruptcy court to determine the dischargeability of the support claim, and its decision regarding dischargeability is res judicata. [*See In re McGregor*, 233 B.R. 406 (Bankr. S.D. Ohio 1999) (finding that a state court has jurisdiction to decide that a debt is nondischargeable for the debtor's failure to list the creditor in its schedules); *see also In re Franklin*, 179 B.R. 913 (Bankr. E.D. Cal. 1995) (discussing "poorly understood" question regarding the concurrent jurisdiction of state and federal courts to determine whether particular debts are discharged in a bankruptcy case).]
    c. A debtor has the right to remove a case involving the dischargeability of a support claim from state court to the federal bankruptcy court. [28 U.S.C. §§ 1334(b) and 1452(a).]
2. Discharge in a Chapter 7 case commenced on or after Oct. 17, 2005.
    a. A debt for a domestic support obligation is nondischargeable in a Chapter 7 case. [11 U.S.C. § 523(a)(5); 2005 Saxon Bulletin.]
    b. A divorce-related debt that is not a domestic support obligation is nondischargeable in a Chapter 7 case. [11 U.S.C. § 727(b); 11 U.S.C. § 523(a)(15); 2005 Saxon Bulletin.]
    c. Thus, in Chapter 7 cases commenced on or after Oct. 17, 2005, distinctions between a domestic support obligation , governed by 11 U.S.C. § 523(a)(5), and other types of divorce-related debts, governed by 11 U.S.C. § 523(15), are immaterial, as both types of debts are nondischargeable. [*In re Johnson*, 397 B.R. 289 (Bankr. M.D.N.C. 2008) (citing *In re Douglas*, 369 B.R. 462 (Bankr. E.D. Ark. 2007)).]
    d. There was no violation of husband's bankruptcy discharge in a Chapter 7 case when husband was ordered to pay as alimony a home equity line of credit, even though husband's obligation on the line of credit had been discharged. [*Sloan v. Sloan*, 151 N.C. App. 399, 566 S.E.2d 97 (2002) (order for payment of the debt was an order for the payment of alimony, for which the court had subject matter jurisdiction, and not an order to pay a discharged debt).]
3. Discharge in a Chapter 13 case commenced on or after Oct. 17, 2005.
    a. A debt for a domestic support obligation is nondischargeable in a Chapter 13 case. [11 U.S.C. § 523(a)(5); 11 U.S.C. § 1328(a)(2); *In re Hutchens,* 480 B.R. 374 (Bankr. M.D. Fla. 2012) (a Chapter 13 discharge has no impact on unpaid back child support and alimony arrearages and does not discharge those debts).]
    b. A divorce-related debt that is not a domestic support obligation (DSO) is dischargeable in a Chapter 13 case. [11 U.S.C. § 1328(a)(2) (no exception for § 523(a)(15) debt); *In re Hutchens,* 480 B.R. 374, 386 (Bankr. M.D. Fla. 2012) (noting that "the law is now well-settled that a claim for a property settlement arising from divorce

proceedings can . . . be discharged in a Chapter 13 case if a debtor makes all the required payments under a plan and receives a full compliance discharge under [11 U.S.C.] § 1328(a)".] Thus, a Chapter 13 debtor will be discharged from a § 523(a)(15) divorce-related debt that was not paid in full under the plan provided the debtor made all payments required by the Chapter 13 plan. A full compliance discharge does not mean that the creditor spouse's divorce-related debt that is not a DSO was paid in full. [*See In re Siegel*, 414 B.R. 79 (Bankr. E.D.N.C. 2009) (Chapter 13 debtor's obligation to indemnify and hold his former spouse harmless with respect to the parties' home equity line of credit debt was not a DSO entitled to priority; rather, the hold-harmless agreement was part of the parties' property settlement and, as such, was not a priority claim that had to be paid in full).] A full compliance discharge means that the debtor spouse made all payments required under the plan and any balance due the creditor spouse after completion of the plan is discharged.

c. Since a divorce-related debt that is not a domestic support obligation (DSO) is dischargeable in a Chapter 13 case under 11 U.S.C. § 1328(a), the end result is that a debtor who receives a discharge under § 1328(a) may discharge a debt that cannot be discharged in a Chapter 7 case. Thus, whether a debt is determined to be a DSO or a divorce-related debt that is not a DSO is important in a Chapter 13 case.

d. **EXCEPTION**: A divorce-related debt that is not a domestic support obligation (DSO) is not discharged in a Chapter 13 case when the debtor applies for and is granted a discharge pursuant to 11 U.S.C. § 1328(b), referred to sometimes as a hardship or best efforts discharge. [11 U.S.C. § 523(a).]

   i. In some cases a debtor is unable to complete the payments required by a Chapter 13 plan. If the debtor's failure to complete all plan payments is due to circumstances for which the debtor should not justly be held accountable, unsecured creditors received at least the amount that they would have received in a Chapter 7 proceeding and modification of the debtor's Chapter 13 plan is not practicable, the bankruptcy court may grant the debtor a discharge under 11 U.S.C. § 1328(b). [11 U.S.C. § 1328(b).]

   ii. The discharge the debtor receives pursuant to 11 U.S.C. § 1328(b) is more limited than a full-compliance discharge under 11 U.S.C. § 1328(a) and does not discharge a divorce-related debt that does not qualify as a DSO. [*See* 11 U.S.C. § 1328(c) (a discharge under § 1328(b) does not discharge any debt specified in 11 U.S.C. § 523(a)); *In re Hutchens*, 480 B.R. 374, 386 n.11 (Bankr. M.D. Fla. 2012) (under a § 1328(b) discharge, "none of the debts incurred in the course of a divorce proceeding would be dischargeable, including a property division.").]

e. An attempt by the parties to avoid the effect in a Chapter 13 case of a discharge has been found invalid. [*See In re Wood*, No. 11-06583-8-JRL, 2012 WL 14270, *2 (Bankr. E.D.N.C. Jan. 4, 2012) (the following provision in parties' marital property agreement was found to be an invalid prepetition waiver of discharge: "[t]o the extent of any obligation contained herein is discharged in bankruptcy and the non-bankrupt party is held liable for said debt, the non-bankrupt party shall have the right to petition a court of competent jurisdiction for spousal support in an amount sufficient to cover any amounts so discharged").]

V. Attorney Fees

A. Attorney Fees

1. Authorization and entitlement.

   a. A court may, upon application of a dependent spouse, enter an order for reasonable attorney fees at any time that a dependent spouse would be entitled to alimony or postseparation support. [G.S. 50-16.4, *amended by* S.L. 2010-14, § 1, effective Oct. 1, 2010, and applicable to fees for services rendered on or after that date; G.S. 6-21(4) (allowing reasonable attorney fees in the discretion of the court in alimony actions, as determined and provided for in accordance with G.S. 50-16.4).]

   b. Attorney fees are to be paid and secured by the supporting spouse in the same manner as alimony. [G.S. 50-16.4.] See Section III.H, above, on the various forms of payment.

   c. The "guiding principle behind the allowance of attorney fees is to enable the dependent spouse, as litigant, to meet the supporting spouse, as litigant, on substantially even terms by making it possible for the dependent spouse to employ adequate and suitable legal representation." [*Clark v. Clark*, 301 N.C. 123, 136, 271 S.E.2d 58, 67 (1980).]

   d. Before granting an award of attorney fees, the trial court must determine, as a matter of law, that the spouse seeking the award:

      i. Would be entitled to alimony pursuant to G.S. 50-16.3A or to postseparation support pursuant to G.S. 50-16.2A,

      ii. Is dependent, and

      iii. Is without sufficient means to subsist during the prosecution of the suit and to defray the necessary expenses. [G.S. 50-16.4 (first two findings); *Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980); *Swain v. Swain*, 179 N.C. App. 795, 635 S.E.2d 504 (2006) (citing *Rickert v. Rickert*, 282 N.C. 373, 193 S.E.2d 79 (1972)) (modification action), *review denied*, 361 N.C. 437, 649 S.E.2d 897 (2007); *Francis v. Francis*, 169 N.C. App. 442, 612 S.E.2d 141 (citing *Clark*) (initial award of alimony), *review denied*, 359 N.C. 631, 616 S.E.2d 233 (2005); *Friend-Novorska v. Novorska*, 163 N.C. App. 776, 594 S.E.2d 409 (2004) (*Swain, Francis, Friend-Novorska* all post-1995 cases citing pre-1995 requirements for award of attorney fees). *Cf. Clark v. Clark*, 231 N.C. App. 514, 753 S.E.2d 743 (2013) (**unpublished**) (appellate court noting that G.S. 50-16.4 does not require a finding that plaintiff be unable to pay attorney fees, beyond its undisputed finding that she is a dependent spouse).]

   e. The party requesting attorney fees must provide proper support for the claim. [*Williamson v. Williamson*, 217 N.C. App. 388, 392, 719 S.E.2d 625, 628 (2011) (citing *Spencer v. Spencer*, 133 N.C. App. 38, 514 S.E.2d 283 (1999)) (claim for fees properly dismissed when defendant did not submit "any attorney fees affidavit or any evidence to support her claim that she is entitled to an award of attorney fees"). *Cf. Beasley v. Beasley*, 816 S.E.2d 866 (2018) (in child support case, trial court had discretion to

determine attorney fee award based on the court record and the attorney fee affidavit submitted to the court).]

f. A trial court can award fees when the dependent spouse's attorney is providing *pro bono* services. [See S.L. 2010-14, § 1, effective Oct. 1, 2010, and applicable to fees for services rendered on or after that date, deleting requirement in G.S. 50-16.4 that award of attorney fees be for the benefit of the dependent spouse.] The amendment changed the result in *Patronelli v. Patronelli*, 360 N.C. 628, 636 S.E.2d 559 (2006) (dependent spouse's request for fees was denied, as any fees ordered paid to dependent spouse's *pro bono* attorney would not have been for dependent spouse's benefit).]

g. Before amendment in 1995, G.S. 50-16.4 provided that "[a]t any time that a dependent spouse would be entitled to alimony pendente lite . . ., the court may . . . enter an order for reasonable counsel fees for the benefit of [the dependent] spouse . . . ." [See editor's note to G.S. 50-16.4; former G.S. 50-16.4 applies to motions to modify orders or judgments in effect on Oct. 1, 1995.]

i. Former G.S. 50-16.4 was construed to allow attorney fees "*any time* a dependent spouse could show that she has the *grounds* for alimony pendente lite, even though the proceeding was not brought for that purpose." [*Broughton v. Broughton*, 58 N.C. App. 778, 783, 294 S.E.2d 772, 777 (emphasis in original) (citing *Upchurch v. Upchurch,* 34 N.C. App. 658, 239 S.E.2d 701 (1977)) (if defendant could meet the requirements for alimony pendente lite, she could recover attorney fees even though she sought modification of alimony), *review denied*, 307 N.C. 269, 299 S.E.2d 214 (1982).]

ii. Under former G.S. 50-16.4, even if alimony pendente lite was denied, a court could award attorney fees in the subsequent action for permanent alimony. [*Vandiver v. Vandiver*, 50 N.C. App. 319, 274 S.E.2d 243, *review denied*, 302 N.C. 634, 280 S.E.2d 449 (1981). *See also Evans v. Evans*, 111 N.C. App. 792, 434 S.E.2d 856 (former spouse does not lose right to attorney fees because divorce decree was entered before order awarding fees, making her no longer a "spouse"), *review denied*, 335 N.C. 554, 439 S.E.2d 144 (1993).]

iii. Except for the former requirement that an award of fees be for the benefit of the dependent spouse, current G.S. 50-16.4 is worded much like the statute was written at the time of *Broughton v. Broughton*, 58 N.C. App. 778, 294 S.E.2d 772, *review denied*, 307 N.C. 269, 299 S.E.2d 214 (1982), and *Vandiver v. Vandiver*, 50 N.C. App. 319, 274 S.E.2d 243, *review denied*, 302 N.C. 634, 280 S.E.2d 449 (1981), in that it states that fees may be awarded "at any time" that a dependent spouse would be entitled to alimony or postseparation support.

2. Discretion as to award and amount.

a. The allowance of alimony does not require the allowance of attorney fees. [*See Kelly v. Kelly*, 167 N.C. App. 437, 606 S.E.2d 364 (2004) (citing *Rickert v. Rickert*, 282 N.C. 373, 193 S.E.2d 79 (1972)) (applying pre-1995 statute) (order that awarded alimony to a dependent spouse and disallowed her request for attorney fees was upheld, with the appellate court noting the wide latitude the trial court is afforded in determining whether to award such fees and further noting that nothing in the statute requires the

trial court to grant a motion for attorney fees); *Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980) (allowing alimony but denying request for attorney fees based on wife's sizeable estate).]

b. When properly awarded, the amount of the fees awarded is within the sound discretion of the trial judge. [*Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980) (citing *Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980)); *Francis v. Francis*, 169 N.C. App. 442, 612 S.E.2d 141 (citing *Clark*), *review denied*, 359 N.C. 631, 616 S.E.2d 233 (2005); *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 545 S.E.2d 788, *aff'd per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001); *Patton v. Patton,* 78 N.C. App. 247, 337 S.E.2d 607 (1985) (if a party establishes entitlement to attorney fees in a given case, the trial court has discretion to award a reasonable fee after consideration of the nature and scope of the legal services rendered and the time and skill required), *rev'd in part on other grounds*, 318 N.C. 404, 348 S.E.2d 593 (1986).]

3. Types of proceedings in which fees awarded.

a. Attorney fees are available in actions for modification of alimony as well as in actions to establish an initial alimony obligation, assuming satisfaction of statutory criteria. [*See* G.S. 50-16.4; *Parsons v. Parsons*, 231 N.C. App. 397, 752 S.E.2d 530 (2013) (alimony modification action); *Shumaker v. Shumaker*, 137 N.C. App. 72, 527 S.E.2d 55 (2000) (contempt proceeding; see Section III.K, above).]

b. Attorney fees can be ordered for additional fees incurred for remand proceeding following an appeal. [*Lasecki v. Lasecki*, 809 S.E.2d 296 (N.C. Ct. App. 2017).]

4. When award of fees may be properly made.

a. Pursuant to G.S. 50-16.4, a court may, upon application of a dependent spouse, enter an order for reasonable attorney fees at any time that a dependent spouse would be entitled to alimony or postseparation support.

i. The court of appeals has construed "at any time" in G.S. 50-16.4 to include "times subsequent to the determination of the issues [in the dependent spouse's] favor at the trial of her cause on its merits." *Upchurch v. Upchurch,* 34 N.C. App. 658, 665–65, 239 S.E.2d 701, 705 (1977), *review denied*, 307 N.C. 269, 299 S.E.2d 214 (1982); *Duncan v. Duncan*, 366 N.C. 544, 742 S.E.2d 799 (2013) (noting that the trial court could have determined attorney fees issue contemporaneously with plaintiff's claim for alimony); *Whedon v. Whedon*, 313 N.C. 200, 328 S.E.2d 437 (1985) (a district court judge may hear an application for attorney fees without a jury at any time on an affidavit, verified pleadings, or other proof) (decided under prior law); 2 Lee's North Carolina Family Law § 9.94 (5th ed. 1999).]

b. The court of appeals has noted that no case has imposed a time limitation for the filing of a motion for attorney fees in a child custody and child support action pursuant to G.S. 50-13.6, except that a proper notice of appeal divests the trial court of jurisdiction to enter an order for fees while the appeal is pending. [*Bramblett v. Bramblett*, 218 N.C. App. 454, 721 S.E.2d 763 (2012) (**unpublished**) (order awarding attorney fees upheld against claim that request was not timely when it was not included in complaint and was asserted more than a year after complaint filed; motion for fees was filed after conclusion of hearing on child custody and support, and trial court heard and ruled on motion before entry of an order in the custody

and support action and prior to any appeal); *Balawejder v. Balawejder*, 216 N.C. App. 301, 721 S.E.2d 679 (2011) (when a custody order is appealed, the trial court loses jurisdiction to consider a request for attorney fees arising out of the custody case).] But see *Duncan v. Duncan*, 366 N.C. 544, 742 S.E.2d 799 (2013), in Sections VI.A.1.a and VI.D.5.b, below.

c. For more on the effect of an appeal of the alimony order on the trial court's jurisdiction to enter an order for attorney fees, see Section VI.D, below.

5. Whether party must be successful in underlying action.

a. G.S. 50-16.4 requires that a dependent spouse be entitled to alimony pursuant to G.S. 50-16.3A or to postseparation support pursuant to G.S. 50-16.2A before a court may award fees.

b. It appears that the court may award attorney fees even if the court decides not to award postseparation support or alimony, as long as the spouse establishes facts that would allow an award of postseparation support. [*See Rickert v. Rickert*, 282 N.C. 373, 379, 193 S.E.2d 79, 83 (1972) (stating that "[a]llowance of counsel fees does not [r]equire allowance of subsistence pendente lite"); 2 Lee's North Carolina Family Law § 9.89 (5th ed. 1999) (stating that the dependent spouse does not have to be the prevailing party in the action to be entitled to either postseparation support or alimony); *Clark v. Clark*, 231 N.C. App. 514, 753 S.E.2d 743 (2013) (**unpublished**) (plaintiff was entitled to attorney fees arising from her motion to increase alimony, even though motion was denied, when defendant did not dispute that plaintiff was entitled to alimony; G.S. 50-16.4 does not require that dependent spouse be the "prevailing party" in litigation, rejecting husband's argument that because wife did not prevail on her motion to increase alimony, she was not entitled to attorney fees associated with that motion; appellate court noted, however, that wife prevailed on her claim for child support arrearages).]

c. However, some cases have denied attorney fees when alimony was not awarded or have recognized as the general rule that denial of alimony results in denial of fees. [*See Romulus v. Romulus*, 215 N.C. App. 495, 527, 715 S.E.2d 308, 329 (2011) (plaintiff conceded that if appellate court upheld denial of her claim for alimony, it should uphold denial of her claim for attorney fees; when denial of alimony upheld, appellate court stated there "was no basis for the trial court to award her attorney fees"); *see also Lucas v. Lucas*, 209 N.C. App. 492, 706 S.E.2d 270 (2011) (noting that a claim for attorney fees under G.S. § 50-16.4 is contingent upon the claimant prevailing on the alimony claim).]

6. Insufficient means to defray litigation expenses.

a. A party has insufficient means to defray the expenses of a suit when he is unable to employ adequate counsel in order to proceed as a litigant to meet the other spouse as a litigant in the suit. [*Belcher v. Averette,* 152 N.C. App. 452, 568 S.E.2d 630 (2002) (child support case).]

b. In making the determination of insufficient means, a trial court should generally rely on the dependent spouse's disposable income and estate. [*Rhew v. Felton*, 178 N.C. App. 475, 631 S.E.2d 859 (citing *Barrett v. Barrett*, 140 N.C. App. 369, 536 S.E.2d 642 (2000)) (unchallenged findings that dependent spouse had borrowed substantial

monies from family members to pay her legal expenses, had limited funds in her bank and savings accounts, and had been forced to sell her home and therefore owned no real property were sufficient, with other findings, to entitle her to attorney fees), *review denied, appeal dismissed*, 360 N.C. 648, 636 S.E.2d 810 (2006); *Barrett* (in determining whether a spouse has insufficient means, trial court should focus on the disposable income and expenses of the dependent spouse, although a comparison of the two estates sometimes may be appropriate; court not required to consider amount of cash that wife received in equitable distribution when husband failed to show that wife still had the money and that it thus could be applied to defray her litigation expenses). *See also Bookholt v. Bookholt*, 136 N.C. App. 247, 523 S.E.2d 729 (1999) (noting that a trial judge is not required to compare the separate estates of both parties but may do so under appropriate circumstances), *superseded on other grounds by statute as stated in Williamson v. Williamson*, 142 N.C. App. 702, 543 S.E.2d 897 (2001); *Clark v. Clark*, 231 N.C. App. 514, 753 S.E.2d 743 (2013) (**unpublished**) (undisputed finding that plaintiff was a dependent spouse, along with extensive findings regarding plaintiff's income and expenses, including a finding that she was unable to meet her ongoing expenses, supported finding that plaintiff was unable to pay attorney fees).]

c. In some cases, a dependent spouse's sizeable estate has precluded a finding of insufficient means or has resulted in a partial award of fees.

   i. In reversing fee award, appellate court determined it was reasonable to require wife to pay $40,000 in attorney fees from an estate worth $1.5 million, which included a $400,000 investment account. [*Parsons v. Parsons*, 231 N.C. App. 397, 752 S.E.2d 530 (2013) (even though husband's estate was significantly larger than wife's, court rejected wife's argument that denial of the award would require that she deplete her estate).]

   ii. Where wife's estate had a net worth of $761,975, record established that an award of attorney fees was not necessary to enable her, as litigant, to meet defendant, as litigant, on substantially even terms. [*Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980) (in this case the separate estate of the dependent spouse was almost equal to that of the supporting spouse).]

   iii. Wife had sufficient means to defray the expense of an alimony and child support suit when she had a net estate of $665,652, a net income of $9,192 in 1977, as well as other assets and interests. [*Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980).]

   iv. Partial award of fees to dependent spouse upheld for time spent by her attorney to draft final order. Partial award of fees based on fact that dependent spouse received permanent alimony of $6,699 a month, $43,236 in retroactive alimony, and an equal distribution in the equitable distribution proceeding. [*Larkin v. Larkin*, 165 N.C. App. 390, 598 S.E.2d 651 (2004), *aff'd per curiam as modified*, 359 N.C. 316, 608 S.E.2d 754 (2005).]

d. In other cases, a dependent spouse with a sizeable estate has been found to have insufficient means when other factors were taken into consideration.

   i. That wife had $75,000 remaining from a cash distributive award and had received or would receive $600,000 from husband's retirement accounts did

not preclude finding that wife had insufficient means when wife had monthly income-expense deficit of $8,000 and defendant was $91,000 in arrears in post-separation support. [*Webb v. Webb*, 207 N.C. App. 526, 700 S.E.2d 248 (2010) (**unpublished**), *review denied*, 365 N.C. 211, 709 S.E.2d 924 (2011).]

ii. Even though wife received a cash distributive award of $69,265 and the marital home from equitable distribution proceeding, evidence that home was in foreclosure at the time of trial, that distributive award was being paid in monthly payments, that defendant was in arrears in child support, and that wife did not have substantial stock and bond holdings or income supported finding that wife lacked sufficient means. [*Walker v. Walker*, 143 N.C. App. 414, 546 S.E.2d 625 (2001).]

iii. Recognizing that wife with an estate of $87,000 was "an individual of some means by contemporary standards," a fee award to wife of only $500 was vacated when husband's net worth was $650,000 and the small award would require wife to deplete her separate estate to meet the expenses of litigation. [*Clark v. Clark*, 301 N.C. 123, 137, 271 S.E.2d 58, 68 (1980).]

iv. While the presence of a substantial separate estate does not automatically negate the dependent spouse's right to attorney fees, the trial court must find that the use of the dependent spouse's separate estate to pay litigation expenses would amount to an unreasonable depletion of that estate before it awards a dependent spouse attorney fees. [*Bookholt v. Bookholt*, 136 N.C. App. 247, 523 S.E.2d 729 (1999) (citing *Chused v. Chused*, 131 N.C. App. 668, 508 S.E.2d 559 (1998)) (where trial judge made no such finding, matter remanded), *superseded on other grounds by statute as stated in Williamson v. Williamson*, 142 N.C. App. 702, 543 S.E.2d 897 (2001).]

e. Findings regarding insufficient means to defray expenses.

i. Where the trial court did not make any findings regarding whether wife was without sufficient means to subsist during the prosecution of the suit and to defray the necessary expenses, the order denying fees was reversed and the matter was remanded. [*Friend-Novorska v. Novorska*, 143 N.C. App. 387, 545 S.E.2d 788, *aff'd per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001).]

ii. The trial court made sufficient findings of fact to conclude that wife had sufficient means to defray the costs of litigation when court found that wife's income had increased substantially since the date of separation and the time of trial, that she retained the marital residence while the husband paid half of the mortgage payments in addition to postseparation support, that wife received an unequal distribution in her favor of the marital property, and that husband had previously paid $2,000 toward wife's attorney fees. [*Friend-Novorska v. Novorska*, 163 N.C. App. 776, 594 S.E.2d 409 (2004).]

iii. Findings demonstrated that wife did not have sufficient means when main asset wife received in equitable distribution, the marital residence, was in foreclosure at time of alimony trial, wife's distributive award was being paid in monthly installments, husband was in arrears in child support and had paid no post-separation support, and, most significantly, wife did not have substantial other

assets, such as stocks and bonds. [*Walker v. Walker*, 143 N.C. App. 414, 546 S.E.2d 625 (2001).]

iv. Findings that wife had negative disposable income and a separate savings account of only $600 were sufficient, without more, to demonstrate that she had insufficient funds to defray the costs of litigation. [*Barrett v. Barrett*, 140 N.C. App. 369, 536 S.E.2d 642 (2000).]

v. Findings were sufficient to show wife's insufficient means when wife had borrowed substantial monies from family members to pay her legal expenses, she had limited funds in her bank and savings accounts, and she was forced to sell her home and therefore owned no real property. [*Rhew v. Felton*, 178 N.C. App. 475, 631 S.E.2d 859, *review denied, appeal dismissed*, 360 N.C. 648, 636 S.E.2d 810 (2006).]

7. Reasonableness of fees awarded.

a. An order awarding attorney fees "must contain findings as to the basis of the award, including the nature and scope of the legal services, the skill and time required, and the relationship between the fees customary in such a case and those requested." [*Rhew v. Felton*, 178 N.C. App. 475, 486, 631 S.E.2d 859, 867 (quoting *Holder v. Holder*, 87 N.C. App. 578, 584, 361 S.E.2d 891, 894 (1987)), *review denied, appeal dismissed*, 360 N.C. 648, 636 S.E.2d 810 (2006). *See also Squires v. Squires*, 178 N.C. App. 251, 631 S.E.2d 156 (2006) (citing *Williamson v. Williamson*, 140 N.C. App. 362, 536 S.E.2d 337 (2000)) (noting that findings as to nature and scope of legal services rendered and skill and time required will be basis for determination of reasonableness of fees).]

b. An award in an alimony case that included time billed by a firm paralegal has been upheld as reasonable. [*Hunt v. Hunt*, 233 N.C. App. 785, 759 S.E.2d 712 (**unpublished**), *review denied*, 367 N.C. 524, 762 S.E.2d 443 (2014).]

c. Findings as to reasonableness of fees.

i. Court must make findings of fact upon which determination of the reasonableness of the award may be based. [*Weaver v. Weaver*, 88 N.C. App. 634, 364 S.E.2d 706 (citing *Fungaroli v. Fungaroli*, 53 N.C. App. 270, 280 S.E.2d 787 (1981)), *review denied*, 322 N.C. 330, 368 S.E.2d 875 (1988).]

ii. Court should conduct broad inquiry, considering as relevant factors the nature and scope of services rendered, skill and time required, magnitude of task imposed on attorney, and reasonable consideration for parties' respective conditions and financial circumstances. [*Whedon v. Whedon*, 313 N.C. 200, 328 S.E.2d 437 (1985); *Owensby v. Owensby*, 312 N.C. 473, 322 S.E.2d 772 (1984). *See also Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005) (appellate court required findings on nature and scope of the legal services rendered, skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers); *Williamson v. Williamson*, 140 N.C. App. 362, 536 S.E.2d 337 (2000) (citing *Owensby*) (matter remanded for additional findings when court failed to make findings as to the nature and scope of legal services rendered and skill and time required).]

iii. While the court of appeals has held in a proceeding to modify child custody that a trial court can take judicial notice of the customary fee charged in the community [*See Simpson v. Simpson*, 209 N.C. App 320, 703 S.E.2d 890 (2011).], the court also has vacated an award where the trial court order simply stated "the court is aware of the range of hourly rates charged by law firms [in the local area and in North Carolina]" and there was no additional evidence in the case on that point. [*WFC Lynnwood I LLC v. Lee of Raleigh, Inc.*, 817 S.E.2d 437, 440 (N.C. Ct. App. 2018).] *See* Ann Anderson, *Attorney Fee Motions and Judicial Notice of "Customary Fee for Like Work,"* UNC Sch. of Gov't: On the Civil Side Blog (July 20, 2018), https://civil.sog.unc.edu/attorney-fee-motions-and-judicial-notice-of-customary-fee-for-like-work.

iv. Findings insufficient when court failed to find how many hours of labor were actually expended by defendant's attorneys, the customary charge for similar services, or whether the charge by defendant's attorney was in line with the customary fee and failed to state how it adjudged the difficulty of the legal questions or the adequacy of the representation. [*Owensby v. Owensby*, 312 N.C. 473, 322 S.E.2d 772 (1984).]

v. Findings that amount of fees awarded is reasonable or that attorney provided "valuable legal services" were insufficient to support awards in the following cases: *Bowes v. Bowes*, 43 N.C. App. 586, 590, 259 S.E.2d 389, 393 (1979) (no findings of fact, just a conclusion that $750 was a "reasonable attorney . . . fee under the circumstances of this case"), *review denied*, 299 N.C. 120, 262 S.E.2d 5 (1980); *Coleman v. Coleman*, 74 N.C. App. 494, 498, 328 S.E.2d 871, 874 (1985) (only a finding and a conclusion that plaintiff's attorney provided her with "valuable legal services" in the prosecution of this action; case remanded for "appropriate" findings); *Hunt v. Hunt*, 233 N.C. App. 785, 759 S.E.2d 712 (**unpublished**) (not paginated on Westlaw) (citing *Coleman*) (a finding that it was "Plaintiff's attorney's opinion" that the reasonable value of her services was $3,100 was not sufficient, as the trial court, not the attorney, is to decide the reasonableness of the fees), *review denied*, 367 N.C. 524, 762 S.E.2d 443 (2014).

vi. Findings supporting the award of alimony, plus two findings that detailed the reasonable fees that wife incurred for the alimony portion of the litigation, were sufficient to support an award of fees. [*Squires v. Squires*, 178 N.C. App. 251, 631 S.E.2d 156 (2006).]

8. Other findings.

a. Findings are required when the court awards attorney fees and also when it denies fees.

i. The trial court must set out the findings of fact upon which an award of fees is made. [*Swain v. Swain*, 179 N.C. App. 795, 635 S.E.2d 504 (2006) (in alimony modification case, fee award was vacated where court made no findings with regard to wife's ability to subsist during prosecution of the suit or her ability to defray the necessary expenses of suit), *review denied*, 361 N.C. 437, 649 S.E.2d 897 (2007).]

ii. Denial of fees must be supported by findings. [*Friend-Novorska v. Novorska*, 143 N.C. App. 387, 545 S.E.2d 788 (in alimony action, portion of order denying fees was reversed where court did not make any findings regarding whether wife was without sufficient means to subsist during prosecution of the suit and to defray the necessary expenses), *aff'd per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001).]

b. Findings in combined actions.

i. Since attorney fees are not recoverable in an action for equitable distribution (ED), in a combined action, the findings of fact must reflect that the attorney fees awarded are attributable only to the alimony or child custody and support claims. [*Robinson v. Robinson*, 210 N.C. App. 319, 707 S.E.2d 785 (2011) (in a combined action for ED, alimony, and child support, findings should have reflected that the fees awarded were attributable only to the alimony and/or child support actions); *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005) (citing *Holder v. Holder*, 87 N.C. App. 578, 361 S.E.2d 891 (1987)); *Squires v. Squires*, 178 N.C. App. 251, 631 S.E.2d 156 (2006) (in combined action, attorney fees awarded must be attributable to work by the attorneys on the divorce, alimony, and child support actions and not for the ED action; findings sufficient to support award of fees for alimony portion of action for ED and alimony).]

ii. Order upheld that excluded attorney fees for the ED portion of a case and directed husband to pay a portion of the approximately 75 percent of wife's attorney fees that were attributable to the custody, child support, and alimony portions of the case, even though the fee affidavits did not label every charge as being attributable to a particular issue. [*Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005) (since services were adequately described, the trial court could compare the time spent on each issue at trial and the evidence presented with the line-item services on the fee affidavits to rationally determine proper apportionment of fees). *See also Clark v. Clark*, 231 N.C. App. 514, 753 S.E.2d 743 (2013) (**unpublished**) (when plaintiff was entitled to attorney fees related to her motions to increase alimony and for payment of child support arrearages, both of which are authorized by statute, the trial court was not required to set out amount of fees incurred as to each issue).]

9. Award of attorney fees pursuant to provisions in a separation agreement or marital contract.

a. Attorney fees may be barred by an express provision in a valid separation agreement, premarital agreement, or marital contract made pursuant to G.S. 52-10(a1), so long as the agreement is performed. [G.S. 50-16.6(b), *amended by* S.L. 2013-140, § 2, effective June 19, 2013 (amendment added reference to G.S. 52-10(a1)).]

b. Attorney fees may be authorized by an agreement between the parties.

i. The North Carolina Supreme Court has interpreted G.S. 52-10.1 to authorize a married couple to include a provision for attorney fees in a separation agreement. [*Bromhal v. Stott,* 341 N.C. 702, 462 S.E.2d 219 (1995) (holding that provisions within separation agreements requiring the payment of attorney fees

upon a breach by one of the parties are not inconsistent with public policy and are legal, valid, and binding under G.S. 52-10.1).]

ii. The trial court properly awarded attorney fees in an action for specific performance of an alimony provision in a separation agreement when the parties had specifically and voluntarily contracted for indemnification of such fees. [*Edwards v. Edwards,* 102 N.C. App. 706, 403 S.E.2d 530 (agreement provided that if a party failed to perform an obligation under the agreement, causing the other party to incur expenses, including reasonable attorney fees, to enforce the obligation the defaulting party must indemnify and hold the other harmless from any such expense), *review denied,* 329 N.C. 787, 408 S.E.2d 518 (1991).]

iii. Attorney fees were not allowed for research on the enforceability of an alimony escalation provision that the trial court found contrary to public policy. [*Jackson v. Penton*, 206 N.C. App. 761, 699 S.E.2d 141 (2010) (**unpublished**) (not paginated on Westlaw) (incorporated separation agreement provided that "Husband (defendant) shall pay to Wife (plaintiff) any and all reasonable attorney's fees incurred in enforcing this [alimony] obligation;" court found fees awarded to enforce a provision that was not enforceable were not reasonable).]

c. Findings when award of fees is based on provision in a separation agreement and not on G.S. 50-16.4.

i. The findings of fact and conclusions of law required by G.S. 50-16.4 to support an award of attorney fees have not been required when the award was based on a provision in a separation agreement and not on the statute. [*Jackson v. Penton*, 206 N.C. App.761, 699 S.E.2d 141 (2010) (**unpublished**) (provision in incorporated separation agreement is set out in Section V.A.9.b.iii, above).]

d. For more on attorney fees provisions in a separation agreement, see *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

10. Standard of review on appeal of an award of fees.

a. Whether the requirements for an award of fees have been met is a question of law that is reviewable on appeal. [*Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980) (reversing an award of fees); *Walker v. Walker*, 143 N.C. App. 414, 546 S.E.2d 625 (2001) (citing *Clark*) (upholding partial award of fees).]

11. Award of fees for services performed on appeal and prior to filing of action.

a. Services performed on appeal.

i. An award of attorney fees for services performed on appeal should ordinarily be granted, provided the general statutory requirements for such an award are duly met, especially where the appeal is taken by the supporting spouse. [*Fungaroli v. Fungaroli*, 53 N.C. App. 270, 273, 280 S.E.2d 787, 790 (1981) (husband had taken three appeals concerning alimony and custody award to wife, the last of which challenged the trial court's award of fees to wife incurred, in part, for representation by her attorney in the North Carolina Court of Appeals, the North Carolina Supreme Court, and the U.S. Supreme Court; after citing G.S. 50-13.6, allowing award of attorney fees in child support and custody cases, and G.S. 50-16.4, allowing award of attorney fees in alimony cases, the court

noted that "there is nothing in our statutory or case law that would suggest that a dependent spouse in North Carolina is entitled to meet the supporting spouse on equal footing, in terms of adequate and suitable legal representation, at the trial level only"); *Whedon v. Whedon*, 313 N.C. 200, 328 S.E.2d 437 (1985) (citing *Fungaroli*); *Martin v. Martin*, 207 N.C. App. 121, 698 S.E.2d 491 (2010) (citing *Fungaroli*) (attorney fees are available for an appeal of an alimony modification order when the supporting spouse is the appellant if the requirements of G.S. 50-16.4 are met); *McKinney v. McKinney*, 228 N.C. App. 300, 745 S.E.2d 356 (2013) (citing *Fungaroli*) (award of appellate attorney fees in child support, child custody, and alimony matters is within the discretion of the trial court), *review denied*, 367 N.C. 288, 753 S.E.2d 678, *review dismissed*, 367 N.C. 288, 753 S.E.2d 679 (2014).]

b. Services performed prior to filing of action.

i. Attorney fees have been awarded in an alimony action for work by a dependent spouse's attorneys prior to the filing of pleadings. [*Whedon v. Whedon*, 58 N.C. App. 524, 294 S.E.2d 29 (noting that all litigation inevitably involves certain precursory activity), *review denied*, 306 N.C. 752, 295 S.E.2d 764 (1982).]

c. Services performed on remand.

i. When attorney fees are authorized, trial court also can award fees for court proceedings following a remand of the case from the court of appeals. [*Lasecki v. Lasecki*, 809 S.E.2d 296 (N.C. Ct. App. 2017).]

12. G.S. 50-16.4 does not authorize payment of expenses.

a. G.S. 50-16.4 does not authorize a court to award expert witness fees. [*Martin v. Martin*, 207 N.C. App. 121, 698 S.E.2d 491 (2010) (trial court erred when it ordered supporting spouse to pay dependent spouse's expert witness fees for expert not subpoenaed to appear at trial); *Slaughter v. Slaughter,* 803 S.E.2d 419 (N.C Ct. App.) (trial court erred in ordering husband to pay $20,000 for fees charged by wife's forensic accountant for non-testimonial work), *review withdrawn, review dismissed*, 370 N.C. 380, 806 S.E.2d 41 (2017); *Williams v. Williams*, 42 N.C. App. 163, 256 S.E.2d 401 (reversing award of $2,500 to wife for reasonable expenses of prosecuting alimony action; G.S. 50-16.4 provides only for the award of "reasonable counsel fees" and makes no mention of "expenses"), *aff'd*, 299 N.C. 174, 261 S.E.2d 849 (1980).] Note that *Lassiter v. N.C. Baptist Hospitals, Inc.*, 368 N.C. 367, 778 S.E.2d 68 (2015), overruled earlier case law holding that expert witness fees could be assessed only when the witness is under subpoena.

VI. Appeal

A. Right to Take an Immediate Appeal

1. A final order may be appealed as a matter of right to the court of appeals. [G.S. 7A-27(b)(2), *added by* S.L. 2013-411, § 1, effective Aug. 23, 2013; 1-277(a).] A final judgment is one that disposes of the cause as to all the parties, leaving nothing to be judicially determined

between them in the trial court. [*Hausle v. Hausle*, 226 N.C. App. 241, 739 S.E.2d 203 (2013); *Duncan v. Duncan*, 366 N.C. 544, 742 S.E.2d 799 (2013) (final judgment generally is one that ends the litigation on the merits).]

a. An alimony order was final and immediately appealable as of right pursuant to G.S. 1-277(a), even though it reserved the issue of attorney fees. Attorney fees and costs are collateral issues and not part of the parties' substantive claims. [*Duncan v. Duncan*, 366 N.C. 544, 742 S.E.2d 799 (2013) (citing *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202–03, 108 S. Ct. 1717, 1722 (1988)) (announcing a bright-line rule applicable to any civil case disposing of the parties' substantive claims but leaving open the issue of attorney fees and costs); *Lucas v. Lucas*, 209 N.C. App. 492, 706 S.E.2d 270 (2011) (citing *Bumpers v. Cmty. Bank of N. Va.*, 364 N.C. 195, 695 S.E.2d 442 (2010)) (alimony and equitable distribution judgment final for purposes of appeal, even if a claim for attorney fees under G.S. 50-16.4 remained pending; claim for attorney fees under G.S. 50-16.4 is not a substantive issue or part of the merits of an alimony claim under G.S. 50-16.3A). *See also Ray Haluch Gravel Co. v. Cent. Pension Fund*, 571 U.S. 177, 134 S. Ct. 773 (2014) (holding, for federal appellate jurisdictional purposes, that whether a claim for attorney fees is based on a statute, a contract, or both, a pending claim for fees and costs does not prevent, as a general rule, the merits judgment from becoming "final" for purposes of appeal).]

b. But when an alimony order is appealed, the trial court loses jurisdiction to consider a request for attorney fees arising from the alimony case. [*Balawejder v. Balawejder*, 216 N.C. App. 301, 721 S.E.2d 679 (2011) (appeal from an order for custody and child support); *In re Scearce*, 81 N.C. App. 662, 345 S.E.2d 411, *review denied*, 318 N.C. 415, 349 S.E.2d 590 (1986); *Condie v. Condie*, 51 N.C. App. 522, 277 S.E.2d 122 (1981) (trial judge lacked authority to enter an order awarding attorney fees after appeal of the alimony order was filed in the court of appeals).] But see *Duncan v. Duncan*, 366 N.C. 544, 742 S.E.2d 799 (2013), in Section VI.A.1.a, immediately above, and in Section VI.D.5.b, below. Because *Duncan* identified attorney fees as a "collateral issue" separate from the parties' substantive claims, court of appeals opinions holding that trial courts lose jurisdiction to determine attorney fees while the alimony order is on appeal because the fee issue is affected by alimony may be called into question.

2. Generally there is no right of immediate appeal of an interlocutory order. An interlocutory order is one made during the pendency of an action that does not dispose of the case but leaves it for further action by the trial court in order to settle and determine the entire controversy. [*Hausle v. Hausle*, 226 N.C. App. 241, 739 S.E.2d 203 (2013).]

3. Immediate appeal of an interlocutory order is allowed in three instances:

a. When the order affects a substantial right. [G.S. 7A-27(b)(3)a., *added by* S.L. 2013-411, § 1, effective Aug. 23, 2013; 1-277(a).] The traditional "substantial right" exception continues to apply to interlocutory orders entered in a family case, such as a claim for attorney fees, that are not covered by the recently enacted G.S. 50-19.1, discussed in Section VI.A.4 below. [*Beasley v. Beasley*, 816 S.E.2d 866 (N.C. Ct. App. 2018).]

i. A substantial right is one that "will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." [*Peters v. Peters*,

232 N.C. App. 444, 448, 754 S.E.2d 437, 440 (2014) (quoting *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000)).]

ii. ii. The court of appeals has taken a restrictive view of the substantial right exception in the context of equitable distribution or alimony matters and has previously recognized that interlocutory appeals which challenge only the financial repercussions of a separation or divorce generally have not been held to affect a substantial right. [Duncan v. Duncan, 193 N.C. App. 752, 671 S.E.2d 71 (2008) (**unpublished**) (citing Embler v. Embler, 143 N.C. App. 162, 545 S.E.2d 259 (2001)).]

b. In cases involving multiple parties or claims, when the order is final as to some but not all of the claims or parties and the trial judge certifies the order for immediate appeal by including in the order that "there is no just reason for delay." [G.S. 1A-1, Rule 54(b); *Duncan v. Duncan*, 366 N.C. 544, 742 S.E.2d 799 (2013) (certification under Rule 54(b) permits an interlocutory appeal from orders that are final as to a specific portion of the case but which do not dispose of all claims as to all parties).]

i. Appeal of an alimony order that was interlocutory when filed because of pending child support and equitable distribution (ED) claims was no longer interlocutory when those claims had been resolved by the time the appeal was heard. [*Crowley v. Crowley*, 203 N.C. App. 299, 691 S.E.2d 727 (granting defendant's motion to amend the record on appeal to reflect entry of a judgment resolving claims for ED, child support, and attorney fees), *review denied*, 364 N.C. 749, 700 S.E.2d 749 (2010).]

c. For appeals taken on or after Aug. 23, 2013, G.S. 7A-27 was amended to allow for an immediate appeal of an order or judgment resolving a claim listed in G.S. 50-19.1, without requiring certification from the trial judge pursuant to G.S. 1A-1, Rule 54(b) that "there is no just reason for delay." [G.S. 7A-27(b)(3)e., *added by* S.L. 2013-411, § 1, effective Aug. 23, 2013.] G.S. 50-19.1 provides:

i. Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, the validity of a premarital agreement as defined by G.S. 52B-2(1), child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action.

ii. A party does not forfeit the right to appeal under this section if the party fails to immediately appeal from an order or judgment described in [G.S. 50-19.1].

iii. An appeal from an order or judgment under [G.S. 50-19.1] shall not deprive the trial court of jurisdiction over any other claims pending in the same action. [G.S. 50-19.1, *added by* S.L. 2013-411, § 2, effective Aug. 23, 2013; *amended by* S.L. 2018-86, § 1, effective June 25, 2018, and applies to appeals filed on or after that date.]

4. Before the effective date of G.S. 50-19.1, final judgments of equitable distribution, alimony, child support, custody, absolute divorce, and divorce from bed and board could not be appealed if other claims remained pending in the case, unless the trial judge certified

that there is no just reason for delay pursuant to G.S. 1A-1, Rule 54(b) or unless the judgment affected a substantial right.

5. Note also that the court of appeals has discretion to treat an appeal as a petition for certiorari to review an interlocutory appeal. [N.C. R. App. P. 21(a)(1).]

B. Treatment of Findings of Fact and Conclusions of Law by an Appellate Court

1. Where trial is by judge and not by jury, findings of fact supported by competent evidence are binding on the appellate courts, even if the evidence would support a contrary finding. [*In re Estate of Trogdon*, 330 N.C. 143, 409 S.E.2d 897 (1991). *See also Dodson v. Dodson*, 190 N.C. App. 412, 660 S.E.2d 93 (2008) (citing *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990)) (review of trial court's findings is limited to whether there is competent evidence to support the findings and whether the findings support the conclusions of law).]
2. Findings unchallenged on appeal are presumed correct and are binding on the court of appeals. [*Bodie v. Bodie*, 221 N.C. App. 29, 727 S.E.2d 11 (2012) (quoting *Lange v. Lange*, 167 N.C. App. 426, 430, 605 S.E.2d 732, 735 (2004)).]
3. A finding in an alimony or postseparation support (PSS) order that is not appealed may not be reviewed in an appeal from an order modifying an award to the dependent spouse. [*Harris v. Harris*, 188 N.C. App. 477, 656 S.E.2d 316 (2008) (where court determined in a PSS order that wife's voluntary tithes to church were reasonable expenses, which husband did not appeal, husband could not have appellate court review that finding on appeal from an order modifying an alimony award to wife).]

C. Standard of Review

1. When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. [*Bodie v. Bodie*, 221 N.C. App. 29, 727 S.E.2d 11 (2012) (quoting *Williamson v. Williamson*, 217 N.C. App. 388, 719 S.E.2d 625 (2011)); *Smallwood v. Smallwood*, 227 N.C. App. 319, 327, 742 S.E.2d 814, 820 (2013) (citing *Holloway v. Holloway*, 221 N.C. App. 156, 164, 726 S.E.2d 198, 204 (2012)) (in matters without a jury, appellate review is "strictly limited" to determining whether the record contains competent evidence to support the trial court's findings of fact and whether those findings, in turn, support the trial court's conclusions of law).]
2. Standard of review in appeal of the following matters is de novo:
    a. Whether a spouse is entitled to an award of alimony or postseparation support. [*Kabasan v. Kabasan*, 810 S.E.2d 691 (N.C. Ct. App. 2018) (quoting *Collins v. Collins*, 243 N.C. App. 696, 699, 778 S.E.2d 854, 856 (2015) (questions of law are reviewed de novo).]
    b. A trial court's conclusions of law. [*Smallwood v. Smallwood*, 227 N.C. App. 319, 742 S.E.2d 814 (2013) (citing *Casella v. Alden*, 200 N.C. App. 24, 682 S.E.2d 455 (2009)).]
    c. Entitlement to attorney fees. [*Rhew v. Felton*, 178 N.C. App. 475, 631 S.E.2d 859 (citing *Barrett v. Barrett*, 140 N.C. App. 369, 536 S.E.2d 642 (2000)), *review denied, appeal dismissed*, 360 N.C. 648, 636 S.E.2d 810 (2006). *See also Francis v. Francis*, 169 N.C. App. 442, 612 S.E.2d 141 (citing *Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58

(1980)) (whether the requirements for an award of attorney fees have been met is a question of law that is reviewable on appeal), *review denied*, 359 N.C. 631, 616 S.E.2d 233 (2005).]

3. An appellate court reviews for abuse of discretion a trial court's decision regarding:
   a. The manner of payment of an alimony award. [*Rhew v. Felton*, 178 N.C. App. 475, 631 S.E.2d 859, *review denied, appeal dismissed*, 360 N.C. 648, 636 S.E.2d 810 (2006).]
   b. The amount of an alimony award. [*Sayland v. Sayland*, 267 N.C. 378, 148 S.E.2d 218 (1966); *Collins v. Collins*, 243 N.C. App. 696, 778 S.E.2d 854 (2015) (citing *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982)); *Robinson v. Robinson*, 210 N.C. App. 319, 707 S.E.2d 785 (2011) (citing *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 588 S.E.2d 517 (2003)); *Harris v. Harris*, 188 N.C. App. 477, 656 S.E.2d 316 (2008); *Rhew v. Felton*, 178 N.C. App. 475, 631 S.E.2d 859, *review denied, appeal dismissed*, 360 N.C. 648, 636 S.E.2d 810 (2006). *See also Alvarez v. Alvarez*, 134 N.C. App. 321, 517 S.E.2d 420 (1999) (citing Quick) (when considering the amount of alimony, appellate court must review whether the trial judge followed the requirements of the applicable statutes).]
   c. The duration of alimony. [*Robinson v. Robinson*, 210 N.C. App. 319, 707 S.E.2d 785 (2011) (citing *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 588 S.E.2d 517 (2003)).]
   d. The amount of a modified alimony award. [*Swain v. Swain*, 179 N.C. App. 795, 635 S.E.2d 504 (2006), *review denied*, 361 N.C. 437, 649 S.E.2d 897 (2007).]
   e. What constitutes the reasonable needs and expenses of a party in an alimony action. [*Parsons v. Parsons*, 231 N.C. App. 397, 752 S.E.2d 530 (2013) (citing *Megremis v. Megremis*, 179 N.C. App. 174, 633 S.E.2d 117 (2006)); *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005) (citing *Whedon v. Whedon*, 58 N.C. App. 524, 294 S.E.2d 29 (1982)).]
   f. Weight given to factors in G.S. 50-16.3A(b). [*Friend-Novorska v. Novorska*, 143 N.C. App. 387, 545 S.E.2d 788, *aff'd per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001).]
   g. The amount awarded as attorney fees. [*Rhew v. Felton*, 178 N.C. App. 475, 631 S.E.2d 859, *review denied, appeal dismissed*, 360 N.C. 648, 636 S.E.2d 810 (2006); *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005); *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 545 S.E.2d 788 (citing *Owensby v. Owensby*, 312 N.C. 473, 322 S.E.2d 772 (1984)), *aff'd per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001).]
   h. A decision to deny relief under G.S. 1A-1, Rule 60(b). [*Macher v. Macher*, 188 N.C. App. 537, 656 S.E.2d 282, *aff'd per curiam*, 362 N.C. 505, 666 S.E.2d 750 (2008); *Sloan v. Sloan*, 151 N.C. App. 399, 566 S.E.2d 97 (2002).]
   i. The standard used by appellate courts to review a decision whether to award alimony is not clear.
      i. In the following cases, whether a party is entitled to alimony has been reviewed de novo. [*Barrett v. Barrett*, 140 N.C. App. 369, 536 S.E.2d 642 (2000); *Carpenter v. Carpenter*, 245 N.C. App. 1, 781 S.E.2d 828 (2016), *Romulus v. Romulus*, 215 N.C. App. 495, 715 S.E.2d 308 (2011), *Helms v. Helms*, 191 N.C. App. 19, 661 S.E.2d 906, *review denied*, 362 N.C. 681, 670 S.E.2d 233 (2008), *Rhew v. Felton*, 178 N.C. App. 475, 631 S.E.2d 859, *review denied, appeal dismissed*, 360 N.C.

648, 636 S.E.2d 810 (2006), and *Webb v. Webb*, 207 N.C. App. 526, 700 S.E.2d 248 (2010) (**unpublished**), *review denied*, 365 N.C. 211, 709 S.E.2d 924 (2011) (*Carpenter*, *Romulus*, *Helms*, *Rhew*, and *Webb* citing *Barrett*); *Collins v. Collins*, 243 N.C. App. 696, 778 S.E.2d 854 (2015) (entitlement to alimony is a question of law that is reviewed de novo).]

ii. In other cases, whether a party is entitled to alimony has been reviewed for a manifest abuse of discretion. [*Alvarez v. Alvarez*, 134 N.C. App. 321, 517 S.E.2d 420 (1999); *Megremis v. Megremis*, 179 N.C. App. 174, 633 S.E.2d 117 (2006), and *Slight v. Slight*, 200 N.C. App. 321, 683 S.E.2d 467 (2009) (**unpublished**) (*Megremis* and *Slight* citing *Alvarez*).]

D. Effect of an Appeal on Jurisdiction

1. Pursuant to G.S. 1-294, when an appeal is perfected, the trial court is divested of jurisdiction "upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure." [G.S. 1-294, amended by S.L. 2015-25, § 2, effective May 21, 2015.]
2. The court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. [G.S. 1-294, amended by S.L. 2015-25, § 2, effective May 21, 2015.] Thus, pursuant to G.S. 1-294, a trial court has jurisdiction to enter an order on matters other than postseparation support and alimony while an order for those matters is on appeal.
3. G.S. 50-16.7(j) provides that an alimony order is enforceable by civil contempt and that its disobedience may be punished by criminal contempt. Thus, notwithstanding the provisions of G.S. 1-294, orders for postseparation support and alimony are enforceable in the trial court by civil contempt pending appeal. [G.S. 50-16.7(j).] See Sections II.H and III.K, above, for more on contempt.
4. Note also that an appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, the validity of a premarital agreement as defined by G.S. 52B-2(1), child custody, child support, alimony, or equitable distribution, where the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), does not deprive the trial court of jurisdiction over any other claims pending in the same action. [G.S. 50-19.1, *added by* S.L. 2013-411, § 2, effective Aug. 23, 2013; *amended by* S.L. 2018-86, § 1, effective June 25, 2018.]
5. When request for attorney fees is pending when alimony order is appealed.
   a. After an alimony order is appealed, the trial court lacks jurisdiction to consider a request for attorney fees arising from the alimony case. [*Balawejder v. Balawejder*, 216 N.C. App. 301, 721 S.E.2d 679 (2011) (citing *McClure v. Cty. of Jackson*, 185 N.C. App. 462, 648 S.E.2d 546 (2007)) (stating rule in context of appeal from order for custody); *Webb v. Webb*, 196 N.C. App. 770, 677 S.E.2d 462 (trial court ordered permanent alimony to wife and found that she was entitled to attorney fees but did not decide amount thereof; appeal of uncertified order was interlocutory and did not affect a substantial right; rejecting defendant's argument that order was final for appeal purposes despite pending claim for attorney fees), *stay denied*, 687 S.E.2d 485 (N.C. 2009); *Condie v. Condie*, 51 N.C. App. 522, 277 S.E.2d 122 (1981) (trial judge

lacked authority to enter an order awarding attorney fees after appeal of the alimony order was filed in the court of appeals; order for attorney fees entered after appeal of alimony order was vacated); *Phillips v. Phillips*, 206 N.C. App. 330, 698 S.E.2d 557 (2010) (**unpublished**) (citing *McClure*) (order awarding fees, entered two months after notice of appeal from alimony order, void for want of jurisdiction).]

b. However, the North Carolina Supreme Court has held that an alimony order was final and immediately appealable as of right pursuant to G.S. l-277(a), even though it reserved the issue of attorney fees, reasoning that attorney fees and costs are collateral issues and not part of the parties' substantive claims. [*Duncan v. Duncan*, 366 N.C. 544, 742 S.E.2d 799 (2013) (citing *Budinich v. Becton Dickinson & Co.,* 486 U.S. 196, 202–03, 108 S. Ct. 1717, 1722 (1988)) (announcing a bright-line rule applicable to any civil case disposing of the parties' substantive claims but leaving open the issue of attorney fees and costs); *Lucas v. Lucas*, 209 N.C. App. 492, 706 S.E.2d 270 (2011) (citing *Bumpers v. Cmty. Bank of N. Va*., 364 N.C. 195, 695 S.E.2d 442 (2010)) (alimony and equitable distribution judgment final for purposes of appeal, even if a claim for attorney fees under G.S. 50-16.4 remained pending; claim for attorney fees under G.S. 50-16.4 is not a substantive issue or part of the merits of an alimony claim under G.S. 50-16.3A).] Because *Duncan* identified attorney fees as a "collateral issue" separate from the parties' substantive claims, court of appeals opinions holding that trial courts lose jurisdiction to determine attorney fees while the alimony order is on appeal because the fee issue is affected by alimony may be called into question. *See* G.S. 1-294 (an appeal divests the court of jurisdiction with regard to "the judgment appealed from, or upon the matter embraced therein," but the court below may proceed upon any other matter "not affected by the judgment appealed from.").

c. The attorney fee issue may be addressed by the trial court after the appeal is resolved. [*In re Scearce,* 81 N.C. App. 662, 345 S.E.2d 411 (holding that a request for attorney fees may be raised by a motion in the cause subsequent to the determination of the main custody action; if the matter is on appeal, the trial court can properly consider the motion for attorney fees upon resolution of the appeal), *review denied,* 318 N.C. 415, 349 S.E.2d 590 (1986).] Alternatively, the trial court could defer entry of the written judgment until after a ruling is made on the issue of attorney fees and incorporate all of its rulings into a single, written judgment, from which appeal could be taken. [*McClure v. Cty. of Jackson*, 185 N.C. App. 462, 648 S.E.2d 546 (2007) (suggesting procedure).]

6. For a more thorough discussion of the court's jurisdiction to enter an award of fees after appeal of the main action, see *Child Support Liability and Amount*, Bench Book, Vol. 1, Chapter 3, Part 2, Section I.I.6.

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Findings for Postseparation Support (PSS)

- ☐ 1. Personal and subject matter jurisdiction
  - ☐ Service of process
  - ☐ Residence of parties (minimum contacts required for nonresident defendant)
  - ☐ PSS requested in an action for divorce, whether absolute or from bed and board, for annulment, or for alimony without divorce
  - ☐ PSS requested before entry of divorce
- ☐ 2. Date of marriage and date of separation
- ☐ 3. Findings on the financial needs of the parties, determined by consideration of each of the following, about which evidence is presented:
  - ☐ Present actual income of both parties from any source
  - ☐ The accustomed standard of living during the marriage
  - ☐ The income-earning abilities of each party
  - ☐ The debt-service obligations of each party
  - ☐ The legal obligation of either party to support other persons
  - ☐ The expenses reasonably necessary to support each of the parties
- ☐ 4. Preseparation marital misconduct
  - ☐ Only considered if the party from whom support is sought offers evidence first concerning misconduct of spouse seeking support
  - ☐ If evidence is presented, finding that court considered the evidence, whether offered by dependent or supporting spouse
- ☐ 5. Based on findings above, that party
  - ☐ Seeking support is a dependent spouse who
    - ☐ Is actually substantially dependent or
    - ☐ Is substantially in need of support
  - ☐ Who is to pay support is a supporting spouse
- ☐ 6. Based on all findings above, resources of dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay
- ☐ 7. If PSS awarded
  - ☐ Reasons for award
  - ☐ Amount of award and reasons for amount
  - ☐ Effective date of award
  - ☐ Duration of award and reasons for duration
  - ☐ Manner of payment and reasons for that manner
  - ☐ Date award will terminate (if no date specified, award will terminate as provided in G.S. 50-16.1A(4))
- ☐ 8. If PSS denied, reasons for denial
- ☐ 9. Other issues:
  - ☐ If imputing income, must find party acted in deliberate bad faith disregard of support obligation and support amount imputed with findings of past work history and income-earning opportunities available to the party. If no work history, impute minimum wage.
  - ☐ Modification: Must find substantial change of circumstances occurring since entry of existing order, relating to ability of supporting spouse to pay or relating to the financial needs of the dependent spouse. If find substantial change, then proceed to findings above.
  - ☐ REMEMBER: If PSS order was issued in another state or a foreign country with continuing, exclusive jurisdiction over that order under the law of that state or foreign country, Uniform Interstate Family Support Act (UIFSA) prohibits modification by any tribunal other than the tribunal that issued the order.
  - ☐ Attorney fees. For findings necessary to support award of attorney fees, see discussion in *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2, Section V.

Findings for Alimony

- ☐ 1. Personal and subject matter jurisdiction
  - ☐ Service of process
  - ☐ Residence of parties (minimum contacts required for nonresident defendant)
  - ☐ Alimony requested in an action for divorce, whether absolute or from bed and board, for annulment, or for alimony without divorce
  - ☐ Alimony requested before entry of divorce
- ☐ 2. Date of marriage and date of separation
- ☐ 3. Date of divorce judgment, if any
- ☐ 4. Findings on each of the following about which evidence is presented:
  - ☐ Marital misconduct of either party (see paragraph 8, below)
  - ☐ The present actual income of both parties
  - ☐ The accustomed standard of living during the marriage
  - ☐ The earnings and income earning capacities of each party
  - ☐ Assets and liabilities of each party and the debt service obligations of each party
  - ☐ The ages and the physical, mental, and emotional conditions of each spouse
  - ☐ The length of the marriage
  - ☐ The contribution of either party to the education, training, or increased earning capacity of the other party
  - ☐ The extent to which the earning power, expenses, or financial obligations of one party will be affected by reason of serving as the custodian of a minor child
  - ☐ The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs
  - ☐ The property brought to the marriage by either party
  - ☐ The contributions of one party as a homemaker
  - ☐ The tax ramifications of an alimony award
  - ☐ The fact that income received by either party was previously considered by the court in determining the value of marital or divisible property in equitable distribution
  - ☐ The relative needs of the parties
  - ☐ The legal obligation of either party to support other persons
  - ☐ Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper
- ☐ 5. Based on findings above, that party
  - ☐ Seeking support is a dependent spouse
    - ☐ Who is actually substantially dependent or
    - ☐ Who is substantially in need of support
  - ☐ To pay support is a supporting spouse
- ☐ 6. Based on all factors listed above, award of alimony is equitable under the circumstances
- ☐ 7. If alimony awarded
  - ☐ Reasons for award
  - ☐ Amount of award and reasons for amount
  - ☐ Effective date of award
  - ☐ Duration of award and reasons for duration
  - ☐ Manner of payment and reasons for that manner
  - ☐ If award also made for child support, alimony award separately stated and identified
  - ☐ While specific finding on ability to pay not required, must be clear that court considered supporting spouse's ability to pay

- ☐ 8. Marital misconduct
  - ☐ All misconduct occurring after separation, only if offered to corroborate evidence of misconduct occurring on or before separation
  - ☐ All marital misconduct occurring on or before the date of separation
  - ☐ Illicit sexual behavior before the date of separation:
    - ☐ By dependent spouse only (bars alimony altogether)
    - ☐ By supporting spouse only (requires alimony of some amount and duration)
    - ☐ By both parties (a factor for court to consider)
  - ☐ See *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2, Section III.G.3.a for findings to support marital misconduct generally. For more on illicit sexual behavior, on abandonment, and on indignities, see "marital misconduct" generally, *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2, Section III.A.4.
- ☐ 9. If alimony denied, reasons for denial
- ☐ 10. Other issues:
  - ☐ If imputing income, must find party acted in deliberate bad faith disregard of support obligation and support amount imputed with findings of past work history and income earning opportunities available to that party. If no work history, impute minimum wage.
  - ☐ Modification: Must find substantial change of circumstances occurring since entry of existing order, relating to ability of supporting spouse to pay or relating to the financial needs of the dependent spouse.
  - ☐ If substantial change found, then proceed to all other findings listed above. Reconsideration of dependency is not allowed. Consider same factors used to make initial award when setting new award.
  - ☐ REMEMBER: If alimony order was issued by a tribunal in another state or a foreign country having continuing, exclusive jurisdiction over that order under the law of that state or foreign country, UIFSA prohibits modification by any tribunal other than the tribunal that issued the order.
  - ☐ Attorney fees. For findings necessary to support award of attorney fees, see discussion in *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2, Section V.

Findings for Attorney Fees

- ☐ 1. Fees awarded
  - ☐ Party seeking fees would be entitled to alimony or postseparation support
  - ☐ Party is dependent
  - ☐ Party has insufficient means to defray expenses of suit
  - ☐ Reasonableness of fees, including
    - ☐ Nature and scope of services rendered
    - ☐ Attorney's skill and time required
    - ☐ Attorney's hourly rate
    - ☐ Reasonableness of that rate compared to other lawyers in community
  - ☐ If alimony claim combined with other claims for which fees not statutorily authorized (equitable distribution, termination of parental rights), fees awarded attributed only to claims for which fees authorized by statute
- ☐ 2. Fees denied
  - ☐ Findings as to reason(s) for denial