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Chapter 5
Divorce and Annulment

In cooperation with the School of Government, The University of North Carolina at Chapel Hill
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Chapter 5: **Divorce and Annulment**

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Chapter 5: **Divorce and Annulment**

I. Absolute Divorce

A. Jurisdiction

1. Subject matter jurisdiction.

   a. The district court division is the proper division without regard to the amount in controversy for the trial of actions for annulment and divorce. [G.S. 7A-244.]

   b. The requirement in G.S. 50-6 that one of the parties to an absolute divorce must have resided in North Carolina for at least six months before the filing of the divorce action is jurisdictional. [*Chamberlin v. Chamberlin*, 70 N.C. App. 474, 319 S.E.2d 670 (residency requirement confers the necessary subject matter jurisdiction for the trial court to proceed in rem under G.S. 1-75.8(3)), *review denied*, 312 N.C. 621, 323 S.E.2d 921 (1984).]

      i. "Resided" as used in G.S. 50-6 actually means "domiciled," which requires both actual residence and the intent to remain permanently or for an indefinite length of time. [*Atassi v. Atassi*, 117 N.C. App. 506, 451 S.E.2d 371, *review denied*, 340 N.C. 109, 456 S.E.2d 310 (1995); *Andris v. Andris*, 65 N.C. App. 688, 309 S.E.2d 570 (1983); *Huston v. Huston*, 212 N.C. App. 235, 713 S.E.2d 250 (**unpublished**) (citing *Bryant v. Bryant*, 228 N.C. 287, 45 S.E.2d 572 (1947)) (for residency to constitute a jurisdictional fact, party must have physically resided in North Carolina for at least six months before initiating a divorce proceeding and party must intend to remain in North Carolina for an indefinite period of time), *review denied*, 365 N.C. 338, 717 S.E.2d 392 (2011).]

      ii. The intent to establish a legal residence at some future time is not a sufficient basis for a finding of domicile so as to give the court jurisdiction of a divorce action. [*Martin v. Martin*, 253 N.C. 704, 118 S.E.2d 29 (1961).]

      iii. Although a person may have more than one residence, he can only have one domicile. [*Atassi v. Atassi*, 117 N.C. App. 506, 451 S.E.2d 371 (citing *Davis v. Md. Cas. Co.*, 76 N.C. App. 102, 331 S.E.2d 744 (1985)), *review denied,* 340 N.C. 109, 456 S.E.2d 310 (1995).]

      iv. One need not be a citizen of the United States in order to establish residence or domicile within the state for purposes of divorce actions. [*Rector v. Rector*, 4 N.C. App. 240, 166 S.E.2d 492 (1969) (wife, a German national and not a U.S. citizen, who intended to reside in North Carolina and had no desire or intent to return to Germany to live, was a resident within the meaning of G.S. 50-6).]

      v. One party's residency is sufficient for jurisdiction over a divorce action even though the other party's whereabouts are unknown and that party is served by

publication. [*Fleek v. Fleek,* 270 N.C. 736, 155 S.E.2d 290 (1967) (trial court had jurisdiction of plaintiff wife and of the marriage status and authority to grant the divorce; notice provided to husband by publication and by mailing copies to last known addresses in Italy and Switzerland); *Williams v. North Carolina*, 317 U.S. 287, 63 S. Ct. 207 (1942) (state where one spouse domiciled can enter divorce), *overruling in part Haddock v. Haddock*, 201 U.S. 562, 26 S. Ct. 525 (1906).]

vi. Proof that a party has resided or been stationed at a military installation pursuant to military duty for a period of at least six months preceding the filing of a complaint for absolute divorce constitutes compliance with the residency requirement set out in G.S. 50-6. [G.S. 50-18.] A servicemember still is required to satisfy the "intent to remain" for an indefinite period of time requirement. [*Martin v. Martin,* 253 N.C. 704, 118 S.E.2d 29 (1961); *Huston v. Huston,* 212 N.C. App. 235, 713 S.E.2d 250 (**unpublished**) (citing *Martin*), *review denied,* 365 N.C. 338, 717 S.E.2d 392 (2011).]

c. The requirement in G.S. 50-6 that the parties live separate and apart for one year is jurisdictional. [*Henderson v. Henderson,* 232 N.C. 1, 59 S.E.2d 227 (1950) (if required separation does not exist, the court does not have jurisdiction to try the action and grant a divorce); *Bruce v. Bruce,* 79 N.C. App. 579, 339 S.E.2d 855, *review denied*, 317 N.C. 701, 347 S.E.2d 36 (1986).]

i. If either of the required elements in G.S. 50-6—that the parties have lived apart for one year or that a party resided in the State for six months before divorce complaint was filed—is lacking, the trial court does not have subject matter jurisdiction to enter a judgment and any purported judgment entered is void. [*See Caldon v. Caldon,* 193 N.C. App. 752, 671 S.E.2d 72 (2008) (**unpublished**) (citing *Henderson v. Henderson,* 232 N.C. 1, 59 S.E.2d 227 (1950)) (judgment of divorce, which was based on a complaint filed before the parties had lived apart for a year, was void for lack of subject matter jurisdiction, even though parties had been separated a full year by the time the divorce was granted).]

ii. For computation of the required periods pursuant to G.S. 1A-1, Rule 6, and the year-and-a-day rule, see Section I.D.2, below.

d. The requirement in G.S. 50-8 that the complaint be verified is jurisdictional. [*Hodges v. Hodges,* 226 N.C. 570, 39 S.E.2d 596 (1946) (a court will not obtain jurisdiction in an action for divorce unless the complaint is verified); *Boyd v. Boyd,* 61 N.C. App. 334, 300 S.E.2d 569 (1983) (trial court lacks subject matter jurisdiction over an action for absolute divorce if the complaint is not verified); *Arispe v. Arispe,* 165 N.C. App. 904, 602 S.E.2d 727 (2004) (**unpublished**) (citing *Boyd*) (judgment for absolute divorce based on an unverified complaint reversed for lack of subject matter jurisdiction).]

i. The complaint must be verified at the time of filing. It is not sufficient to obtain verification before complaint and summons are served on defendant. [*Boyd v. Boyd,* 61 N.C. App. 334, 300 S.E.2d 569 (1983).]

ii. When failure to verify is a jurisdictional defect, the trial court never obtains jurisdiction over the action, and orders entered in the action are void. [*In re T.R.P.,* 360 N.C. 588, 636 S.E.2d 787 (2006); *Fansler v. Honeycutt,* 221 N.C. App. 226, 228, 728 S.E.2d 6, 8 (2012) (quoting *In re Green,* 67 N.C. App. 501, 503, 313

S.E.2d 193, 194–95 (1984)) (failure to comply with statutory verification requirement renders the petition "incomplete and non-operative;" unverified complaint for a civil no-contact order pursuant to G.S. Chapter 50C did not provide subject matter jurisdiction).]

iii. No appellate court has addressed whether an unverified divorce complaint may be amended pursuant to G.S. 1A-1, Rule 15, to add a verification. Pursuant to *In re T.R.P.,* 360 N.C. 588, 636 S.E.2d 787 (2006), a court would lack jurisdiction to grant leave pursuant to Rule 15(a) to amend after a responsive pleading has been served. However, it may be sufficient for a plaintiff to file an amended complaint as of right before a responsive pleading is served pursuant to Rule 15(a), which would relate back to the time of the original filing under Rule 15(c). [*See Brisson v. Santoriello,* 134 N.C. App. 65, 516 S.E.2d 911 (1999) (court of appeals holding that plaintiff in a medical malpractice action should have been allowed to amend the complaint as of right to add the certification required by G.S. 1A-1, Rule 9(j); state supreme court decided the case on other grounds), *aff'd in part as modified*, 351 N.C. 589, 528 S.E.2d 568 (2000); *Gladstein v. S. Square Assocs.,* 39 N.C. App. 171, 249 S.E.2d 827 (1978) (request to amend a negligence complaint to add a verification was a request for a "technical" amendment that the trial court should have allowed), *review denied*, 296 N.C. 736, 254 S.E.2d 178 (1979); *see also Best v. Dunn*, 126 N.C. 560, 36 S.E. 126 (1900) (court held leave to amend to cure insufficiency of verification should be granted to facilitate the administration of justice).] The cases cited, *Brisson*, *Gladstein*, and *Best,* do not address the failure to verify as a jurisdictional defect.

iv. Note, also, that the court in *Boyd v. Boyd,* 61 N.C. App. 334, 300 S.E.2d 569 (1983), stated that the plaintiff should have taken a voluntary dismissal and filed a new divorce complaint with the proper verification, rather than attaching the verification after filing. For more on correcting the problem created by an unverified complaint for divorce, see Cheryl Howell, *Can a Verification Problem Be Corrected After a Divorce Complaint Is Filed?* UNC Sch. of Gov't: On the Civil Side Blog (May 29, 2015), http://civil.sog.unc.edu/can-a-verification-problem-be-corrected-after-a-divorce-complaint-is-filed.

e. 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 raising for the first time on appeal trial court's jurisdiction to order alimony after entry of divorce judgment; finding no subject matter jurisdiction), *review denied,* 360 N.C. 536, 633 S.E.2d 826 (2006); *Magaro v. Magaro,* 206 N.C. App. 762, 699 S.E.2d 141 (2010) (**unpublished**) (citing *Stark*) (parties could not by consent confer subject matter jurisdiction on a court to modify a judgment for absolute divorce to provide for alimony when alimony had not been requested before divorce judgment entered).]

f. Divorce when marriage was valid where celebrated but could not have been celebrated in North Carolina.

i. General rule of recognition.

(a) The general rule is that North Carolina courts will recognize any marriage that was valid where entered as long as the marriage does not violate the

public policy of North Carolina. [*Overton v. Overton,* 260 N.C. 139, 132 S.E.2d 349 (1963) (presuming that a marriage entered into in another state is valid under the laws of that state in the absence of contrary evidence); *State v. Ross,* 76 N.C. 242 (1877) (a North Carolina court will not recognize incestuous or bigamous marriages).]

(b) A North Carolina court has recognized the following:

(1) A common law marriage entered into and valid under the laws of South Carolina, even though common law marriages cannot be created in North Carolina; [*Harris v. Harris,* 257 N.C. 416, 126 S.E.2d 83 (1962) (if plaintiff and defendant had a valid common law marriage in South Carolina, such marriage would be given full recognition in this state). *See also Parker v. Parker,* 46 N.C. App. 254, 265 S.E.2d 237 (1980) (citing *Overton v. Overton,* 260 N.C. 139, 132 S.E.2d 349 (1963)) (remanding for a determination as to whether the parties entered into a common law marriage in South Carolina); *Garrett v. Burris,* 224 N.C. App. 32, 735 S.E.2d 414 (2012) (citing *State v. Alford*, 298 N.C. 465, 259 S.E.2d 242 (1979)), *aff'd per curiam,* 366 N.C. 551, 742 S.E.2d 803 (2013) (noting that common law marriages cannot be created in North Carolina but will be recognized if created in a state where valid); *Alford* (citing *Harris*) (if defendant established that he entered into a valid common law marriage in Pennsylvania, his common law wife would not be "competent or compellable" under G.S. 8-57 to give evidence against him).]

(2) A marriage in South Carolina, valid in that state, between a black person and a white person even though prohibited at that time by North Carolina statute and North Carolina's Constitution. [*State v. Ross,* 76 N.C. 242 (1877) (a marriage lawful in its inception continued to be lawful after parties moved to North Carolina; parties not guilty in a criminal prosecution for fornication).]

ii. Whether North Carolina will dissolve a marriage recognized as valid under the laws of another state.

(a) While no court in North Carolina has entered a judgment of divorce in a marriage valid where celebrated but not valid here, it appears that, absent a violation of public policy, if a party proves by a preponderance of the evidence a valid common law marriage under the law of another state, a North Carolina court will adjudicate a claim for absolute divorce, as well as other claims arising therefrom. [*See Garrett v. Burris,* 224 N.C. App. 32, 735 S.E.2d 414 (2012) (when plaintiff failed to prove the necessary elements of a common law marriage pursuant to Texas law, the denial of plaintiff's claim for absolute divorce was affirmed), *aff'd per curiam,* 366 N.C. 551, 742 S.E.2d 803 (2013); *Parker v. Parker,* 46 N.C. App. 254, 265 S.E.2d 237 (1980) (vacating trial court's decision denying temporary alimony and remanding for court to determine whether the parties had a common law marriage in South Carolina).]

(b) For same-sex marriages, see discussion in Section I.A.1.g, immediately below.

g. Same-sex marriages.

i. The Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution require that same-sex couples be allowed to exercise in all states the fundamental right to marry and also require that all states recognize a lawful same-sex marriage performed in another state. [*Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (U.S. 2015) (considering cases brought against state officials responsible for enforcing marriage laws in Michigan, Kentucky, Ohio, and Tennessee by fourteen same-sex couples and two men whose same-sex partners had died and stating that it was "clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality;" state laws at issue in the case were invalid to the extent they excluded same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples).]

ii. S.L. 2017-103, § 35, effective July 12, 2017, acknowledged the validity of same-sex marriage by amending G.S. 12-3 to define the terms "husband" and "wife"" and similar terms when used throughout the North Carolina General Statutes to mean "any two individuals who then are lawfully married to each other." [G.S. 12-3(16).] For more on the implications of this amendment, see Cheryl Howell, *New Legislation Acknowledges Same-Sex Marriage*, UNC Sch. of Gov't: On the Civil Side Blog (Aug. 8, 2017), https://civil.sog.unc.edu/new-legislation-acknowledges-same-sex-marriage.

iii. North Carolina's statutory and constitutional provisions limiting marriage to opposite-sex couples are set out below. Neither has been repealed, but both violate the federal constitution pursuant to *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (U.S. 2015) discussed above.

(a) North Carolina statute addressing same-gender marriage. G.S. 51-1.2, *added by* S.L. 1995-588, § 1, effective June 20, 1996, provides that marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina.

(b) North Carolina's marriage amendment. Effective May 23, 2012, Article XIV, Section 6 of the North Carolina Constitution provides:

> Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State. This section does not prohibit a private party from entering into contracts with another private party; nor does this section prohibit courts from adjudicating the rights of private parties pursuant to such contracts.

2. Jurisdiction in rem or quasi in rem.

a. "When the action [for divorce] is limited solely to a dissolution of the marriage, it [is] a proceeding *in rem*, the *res* upon which the judgment operates being the *status* of the parties." [*Chamberlin v. Chamberlin,* 70 N.C. App. 474, 476, 319 S.E.2d 670, 671 (emphasis in original) (quoting 1 Lee's North Carolina Family Law § 41 (4th ed.

1979)), *review denied,* 312 N.C. 621, 323 S.E.2d 921 (1984). *See also Hart v. Hart,* 74 N.C. App. 1, 327 S.E.2d 631 (1985) (noting that historically divorce has been regarded as an action in rem).]

b. G.S. 1-75.8(3) provides for in rem and quasi in rem jurisdiction over actions for divorce or annulment involving a North Carolina resident.

c. While a defendant always must be served with process [G.S. 1-75.8.], a court may grant a divorce without in personam jurisdiction (i.e., "minimum contacts") over that defendant as long as the spouse seeking divorce is a resident of North Carolina. [2 Lee's North Carolina Family Law § 7.26 (5th ed. 1999). *See also Chamberlin v. Chamberlin,* 70 N.C. App. 474, 319 S.E.2d 670 (denying an out-of-state defendant's motion to dismiss for lack of personal jurisdiction and affirming district court's exercise of jurisdiction under G.S. 1-75.8(3) to grant absolute divorce), *review denied,* 312 N.C. 621, 323 S.E.2d 921 (1984).]

d. The court must have in personam jurisdiction (i.e., "minimum contacts") over the absent spouse to resolve other claims under G.S. Chapter 50 that may be joined with a claim for absolute divorce.

i. Action for alimony is an in personam action. [*Surratt v. Surratt,* 263 N.C. 466, 139 S.E.2d 720 (1965).] For more on the exercise of jurisdiction over an alimony claim, see *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2.

ii. Child support actions are in personam. [*Lynch v. Lynch*, 96 N.C. App. 601, 386 S.E.2d 607 (1989).] For more on the exercise of jurisdiction over a claim for child support, see *Procedure for Initial Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 2.

iii. Unlike a simple divorce action in which the court exercises jurisdiction over a **status**, in an equitable distribution (ED) action the court is exercising jurisdiction over **property interests**. [*Carroll v. Carroll*, 88 N.C. App. 453, 363 S.E.2d 872 (1988).] For more on the exercise of jurisdiction over an ED claim, see *Equitable Distribution Overview and Procedure*, Bench Book, Vol. 1, Chapter 6, Part 1.

e. In personam jurisdiction is not required if the action joined is for child custody.

i. In personam jurisdiction over a nonresident party is not required in a child custody proceeding. [G.S. 50A-201(c) (personal jurisdiction over a party or a child is not necessary to make a child custody determination); *Shingledecker v. Shingledecker*, 103 N.C. App. 783, 407 S.E.2d 589 (1991) (citing *Hart v. Hart*, 74 N.C. App. 1, 327 S.E.2d 631 (1985)) (rejecting nonresident wife's objection to court's exercise of jurisdiction in custody proceeding). *See also Coble v. Coble*, 229 N.C. 81, 47 S.E.2d 798 (1948) (child custody action is a proceeding in rem).]

ii. For more on the exercise of jurisdiction in a child custody action, see *Child Custody*, Bench Book, Vol. 1, Chapter 4.

3. Jurisdiction of the clerk to enter judgment of divorce.

a. Upon request of the plaintiff, the clerk of superior court may enter judgment of divorce when:

i. The plaintiff's only claim against the defendant is for absolute divorce or absolute divorce and the resumption of a former name;

ii. The defendant has been defaulted for failure to appear, the defendant has answered admitting the allegations of the complaint, or the defendant has filed a waiver of the right to answer; and

iii. The defendant is not an infant or incompetent person. [G.S. 50-10(e).]

b. Form AOC-CV-710, Judgment for Absolute Divorce before the Clerk, may be used.

B. Venue

1. Action for divorce 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 another statute. [G.S. 1-82; 50-3.]
2. Removal.
   a. The defendant has the right to remove an action for divorce to defendant's county of residence, either before or after judgment, if:
      i. Both plaintiff and defendant were residents of North Carolina when the action was filed,
      ii. Plaintiff stopped being a North Carolina resident after filing the action in his county of residence, and
      iii. Defendant does not reside in the county in which the 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).]
3. Venue for a divorce action brought by a plaintiff who is not a resident of North Carolina is in the county of defendant's residence. [G.S. 50-8. *See Smith v. Smith*, 56 N.C. App. 812, 290 S.E.2d 390 (1982) (plaintiff from Virginia filed in Mecklenburg County against defendant who resided in Rowan County; venue was in Rowan County but defendant waived objection).]
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).]
5. Venue provisions are not jurisdictional. Objection to venue is waived if not raised in writing before time for answering expires. [*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) (both G.S. 50-3 and 50-8 are venue statutes and are not jurisdictional and may be waived).]

6. Court of original venue is proper court for subsequent actions unless transfer allowed or objection to venue is waived. [*Latham v. Latham*, 74 N.C. App. 722, 329 S.E.2d 721 (1985) (where parties divorced, remarried, and separated again, court where first divorce action was filed retained jurisdiction over the minor child after second separation).]
7. Transfer of venue.
    a. The most common reasons for a change of venue are found in G.S. 1-83, which provides 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 improper).] or
            (a) "May change" venue as used in G.S. 1-83(1) has been interpreted to mean "must change" venue. [*Zetino-Cruz v. Benitez-Zetino*, 791 S.E.2d 100 (N.C. Ct. App. 2016) (quoting *Kiker v. Winfield*, 234 N.C. App. 363, 364, 759 S.E.2d 372, 373 (2014)).]
        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 in the statute).]
            (a) Change of venue under G.S. 1-83(2) is discretionary with the court. [*Zetino-Cruz v. Benitez-Zetino*, 791 S.E.2d 100 (N.C. Ct. App. 2016).]
            (b) G.S. 1-83(2) does not authorize a change of venue for the "convenience of the court." [*Zetino-Cruz v. Benitez-Zetino*, 791 S.E.2d 100, 108 (N.C. Ct. App. 2016).]
    b. G.S. 1-83 also provides that court may change the place of trial when action is for divorce and motion is made by plaintiff and defendant has not been personally served with summons. [G.S. 1-83(4).]
    c. 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.

C. Parties

1. Necessary parties.
    a. Spouses are the only necessary parties to a divorce action. [*Thomas v. Thomas*, 43 N.C. App. 638, 260 S.E.2d 163 (1979) (there are but two necessary parties to an action for divorce: husband and wife).]
    b. Children are neither proper nor necessary parties to an action for divorce between their parents. [*Thomas v. Thomas*, 43 N.C. App. 638, 260 S.E.2d 163 (1979).]
2. Incompetency.
    a. G.S. 50-22 authorizes the following individuals to commence, defend, maintain, arbitrate, mediate, or settle any action authorized by G.S. Chapter 50 on behalf of an incompetent spouse, subject to the limitation in Section I.C.2.b, below:

i. A duly appointed agent who has the power to sue and defend civil actions on behalf of an incompetent spouse and who has been appointed pursuant to a durable power of attorney executed in accordance with G.S. Chapter 32C;

ii. A guardian appointed in accordance with G.S. Chapter 35A; or

iii. A guardian ad litem appointed in accordance with G.S. 1A-1, Rules 17 and 25(b). [G.S. 50-22.]

b. Only a competent spouse may file an action for absolute divorce from an incompetent spouse. [G.S. 50-22; *Freeman v. Freeman,* 34 N.C. App. 301, 237 S.E.2d 857 (1977) (considering whether general guardian could maintain an action for absolute divorce on behalf of an incompetent person, stating that divorce action is so personal and volitional that the general rule is, absent statutory authority, an action for divorce cannot be maintained by a general guardian on behalf of an incompetent person).]

i. In an action by a competent spouse for absolute divorce, the incompetent spouse must be represented by one of the persons listed in Section I.C.2.a, above. [G.S. 1A-1, Rule 17(b)(2); G.S. 50-22.]

c. This is different than annulment. See Section III.D.2.b.i, below, discussing annulment actions brought on behalf of incompetents.

3. Effect of death of a party.

a. G.S. 28A-18-1(a)(3) provides that upon the death of a party, the right to prosecute or defend an action then existing survives to the party's personal representative, except causes of action where the relief sought could not be enjoyed, or where granting it would be nugatory after death. [See also G.S. 1A-1, Rule 25(a), providing that no action abates by reason of the death of a party if the action survives.]

b. A pending action for absolute divorce does not survive the death of a party. [*Caldwell v. Caldwell,* 93 N.C. App. 740, 379 S.E.2d 271 (no error when trial court dismissed husband's action for absolute divorce when husband died before judgment was entered), *review denied,* 325 N.C. 270, 384 S.E.2d 513 (1989), *superseded by statute on other grounds as stated in Dunevant v. Dunevant*, 142 N.C. App. 169, 542 S.E.2d 242 (2001).]

c. A valid divorce decree that deals exclusively with the parties' marital status may not be set aside following death of one of the parties thereto. [*See Dunevant v. Dunevant*, 142 N.C. App. 169, 542 S.E.2d 242 (2001) (judgment of absolute divorce entered, wife moved to set aside as void, husband died after hearing on the motion but before court ruled thereon; trial court erred when it set aside divorce decree after husband's death, as proceeding to set aside divorce decree abated upon husband's death).] This rule has been applied even when the trial court wrongly denied a divorce. [*See Elmore v. Elmore,* 67 N.C. App. 661, 313 S.E.2d 904 (1984) (even though the court of appeals believed that the trial court "clearly" erred in granting wife's motion for directed verdict, thus denying husband a divorce, when husband died pending appeal, court was compelled to hold that husband's action abated and to dismiss his appeal).]

d. However, a divorce decree that is void due to lack of service on the defendant can be set aside after the death of a party. [*Freeman v. Freeman,* 155 N.C. App. 603, 573 S.E.2d 708 (2002) (no error when trial court granted relief from a judgment of divorce pursuant to G.S. 1A-1, Rule 60(b)(4) after husband's death when wife

presented clear, unequivocal, and convincing evidence that she had not been served with the divorce complaint, nor known about the divorce), *review denied,* 357 N.C. 250, 582 S.E.2d 32 (2003).]

e. The court of appeals also has indicated that an action to set aside a divorce judgment after the death of a party may proceed when the divorce judgment affects the property rights of the parties. [*Dunevant v. Dunevant*, 142 N.C. App. 169, 542 S.E.2d 242 (2001) (quoting two Alabama cases finding that, upon proper motion, a trial court had jurisdiction to amend, alter, or modify a divorce decree that dealt with property rights after the death of one of the parties thereto, even though it had no jurisdiction to change the divorced status of the parties). *See also Allred v. Tucci,* 85 N.C. App. 138, 354 S.E.2d 291 (a proceeding to set aside an invalid divorce decree is not barred by the death of one of the spouses where property rights are involved), *review denied,* 320 N.C. 166, 358 S.E.2d 47 (1987).]

f. For more on the effect of death of a spouse on an ED claim, see *Equitable Distribution Overview and Procedure*, Bench Book, Vol. 1, Chapter 6, Part 1.

D. Grounds

1. Plaintiff and defendant have lived separate and apart for three years by reason of the incurable insanity of one of them. [G.S. 50-5.1.]

   a. Only the sane spouse may petition for divorce. [G.S. 50-5.1.]

   b. G.S. 50-5.1 provides the sole remedy for a plaintiff seeking divorce from an incurably insane spouse. [*Scott v. Scott*, 336 N.C. 284, 442 S.E.2d 493 (1994).] G.S. 50-5.1 is not simply an alternative to G.S. 50-6.

   c. In making findings on incurable insanity, the trial court is entitled to consider both expert and nonexpert testimony. [*Scott v. Scott*, 336 N.C. 284, 442 S.E.2d 493 (1994).]

   d. "Incurable insanity" means mental impairment to such an extent that the spouse does not understand what he is engaged in doing and the nature and consequences of the act. [*Scott v. Scott*, 106 N.C. App. 606, 417 S.E.2d 818 (1992) (state supreme court rejected as the definition for incurable insanity the definition of "severe and persistent mental illness" found elsewhere in the General Statutes), *aff'd,* 336 N.C. 284, 292, 442 S.E.2d 493, 497 (1994).]

   e. There are numerous provisos and evidentiary provisions in the statute that specify the methods by which the spouse's insanity may be proved and specifically state which treating professionals can provide such proof. [G.S. 50-5.1.]

   f. If the judgment grants a divorce on the grounds of incurable insanity under G.S. 50-5.1, and if the insane defendant has insufficient income and property to provide for his or her care and maintenance, the court must require the plaintiff to provide for the care and maintenance of the defendant for the defendant's lifetime. [G.S. 50-5.1.]

   g. For a jury instruction on this ground for divorce, see N.C.P.I.—Civil 815.44—Divorce—Absolute—Issue of Incurable Insanity. *See also* N.C.P.I.—Civil 815.46—Divorce—Absolute—Issue of Incurable Insanity—Defense of Contributory Conduct of Sane Spouse.

2. Plaintiff and defendant have lived separate and apart for one year and plaintiff or defendant has resided in the state for a period of at least six months. [G.S. 50-6.]

    a. For divorces pursuant to G.S. 50-6, North Carolina is a "no-fault" jurisdiction, making it necessary to show only that the parties have achieved the required periods of residency and separation to obtain a divorce under G.S. 50-6. [*Morris v. Morris,* 45 N.C. App. 69, 262 S.E.2d 359 (1980).] Computation of the required periods may be pursuant to G.S. 1A-1, Rule 6(a). [G.S. 1-593 (the time within which an act is to be done, as provided by law, shall be computed in the manner prescribed by Rule 6(a) of the N.C. Rules of Civil Procedure); G.S. 1A-1, Rule 1 (Rules of Civil Procedure shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature, except when a differing procedure is prescribed by statute).]

        i. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, including rules, orders, or statutes respecting publication of notices, the day of the act, event, default, or publication after which the designated period of time begins to run is not to be included. [G.S. 1A-1, Rule 6(a).]

        ii. Applying Rule 6 to the requirement that the parties have lived separate and apart for one year means that the parties must have lived separate and apart for a year and a day before a complaint can be filed alleging that the parties have lived separate and apart for one year (the year and a day rule).

    b. If the defendant in an action under G.S. 50-6 asserts incurable insanity as an affirmative defense and meets her burden of proof on that issue, an action under G.S. 50-6 is barred and the action for divorce must be pursuant to G.S. 50-5.1. [*Scott v. Scott,* 336 N.C. 284, 442 S.E.2d 493 (1994).]

    c. Requirement in G.S. 50-6 that parties live "separate and apart."

        i. The words "separate and apart" in G.S. 50-6 require both a physical separation and an intention on the part of at least one of the parties to cease matrimonial cohabitation. [*Smith v. Smith,* 151 N.C. App. 130, 564 S.E.2d 591 (2002); *Myers v. Myers*, 62 N.C. App. 291, 302 S.E.2d 476 (1983).]

        ii. One party's intent to cease cohabitation for the statutory period of one year is sufficient to grant that party a decree of absolute divorce, even if the other spouse was not aware of that intent. [*Smith v. Smith,* 151 N.C. App. 130, 564 S.E.2d 591 (2002).]

        iii. The requirement that parties live separate and apart for one year applies to the year prior to institution of the suit. [*Bruce v. Bruce,* 79 N.C. App. 579, 339 S.E.2d 855 (citing *Myers v. Myers*, 62 N.C. App. 291, 302 S.E.2d 476 (1983)), *review denied*, 317 N.C. 701, 347 S.E.2d 36 (1986).]

        iv. Cessation of sexual relations does not alone constitute a separation. [*Lin v. Lin*, 108 N.C. App. 772, 425 S.E.2d 9 (1993).]

        v. "It is well-settled that there is no separation where 'the parties have held themselves out as husband and wife living together, nor when the association between them has been of such character as to induce others who observe them to regard them as living together in the ordinary acceptation of that descriptive phrase.' "

[*Lin v. Lin*, 108 N.C. App. 772, 775, 425 S.E.2d 9, 11 (1993) (citing *In re Estate of Adamee,* 291 N.C. 386, 230 S.E.2d 541 (1976)).]

vi. A valid separation agreement legalizes separation from and after the date thereof. [*Harrington v. Harrington*, 286 N.C. 260, 210 S.E.2d 190 (1974) (citing *Richardson v. Richardson,* 257 N.C. 705, 127 S.E.2d 525 (1962)), *superseded on other grounds by statute as stated in Smith v. Smith*, 42 N.C. App. 246, 256 S.E.2d 282 (1979).]

vii. Resumption of the marital relationship during the alleged year's separation interrupts the period of separation. [2 Lee's North Carolina Family Law § 7.11 (5th ed. 1999); see Section I.E.1.b, below.]

viii. For a jury instruction on the one-year separation requirement, see N.C.P.I.—Civil 815.40—Divorce—Absolute—Issue of One Year's Separation.

d. Residency requirement in G.S. 50-6.

i. The six-month residency requirement means the six months next preceding commencement of the action. [*Bruce v. Bruce,* 79 N.C. App. 579, 339 S.E.2d 855 (citing *Denson v. Denson*, 255 N.C. 703, 122 S.E.2d 507 (1961)), *review denied*, 317 N.C. 701, 347 S.E.2d 36 (1986).]

ii. The residency requirement requires both that either the plaintiff or defendant has physically resided in North Carolina for at least six months before initiating a divorce proceeding and that that party intends to remain in North Carolina permanently or for an indefinite length of time. [*Andris v. Andris*, 65 N.C. App. 688, 309 S.E.2d 570 (1983) (citing *State v. Williams,* 224 N.C. 183, 29 S.E.2d 744 (1944)); *Huston v. Huston,* 212 N.C. App. 235, 713 S.E.2d 250 (**unpublished**) (citing *Williams*), *review denied,* 365 N.C. 338, 717 S.E.2d 392 (2011).]

iii. While no definitive list of factors exists, a court considering whether a party has the intent to remain indefinitely should review whether the party has established a permanent address in North Carolina, has obtained a North Carolina driver's license, has paid North Carolina taxes, has registered a vehicle in North Carolina, or has registered to vote in North Carolina. Subjective statements of the party also are relevant. [*Huston v. Huston,* 212 N.C. App. 235, 713 S.E.2d 250 (**unpublished**) (citing *Martin v. Martin,* 253 N.C. 704, 118 S.E.2d 29 (1961)) (using totality of the circumstances to decide residency issue), *review denied,* 365 N.C. 338, 717 S.E.2d 392 (2011).]

iv. Plaintiff servicemember satisfied the residency requirement based on unchallenged findings that the parties lived in North Carolina for six months prior to the filing of wife's action; the parties owned real property in Fayetteville; husband has "continued to reside in North Carolina since the filing of" wife's action; husband "has a North Carolina driver's license and has registered his vehicles in the State of North Carolina;" husband "paid property tax, both real and personal, in the State of North Carolina;" and "it was [husband's] present intent to remain a resident of North Carolina for the indefinite future." [*Huston v. Huston,* 212 N.C. App. 235, 713 S.E.2d 250 (**unpublished**) (not paginated on Westlaw) (that husband was registered to vote and had paid state income taxes in Alabama, and that he had alleged in a related case filed in Alabama that he

was a "bona fide" Alabama resident, were relevant factors but did not preclude a determination, based on the totality of the circumstances, that husband met the N.C. statutory residency requirement), *review denied,* 365 N.C. 338, 717 S.E.2d 392 (2011).]

E. Defenses

1. Defenses available in an action for an absolute divorce.
    a. Marriage not recognized as valid in North Carolina. See discussion of recognition of same-sex marriage in Section I.A.1.g, above.
    b. Resumption of marital relations during the alleged year's separation. [G.S. 50-6.]
        i. Isolated incidents of sexual intercourse between the parties do not toll the statutory one-year period required for absolute divorce. [G.S. 50-6.]
        ii. Whether there has been a resumption of marital relations during the period of separation shall be determined by the totality of the circumstances as provided in G.S. 52-10.2. [G.S. 50-6.]
        iii. "Totality of the circumstances" is a standard that focuses on all the circumstances of a particular case, rather than on any one factor. [*Fletcher v. Fletcher,* 123 N.C. App. 744, 474 S.E.2d 802 (1996) (definition of "totality of the circumstances" used in search and seizure cases applicable for purposes of G.S. 52-10.2 and 50-6), *review denied,* 345 N.C. 640, 483 S.E.2d 706 (1997).]
        iv. There may be a resumption of marital relations even though it lasts only a short time. [*See Casella v. Estate of Casella*, 200 N.C. App. 24, 682 S.E.2d 455 (2009) (finding that parties reconciled for three-week period before husband's death).]
        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 sought rescission of a separation agreement based on resumption of marital relations but court found wife never moved back into or resumed cohabitation in the marital home but instead maintained her separate residence; time period involved was brief; there was 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 the 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 parties lived together for four months, had sexual relations, and held themselves out as husband and wife. [*Schultz v. Schultz,* 107 N.C. App. 366, 420 S.E.2d 186 (1992) (husband sought to modify his obligations under a consent judgment based on the parties' reconciliation), *review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993).]
        vii. *But see Lange v. Lange,* 164 N.C. App. 779, 596 S.E.2d 905 (2004) (**unpublished**) (trial court did not err in concluding that although the parties both resided in

the marital residence, the parties did not reconcile when husband lived in a separate apartment within the house pursuant to a lease between the parties).

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

ix. See *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2 for effect of reconciliation on alimony obligations.

2. Defenses not available.

a. There is no statute of limitations for absolute divorce under G.S. 50-6 because separation is a type of "continuing offense." [*Bruce v. Bruce,* 79 N.C. App. 579, 339 S.E.2d 855, *review denied,* 317 N.C. 701, 347 S.E.2d 36 (1986).]

b. Neither res judicata, recrimination, nor conduct that constitutes a ground for divorce from bed and board is a defense to an action for absolute divorce. [G.S. 50-6. *See Boone v. Boone,* 44 N.C. App. 79, 259 S.E.2d 921 (1979) (after G.S. 50-6 was amended in 1977 by S.L 1977-817 and S.L. 1977-1190, recriminatory defenses can no longer be asserted as defenses in an action for absolute divorce).]

F. Procedure

1. Service.

a. A divorce granted without proper service of process upon the defendant is void when the defendant does not appear in the action or does not otherwise waive service of process. [*Chen v. Zou*, 244 N.C. App. 14, 780 S.E.2d 571 (2015) (judgment of divorce was void and trial court properly granted relief from the judgment pursuant to G.S. 1A-1, Rule 60(b)(4) when it was entered without personal jurisdiction over defendant because of improper service by publication in Mecklenburg County; plaintiff had contact with defendant before and after the filing of the divorce action and had been told by defendant and others that defendant was in New York City but made no effort to obtain defendant's New York address; moreover, even if plaintiff had diligently tried to obtain defendant's address, the result would be the same since reliable information concerning defendant's location would require service by publication in New York City); *Freeman v. Freeman,* 155 N.C. App. 603, 573 S.E.2d 708 (2002) (no error when trial court set aside a judgment of divorce pursuant to G.S. 1A-1, Rule 60(b)(4) after husband's death when wife presented clear, unequivocal, and convincing evidence that she had not been served with the divorce complaint, nor known about the divorce), *review denied,* 357 N.C. 250, 582 S.E.2d 32 (2003).]

2. Content of the complaint for absolute divorce.

a. The complaint must:

i. Include a statement that the plaintiff or defendant has been a resident of North Carolina for at least six months prior to the filing of the complaint; [G.S. 50-6; 50-8.]

ii. Allege that the parties have lived separate and apart for one year; [G.S. 50-6. *See Myers v. Myers,* 62 N.C. App. 291, 302 S.E.2d 476 (1983) (the complaint must state a date of separation to establish the general time frame for divorce based on a year's separation).]

iii. Set out the names and ages of any minor children of the marriage or the fact that there are no children of the marriage; [G.S. 50-8.]

(a) The statute requires the names and ages of any children of a party seeking divorce so that the court may protect the interests of such children if the parties have failed to do so. [*Powers v. Parisher,* 104 N.C. App. 400, 409 S.E.2d 725 (1991), *review denied,* 331 N.C. 286, 417 S.E.2d 254 (1992).]

(b) The requirement that, when there were minor children, the complaint include the Social Security numbers of plaintiff and defendant, if known, was deleted by S.L. 2013-93, § 1, effective June 12, 2013.

iv. If custody is being sought, include information required by G.S. 50A-209 (Uniform Child Custody Jurisdiction and Enforcement Act) in the first pleading or an attached affidavit;

v. Be verified;

(a) The complaint must be verified [G.S. 50-8; 1A-1, Rule 11(b).] when it is filed. [*Boyd v. Boyd,* 61 N.C. App. 334, 300 S.E.2d 569 (1983) (not sufficient to obtain verification before the complaint and summons are served on the defendant).]

(b) An order for divorce entered pursuant to an unverified complaint is void for want of subject matter jurisdiction. [*Arispe v. Arispe,* 165 N.C. App. 904, 602 S.E.2d 727 (2004) (**unpublished**). *See also In re T.R.P.*, 360 N.C. 588, 636 S.E.2d 787 (2006) (failure to verify a juvenile petition deprived the trial court of subject matter jurisdiction over all stages of the juvenile case).]

vi. Allege the existence of the marriage. [2 Lee's North Carolina Family Law § 7.32 (5th ed. 1999).]

b. The complaint may include a party's request to adopt a maiden name or other surname as set out in G.S. 50-12. [G.S. 50-12(d).]

c. The complaint does not have to allege:

i. That one of the parties intended the separation to be permanent; [*Sharp v. Sharp*, 84 N.C. App. 128, 351 S.E.2d 799 (1987).]

ii. The cause of the separation, that it was without fault on the part of the plaintiff, or that it was by mutual agreement of the parties. [*Taylor v. Taylor,* 225 N.C. 80, 33 S.E.2d 492 (1945).]

d. The material facts in a complaint for a divorce are deemed denied. [G.S. 50-10(a).]

i. Allegations in a counterclaim for divorce are deemed denied pursuant to G.S. 50-10(a). [*Phillips v. Phillips,* 185 N.C. App. 238, 647 S.E.2d 481 (2007) (citing *Skamarak v. Skamarak,* 81 N.C. App. 125, 343 S.E.2d 559 (1986)) (plaintiff made no admission of marital misconduct by not responding to defendant's counterclaim for alimony filed in divorce case, as G.S. 50-10 applies to deny all allegations), *aff'd per curiam*, 362 N.C. 171, 655 S.E.2d 350 (2008).]

ii. Divorce judgment cannot be entered by default. [*Bruce v. Bruce,* 79 N.C. App. 579, 339 S.E.2d 855, *review denied*, 317 N.C. 701, 347 S.E.2d 36 (1986); G.S. 50-10(d) (court to find facts even if granting summary judgment). See Section I.F.6, below. See also Section I.A.3, above, allowing clerk to enter judgment

of divorce when, among other things, defendant has been defaulted for failure to appear.]

3. Jury trial or trial before the judge.
   a. A party has the right to demand a jury trial as provided in G.S. 1A-1, Rules 38 and 39. [G.S. 50-10(a), (c). *See McCall v McCall,* 138 N.C. App. 706, 531 S.E.2d 894 (2000) (recognizing that under G.S. 50-10(a) and (c), whether parties have been separated at least one year is an issue of fact triable by a jury in an action for divorce).]
   b. Summary judgment is applicable to actions for absolute divorce for the purpose of determining whether any genuine issue of material fact remains for trial by judge or jury. [G.S. 50-10(d) (providing even in summary judgment, court must find all facts necessary for divorce); see Section I.F.7, below, on summary judgment.]
   c. Cases decided before the 1985 amendment to G.S. 50-10 providing for summary judgment in actions for divorce hold that a party who has requested trial by jury and has not waived that right is entitled to a trial by jury, even when the facts are not in dispute. [*Pettus v. Pettus,* 62 N.C. App. 141, 302 S.E.2d 261 (1983); *Morris v. Morris,* 45 N.C. App. 69, 262 S.E.2d 359 (1980); see Section I.F.7, below, on summary judgment.]
4. Evidence.
   a. The trial court properly excluded evidence of wife's health and her prospects for obtaining medical insurance following divorce since those matters were not relevant to determination of whether to grant or deny an absolute divorce. [*Fletcher v. Fletcher,* 104 N.C. App. 225, 408 S.E.2d 753 (1991).]
5. Other claims.
   a. An alimony claim may be asserted in any action brought pursuant to Chapter 50 of the General Statutes, including an action for divorce, whether absolute or from bed and board. [G.S. 50-16.1A(1); 50-16.3A(a).]
   b. A claim for equitable distribution may be filed with any other Chapter 50 action or as a motion in the cause as provided by G.S. 50-11(e) or (f). [G.S. 50-21(a).]
   c. A custody claim may be joined with, asserted as a cross action, brought by a motion in the cause, or be maintained on the court's own motion, in an action for divorce, either absolute or from bed and board, or in an action for annulment or an action for alimony without divorce. [G.S. 50-13.5(b).]
      i. If an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce involving the child's parents is pending, until a final judgment is entered, an action for custody must be filed in that action. [G.S. 50-13.5(f).]
   d. An action for child support may be joined with, asserted as a cross action, brought by a motion in the cause (either before or after judgment), or be maintained on the court's own motion, in an action for divorce, either absolute or from bed and board, or in an action for annulment or an action for alimony without divorce. [G.S. 50-13.5(b); *Bottomley v. Bottomley*, 82 N.C. App. 231, 346 S.E.2d 317 (1986) (plaintiff-husband not precluded from having his child support obligation determined through a motion in the cause in the divorce action by the fact that the court had not previously entered support orders in that action).]

i. If an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce involving the child's parents is pending, until a final judgment is entered, an action for child support and custody must be filed in that action. [G.S. 50-13.5(f). *See Holbrook v. Holbrook,* 38 N.C. App. 303, 247 S.E.2d 923 (1978) (because husband's divorce and custody action was pending in Forsyth County when wife filed custody action in Guilford County, Guilford County was without jurisdiction), *review denied,* 296 N.C. 411, 251 S.E.2d 469, 470 (1979).]

ii. If an action for custody and support is pending and an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce is subsequently instituted in the same or in another county, the court having jurisdiction of the prior action may, in its discretion, direct that the actions be consolidated, and in the event consolidation is ordered, must determine in which court the consolidated action will be heard. [G.S. 50-13.5(f).]

6. Judgment by default.

   a. A judgment for an absolute divorce cannot be entered by default. [*Bruce v. Bruce,* 79 N.C. App. 579, 339 S.E.2d 855 (noting the 1985 legislation making G.S. 1A-1, Rule 56 applicable to absolute divorce actions pursuant to G.S. 50-6), *review denied*, 317 N.C. 701, 347 S.E.2d 36 (1986); G.S. 50-10(d) (court to find facts even if granting summary judgment).]

   b. But the clerk is permitted to enter judgment of divorce when, among other things, the defendant has been defaulted for failure to appear. [*See* G.S. 50-10(e); see Section I.A.3, above.]

7. Summary judgment.

   a. Summary judgment is applicable to actions for absolute divorce for the purpose of determining whether any genuine issue of material fact remains for trial. [G.S. 50-10(d).]

   b. The court may enter a judgment of absolute divorce pursuant to G.S. 1A-1, Rule 56, but the court must find all requisite facts from nontestimonial evidence presented by affidavit, verified motion, or other verified pleading. [G.S. 50-10(d).]

   c. A plaintiff may move for summary judgment after the expiration of thirty days from the commencement of the action and must serve the motion at least ten days before the time fixed for the hearing. [G.S. 1A-1, Rule 56(a), (c).] A defendant may move for summary judgment at any time after commencement of the case. [G.S. 1A-1, Rule 56(b).] For a discussion of the requirement of a hearing when divorce is by summary judgment, see Cheryl Howell, *Does Summary Judgment Divorce Require a Hearing?* UNC Sch. of Gov't: On the Civil Side Blog (May 6, 2016), http://civil.sog.unc.edu/does-summary-judgment-divorce-require-a-hearing.

   d. A notice of hearing on a motion for summary judgment was adequate when it stated the date but not the time of the hearing. [*Wilson v. Wilson*, 191 N.C. App. 789, 666 S.E.2d 653 (2008).]

   e. If the court determines that there are no genuine issues of material fact and grants a divorce on summary judgment, the court must make findings of fact as required by G.S. 50-10. [G.S. 50-10(d); *Khaja v. Husna*, 243 N.C. App. 330, 341–42, 777 S.E.2d

781, 788 (2015) (pursuant to G.S. 50-6, "to grant a summary judgment divorce the trial court need only find that there was no genuine issue of material fact that the parties had been separated for a year, although the exact date is not a necessary finding as long as the time period was a year or more, and that one of the parties had resided in North Carolina for six months preceding the filing of the complaint"), *stay denied*, 368 N.C. 605, 778 S.E.2d 438, *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).]

f. A general denial of the allegations in a complaint does not establish a genuine issue of material fact for trial sufficient to defeat summary judgment. [*Daniel v. Daniel,* 132 N.C. App. 217, 510 S.E.2d 689 (1999).]

g. A trial court is not required to consider a defendant's unverified answer for purposes of a summary judgment motion. [*Venture Properties I v. Anderson*, 120 N.C. App. 852, 463 S.E.2d 795 (1995) (certain verified pleadings may be treated as affidavits for the purposes of a motion for summary judgment if they meet the requirements in G.S. 1A-1, Rule 56(e)), *review denied*, 342 N.C. 898, 467 S.E.2d 908 (1996).]

8. The reference procedure in G.S. 1A-1, Rule 53 is not available in an action for divorce or divorce from bed and board or in actions for alimony without divorce or actions in which a ground of annulment or divorce is in issue. [G.S. 1A-1, Rule 53(a)(1).]

9. Electronic media and still photography coverage of divorce proceedings is expressly prohibited. [Gen. R. Prac. Super. & Dist. Cts. 15(b)(2).]

10. In an action for absolute divorce, if either or both of the parties has sought and obtained marital counseling from persons listed in G.S. 8-53.6, the person or persons rendering counseling are not competent to testify in the divorce action concerning information acquired while rendering the counseling. [G.S. 8-53.6.]

G. Judgment

1. Findings of fact.

a. The trial court may not enter a judgment of divorce until the judge or jury finds the material facts. [G.S. 50-10(a). *See Morris v. Morris,* 45 N.C. App. 69, 262 S.E.2d 359 (1980) (noting that the application to G.S. 50-6 divorces of the G.S. 50-10 requirement that the factual allegations supporting the G.S. 50-6 divorce must be deemed denied requires a finding of the necessary facts).]

b. Material facts within the meaning G.S. 50-10(a) include not only the jurisdictional facts required by G.S. 50-8 to be set forth in the complaint, but also facts constituting the grounds for the claim for relief. [*Allred v. Tucci,* 85 N.C. App. 138, 354 S.E.2d 291, *review denied,* 320 N.C. 166, 358 S.E.2d 47 (1987).]

c. If the court determines that there are no genuine issues of material fact and grants a divorce on summary judgment, the court must make findings of fact as required by G.S. 50-10. [G.S. 50-10(d); *Khaja v. Husna*, 243 N.C. App. 330, 341–42, 777 S.E.2d 781, 788 (2015) (pursuant to G.S. 50-6, "to grant a summary judgment divorce the trial court need only find that there was no genuine issue of material fact that the parties had been separated for a year, although the exact date is not a necessary finding as long as the time period was a year or more, and that one of the parties had

resided in North Carolina for six months preceding the filing of the complaint"), *stay denied*, 368 N.C. 605, 778 S.E.2d 438, *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).]

d. The trial court erred when the order granting a divorce pursuant to plaintiff's summary judgment motion made no findings of fact and conclusions of law regarding service of process on, and jurisdiction over, defendant after defendant requested specific findings on those matters pursuant to G.S. 1A-1, Rule 52. [*Agbemavor v. Keteku,* 177 N.C. App. 546, 629 S.E.2d 337 (2006) (noting that Rule 52 does not generally apply to the decision on a motion for summary judgment but that defendant had requested specific findings under Rule 52 if the court denied defendant's Rule 12 motion to dismiss).]

e. Declarations in divorce judgment as to plaintiff's residency, that the parties had separated with the intent to live permanently separate and apart, and that they had lived separate and apart for more than a year were more in the nature of "findings of facts" and should be treated as such, even though denominated as conclusions of law. [*Dunevant v. Dunevant*, 142 N.C. App. 169, 542 S.E.2d 242 (2001) (divorce judgment not void for lack of findings).]

2. Contents of the judgment.

a. A judgment of divorce cannot be entered by consent, stipulation, or admission. [*Edwards v. Edwards,* 42 N.C. App. 301, 256 S.E.2d 728 (1979).]

b. No judgment of divorce shall be entered until all facts required by G.S. 50-8 are found by a judge or jury. [G.S. 50-10(a).] This is true even when summary judgment is granted. [G.S. 50-10(d).] See Section I.F.7, above, on summary judgment.

c. The requirement that, when there were minor children, he complaint include the Social Security numbers of plaintiff and defendant, if known, was deleted by S.L. 2013-93, § 1, effective June 12, 2013.

d. A judgment for absolute divorce should find that:

i. The defendant was properly served with the summons and complaint as required by the Rules of Civil Procedure;

ii. The defendant is not an infant or an incompetent;

iii. The defendant was served with notice of the hearing or trial as required by the Rules of Civil Procedure or was not served because the defendant failed to make an appearance or waived right to receive notice; [**NOTE:** G.S. 50-10(b) provides that notice of trial is not required when the defendant has not made an appearance in the action.]

iv. The parties were married;

v. The plaintiff or defendant has been a resident of North Carolina for more than six months immediately preceding the commencement of the action;

vi. On the date the complaint was filed, the parties had lived separate and apart for more than one year;

(a) The divorce judgment does not need to contain the exact date of separation. The only fact at issue is whether the parties have been separated for at

least one year. [*Stafford v. Stafford,* 351 N.C. 94, 520 S.E.2d 785 (1999) (per curiam) (under date put forth by either party, the parties had lived separate and apart for a year); *McCall v. McCall,* 138 N.C. App. 706, 531 S.E.2d 894 (2000) (recognizing that under G.S. 50-10(a) and (c), whether parties have been separated for at least one year is an issue of fact triable by a jury in an action for divorce).]

(b) If the divorce judgment does contain a date of separation (DOS) as a finding of fact, the DOS finding may not be binding in later proceedings. [*See Stafford v. Stafford,* 351 N.C. 94, 95, 520 S.E.2d 785, 786 (1999) (per curiam) (appeal was taken of a final divorce judgment to resolve the trial court's determination of the DOS; in holding that the appeal was interlocutory, the North Carolina Supreme Court determined that the DOS in the divorce judgment would not be binding on the trial court in the pending equitable distribution proceeding, stating that the "contested fact concerning the date of separation is an issue in the equitable distribution claim"); *Khaja v. Husna*, 243 N.C. App. 330, 350, 777 S.E.2d 781, 792–93 (2015) (trial court erred when it relied on the DOS found in a summary judgment divorce in a subsequent alimony proceeding; trial court entering the alimony order properly considered the finding that the parties had been separate and apart for a year but improperly used "unnecessary findings of fact in the Divorce Judgment . . . includ[ing] the date of separation . . . as this was a contested issue"), *stay denied*, 368 N.C. 605, 778 S.E.2d 438, *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) For a discussion of the use in later proceedings of a date of separation found as fact in a divorce judgment, see Cheryl Howell, *Equitable Distribution: Can We Use the Date of Separation from the Divorce Judgment?* UNC Sch. of Gov't: On the Civil Side Blog (Aug. 5, 2016), http://civil.sog.unc.edu/equitable-distribution-can-we-use-the-date-of-separation-from-the-divorce-judgment.

vii. At the time of separation, either the plaintiff or the defendant had the intent to remain continuously separate and apart from the other party; and

viii. The parties have lived continuously separate and apart since their separation without resuming the marital relationship.

e. A judgment granting an absolute divorce should conclude that:

i. The trial court had jurisdiction over the subject matter and over the parties and

ii. The plaintiff is entitled to an absolute divorce based on one year's separation.

f. A judgment granting an absolute divorce may, if appropriate:

i. Incorporate a separation agreement; [See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.]

ii. Provide for child custody and support when the court has jurisdiction and upon proper pleadings and notice. [G.S. 50-11.2.] The court may enter an order for child custody and support on its own motion; [G.S. 50-13.5(b)(6). See *Child*

Custody, Bench Book, Vol. 1, Chapter 4 and *Procedure for Initial Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 2.]

iii. Grant a party's request to adopt a maiden or other surname as set out in G.S. 50-12. [G.S. 50-12(d).]

g. If the judgment grants a divorce on the grounds of incurable insanity under G.S. 50-5.1, and if the insane defendant has insufficient income and property to provide for his or her care and maintenance, the court must require the plaintiff to provide for the care and maintenance of the defendant for the defendant's lifetime. [G.S. 50-5.1.]

3. Effect of a judgment of absolute divorce.

a. After a judgment of absolute divorce, all rights arising out of the marriage cease and either party may marry again without restriction. [G.S. 50-11(a).]

b. On the legitimacy of a child.

i. A judgment of divorce shall not cause any child to be treated as a child born out of wedlock. [G.S. 50-11(b), *amended by* S.L. 2013-198, § 24, effective June 26, 2013.]

c. On paternity of a child.

i. A finding in a divorce decree that a child was born or conceived during the parties' marriage may, under certain circumstances, be a binding judicial determination between the parties with respect to the husband's paternity. [*See Rice v. Rice*, 147 N.C. App. 505, 555 S.E.2d 924 (2001) (holding that divorce order, incorporating a separation agreement in which the parties admitted that three children were born of their marriage and which included provisions related to child custody and support, judicially established the rights and obligations of the parties and determined all issues of paternity); *Withrow v. Webb,* 53 N.C. App. 67, 280 S.E.2d 22 (1981) (where husband admitted in answer to wife's complaint that one child was born of the marriage, husband alleged in his complaint for divorce that one child was born of the marriage, and judgment of divorce found that one child was born of marriage and awarded husband visitation and ordered him to pay child support, husband was barred by res judicata from raising paternity issue five years later).]

ii. However, a third party could not rely on a finding in a divorce decree that a child was born or conceived during the parties' marriage as a binding judicial determination that the husband is the child's father when paternity was not an issue actually litigated and necessary to the uncontested divorce action. [*Guilford Cty. ex rel. Gardner v. Davis,* 123 N.C. App. 527, 473 S.E.2d 640 (1996) (putative father could not rely on the divorce judgment as an adjudication of mother's husband as the biological father of the minor child as that judgment merely relied upon the presumption of legitimacy and paternity was not litigated).]

d. On a cause of action for alimony.

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. [G.S. 50-11(c); 50-6; *Stark v. Ratashara,* 177 N.C. App. 449, 628 S.E.2d 471 (because wife had

filed no counterclaim or separate action for alimony before entry of divorce judgment, alimony claim lost), *review denied,* 360 N.C. 536, 633 S.E.2d 826 (2006); *Magaro v. Magaro,* 206 N.C. App. 762, 699 S.E.2d 141 (2010) (**unpublished**) (citing *Stark*) (under G.S. 50-11(c), a judgment for absolute divorce may not be modified to provide for alimony when alimony had not been requested before entry of that judgment; even if the parties consent to the alimony provision, court lacks subject matter jurisdiction).]

ii. 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).]

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

iv. For more on the relationship of alimony to entry of a divorce judgment, see *Post-separation Support and Alimony*, Bench Book, Vol. 1, Chapter 2.

e. On a cause of action for child support.

i. After a final judgment has been entered in an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce involving a minor child's parents, the prior action for divorce, etc. does not preclude either parent from filing a separate action seeking child support in the same county or district or in a different county or district unless the prior divorce, annulment, or alimony judgment also determined the parents' child support obligations. [*See Powers v. Parisher,* 104 N.C. App. 400, 409 S.E.2d 725 (1991) (husband's prior action that sought only an absolute divorce, to which there was no answer or counterclaim, did not preclude wife's later independent child support proceeding), *review denied,* 331 N.C. 286, 417 S.E.2d 254 (1992).] *Cf.* G.S. 50-13.5(f), discussed at Section I.F.5.d, above.

ii. For more on maintaining an independent civil action for child support or joining the support claim with a claim for divorce, see *Procedure for Initial Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 2.

f. On a cause of action for equitable distribution (ED).

i. A judgment of absolute divorce destroys the right of a spouse to ED unless the right is asserted prior to judgment, except as noted in Section I.G.3.f.iii, below. [G.S. 50-11(e).]

ii. For purposes of G.S. 50-11(e), a judgment of divorce does not become final until it is entered. A judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court as provided in G.S. 1A-1, Rule 58. [*Santana v. Santana*, 171 N.C. App. 432, 614 S.E.2d 438 (2005) (finding that an ED motion filed on August 18 was timely when the trial judge orally pronounced and rendered an absolute divorce in open court on August 11, signed the order on August 18, and the order was filed on August 19).]

iii. Exceptions to rule that ED claim must be asserted before entry of divorce decree include the following:

(a) An ED claim filed after entry of divorce may go to judgment if service of process on the defendant in the divorce action was by publication, the defendant did not appear in the divorce action, and the defendant filed an action or a motion in the cause for ED within six months after entry of the divorce judgment. [G.S. 50-11(e).]

(b) An ED claim filed after entry of divorce may go to judgment if the court entering the divorce judgment lacked jurisdiction over the defendant or over the property, and the defendant filed an action or a motion in the cause for ED within six months after entry of the divorce judgment. [G.S. 50-11(f).]

(c) Regarding an ED claim filed before divorce, dismissed, and refiled pursuant to G.S. 1A-1, Rule 41(a):

(1) An ED claim that was properly asserted but voluntarily dismissed without prejudice pursuant to Rule 41(a)(1) **before** judgment of absolute divorce may not be refiled within the one-year period covered by the Rule. [*Rhue v. Pace,* 165 N.C. App. 423, 598 S.E.2d 662 (2004) (order granting absolute divorce reserved ED claim for later resolution but wife had dismissed her claim prior to judgment of absolute divorce; wife's later assertion of an ED claim was a new claim forbidden by G.S. 50-11(e).]

(2) An ED claim that was properly asserted before judgment of absolute divorce and voluntarily dismissed without prejudice pursuant to Rule 41(a)(1) **after** judgment of absolute divorce may be refiled within the one-year period covered by the Rule. [*Stegall v. Stegall*, 336 N.C. 473, 444 S.E.2d 177 (1994).]

(3) An ED claim that was properly asserted before judgment of absolute divorce and voluntarily dismissed without prejudice pursuant to Rule 41(a)(1) after judgment of absolute divorce and not refiled within the one-year period covered by the Rule is lost. [*Sparks v. Peacock*, 129 N.C. App. 640, 500 S.E.2d 116 (1998). *See also Webb v. Webb,* 188 N.C. App. 621, 656 S.E.2d 334 (2008) (no ED claim existed after husband dismissed his claim after entry of divorce and wife had not properly asserted ED claim before or within six months after absolute divorce was granted).]

iv. For more on the relationship of ED to entry of a divorce judgment, see *Equitable Distribution Overview and Procedure*, Bench Book, Vol. 1, Chapter 6, Part 1.

g. On estate rights.

i. A judgment of absolute divorce revokes provisions in a testator's will in favor of the testator's spouse unless otherwise specifically provided in the will. [G.S. 31-5.4.]

ii. A spouse from whom or by whom an absolute divorce has been obtained has no right to a year's allowance, to petition for an elective share, or to take a life estate in lieu thereof and loses all rights of intestate succession in the estate of the other spouse. [G.S. 31A-1(a)(1) and (b)(1), (3), (4). *See Allred v. Tucci,* 85 N.C. App. 138, 354 S.E.2d 291 (recognizing that pursuant to this statute, a divorce decree causes a forfeiture of a spouse's rights in his spouse's estate), *review denied,* 320 N.C. 166, 358 S.E.2d 47 (1987).]

h. On the beneficiary of a revocable trust.

i. A judgment of absolute divorce revokes all provisions in the trust in favor of the settlor's former spouse, including but not by way of limitation, any provision conferring a general or special power of appointment on the former spouse and any appointment of the former spouse as trustee. [G.S. 36C-6-606.]

ii. Provisions revoked by absolute divorce are revived by the settlor's remarriage to the former spouse. [G.S. 36C-6-606.]

iii. "Former spouse" includes a purported former spouse. [G.S. 36C-6-606.]

i. On the beneficiary designation in a life insurance policy.

i. The majority rule is that divorce does not change an ex-spouse's beneficiary status under a life insurance policy. Thus, upon the insured's death, if the ex-spouse is still listed as the beneficiary on the policy, proceeds of the policy are paid to the ex-spouse. [*See* Kristen P. Raymond, Note, *Double Trouble—An Ex-Spouse's Life Insurance Beneficiary Status & State Automatic Revocation Upon Divorce Statutes: Who Gets What?* 19 Conn. Ins. L.J. 399 (2013).]

ii. North Carolina follows the majority rule. [*Daughtry v. McLamb*, 132 N.C. App. 380, 382, 512 S.E.2d 91, 92 (1999) (citing *Devane v. Ins. Co.,* 8 N.C. App. 247, 174 S.E.2d 146 (1970)) (stating that a "divorce should not annul or revoke the beneficiary designation in a life insurance policy" and holding that former wife was entitled to proceeds of life insurance policy when, in the four years between parties' divorce and husband's death, husband did not remove wife as the beneficiary; language in divorce decree awarding husband "any and all insurance" did not divest wife of her interest as beneficiary under the policy). *See also Old Line Life Ins. Co. v. Bollinger*, 161 N.C. App. 734, 589 S.E.2d 411(2003) (at the moment of the insured's death, insurance company was required to grant the proceeds of the policies to the beneficiary on record, the insured's family member, despite the policies having been assigned to his former wife in a settlement agreement and former wife having paid the premiums until the insured's death; without her knowledge, before the assignment to the former wife, the insured/husband removed her as beneficiary and named family member).]

4. Relief from a divorce judgment pursuant to G.S. 1A-1, Rule 60.

a. Generally.

i. An order entered "pursuant to Rule 60(b) 'does not overrule a prior [judgment or] order but, consistent with statutory authority, relieves parties from the effect of [the judgment or] order.'" [*Duplin Cty. Dept. of Soc. Servs. ex rel. Pulley v. Frazier*, 230 N.C. App. 480, 482, 751 S.E.2d 621, 623 (2013) (quoting *Charns*

v. Brown, 129 N.C. App. 635, 639, 502 S.E.2d 7, 10, *review denied*, 349 N.C. 228, 515 S.E.2d 701 (1998)).]

ii. But a party cannot, under G.S. 1A-1, Rule 60(b), set aside the effects of a divorce judgment, one of which is to bar a claim for equitable distribution not asserted before entry of the divorce judgment, without setting aside the divorce judgment itself. [*Howell v. Howell*, 321 N.C. 87, 361 S.E.2d 585 (1987); *Magaro v. Magaro,* 206 N.C. App. 762, 699 S.E.2d 141 (2010) (**unpublished**) (citing *Howell*) (amended divorce judgment void under Rule 60(b)(4); court noted in discussing Rule 60(b) generally that a court has no authority under the Rule to modify a divorce judgment, even by consent, to add a provision requiring payment of alimony when alimony had not been requested before divorce judgment was entered; Rule 60(b) order must set aside the judgment or relieve the moving party from it).]

b. After death of a party. See Section I.C.3, above.

c. On the ground that the judgment is void pursuant to G.S. 1A-1, Rule 60(b)(4).

i. A proceeding to set aside a void divorce decree is not barred by the death of one of the spouses where property rights are involved. [*Allred v. Tucci,* 85 N.C. App. 138, 354 S.E.2d 291 (property rights were involved because the decree of divorce from bed and board would, pursuant to G.S. 31A-1 (set out in Section I.G.3.g.ii, above), cause a forfeiture of husband's rights to wife's estate), *review denied,* 320 N.C. 166, 358 S.E.2d 47 (1987).]

ii. Divorce judgment is void and relief from the judgment may be granted pursuant to G.S. 1A-1, Rule 60(b)(4) for lack of proper service. [*Chen v. Zou,* 244 N.C. App. 14, 780 S.E.2d 571, 573 (2015) (citing *Freeman v. Freeman,* 155 N.C. App. 603, 573 S.E.2d 708 (2002), *review denied,* 357 N.C. 250, 582 S.E.2d 32 (2003)) (judgment of divorce was void and trial court properly granted relief from the judgment pursuant to Rule 60(b)(4) when it was entered without personal jurisdiction over defendant because of improper service by publication in Mecklenburg County; "a misrepresentation [in plaintiff's affidavit of service] involving the actual service of process goes to the trial court's jurisdiction, and it is proper to attack any judgment rendered in such case as a 'void' judgment" under Rule 60(b)(4)); *Freeman* (no error when trial court set aside a judgment of divorce pursuant to G.S. 1A-1, Rule 60(b)(4) after husband's death when wife presented clear, unequivocal, and convincing evidence that she had not been served with the divorce complaint, nor known about the divorce).]

iii. But when the evidence of lack of jurisdiction was conflicting, the court of appeals has upheld denial of a Rule 60(b)(4) motion to set aside a judgment of divorce. [*See Macher v. Macher,* 188 N.C. App. 537, 656 S.E.2d 282 (2008) (conflicting evidence on the issue of whether defendant signed the answer conferring personal jurisdiction).]

iv. A judgment entered before the time to answer has run is void. [*Latimer v. Latimer,* 136 N.C. App. 227, 522 S.E.2d 801 (1999) (no error when trial court set aside a judgment of divorce pursuant to Rule 60(b)(4) after wife presented clear, unequivocal, and convincing evidence that judgment of divorce was entered less than thirty days after service).]

v. A motion for relief from a judgment pursuant to G.S. 1A-1, Rule 60(b)(4) must be made within a reasonable time but is not subject to the one-year-after-entry-of-judgment requirement applicable to motions pursuant to Rule 60(b)(1), (2), or (3). [G.S. 1A-1, Rule 60(b); *Chen v. Zou,* 244 N.C. App. 14, 780 S.E.2d 571 (2015) (defendant improperly served by publication was not required to file her Rule 60(b) motion within twelve months of entry of divorce judgment; defendant's Rule 60(b)(4) motion filed some seventeen months after entry of divorce judgment was filed within a reasonable time when defendant filed it shortly after receiving actual knowledge of the divorce judgment from plaintiff).]

d. For mistake, inadvertence, surprise, or excusable neglect pursuant to G.S. 1A-1, Rule 60(b)(1).

i. Divorce judgment set aside when trial counsel inadvertently misled the court into entering a final divorce decree without preserving an equitable distribution (ED) claim because of counsel's mistaken belief that ED had been preserved in a prior action. [*Provenzano v. Provenzano,* 153 N.C. App. 811, 571 S.E.2d 88 (2002) (**unpublished**).]

ii. Court properly set aside divorce judgment when wife's failure to file a claim for ED was the result of excusable neglect not attributable to her. [*Baker v. Baker,* 115 N.C. App. 337, 444 S.E.2d 478 (1994).]

e. For any other reason justifying relief from the operation of the judgment pursuant to G.S. 1A-1, Rule 60(b)(6).

i. Trial court had discretion to set aside a divorce judgment to allow wife to properly assert a claim for equitable distribution, even after husband had remarried, where husband's actions made it appropriate for the court to exercise this "grand reservoir of equitable power to do justice in a particular case." [*Miller v. Miller*, 799 S.E.2d 890, 907 (N.C. Ct. App. 2017).]

ii. A motion to amend a divorce judgment to permit husband to claim children as dependents on his state and federal tax returns was not properly made pursuant to Rule 60(b)(6) because husband sought to amend the judgment rather than to be relieved of the judgment. [*Coleman v. Arnette,* 48 N.C. App. 733, 269 S.E.2d 755 (1980).]

iii. No error in denial of wife's Rule 60(b) motion to set aside judgment of absolute divorce on ground that the parties had not lived separate and apart for a year when wife herself told husband's attorney that the parties were separated for over one year, wife accompanied that attorney to file the complaint and to be served, wife failed to contest husband's testimony at the divorce proceeding, and wife only filed 60(b) motion after husband's death when she learned that the divorce revoked her name as beneficiary on husband's life insurance policy. [*Stoner v. Stoner,* 83 N.C. App. 523, 350 S.E.2d 916 (1986).]

H. Attorney Fees

1. A court may award costs in an action for divorce, before or after judgment, as may be incurred by either spouse from the sole and separate estate of either spouse, as may be just. [G.S. 6-21(4).]

2. G.S. 6-21 provides that "costs" in divorce cases include reasonable attorney fees in such amounts as the court shall in its discretion determine and allow.

I. Appeal

1. Standard of review.
   a. When there has been a trial by judge without a jury, the court's findings of fact are conclusive on appeal if there is evidence to support them, even if there is contrary evidence. [*Lin v. Lin*, 108 N.C. App. 772, 425 S.E.2d 9 (1993).]
2. Right to take an immediate appeal.
   a. 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. 514, 742 S.E.2d 799 (2013) (final judgment generally is one that ends the litigation on the merits).]
   b. 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); *Garrett v. Burris,* 207 N.C. App. 748, 701 S.E.2d 404 (2010) (**unpublished**) (appeal of trial court's order denying absolute divorce was interlocutory when husband's counterclaims for summary ejectment, conversion, and claim and delivery remained).]
   c. Immediate appeal of an interlocutory order generally is allowed in two instances:
      i. 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).] and
         (a) 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. 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. 514, 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).]
   d. 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).]
   e. For appeals taken on or after Aug. 23, 2013, G.S. 7A-27 was amended to allow for an immediate appeal when the order determines a claim prosecuted under

G.S. 50-19.1. [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, *amended by* S.L. 2018-86, § 1, effective June 25, 2018, and applicable to appeals filed on or after that date.]

f. 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).

II. Divorce from Bed and Board

A. Generally

1. A divorce from bed and board is nothing more than a judicial separation, that is, an authorized separation of the husband and wife. A divorce from bed and board merely suspends the effect of the marriage as to cohabitation; it does not dissolve the marriage bond. [*Schlagel v. Schlagel,* 253 N.C. 787, 117 S.E.2d 790 (1961). *See also Triplett v. Triplett,* 38 N.C. App. 364, 248 S.E.2d 69 (1978) (citing *Schlagel*).]
2. There is no requirement that a spouse move out of the home before an action can be instituted for divorce from bed and board. [*Triplett v. Triplett,* 38 N.C. App. 364, 248 S.E.2d 69 (1978). *See also McCall v. McCall,* 138 N.C. App. 706, 531 S.E.2d 894 (2000) (court not required to make a finding as to the date of separation in a divorce from bed and board).] Thus, a party can file a claim for divorce from bed and board prior to separation.
3. The provisions of G.S. 50-10 are applicable to actions for divorce from bed and board, the grounds for which are specified by G.S. 50-7. [*Allred v. Tucci,* 85 N.C. App. 138, 354 S.E.2d 291, *review denied,* 320 N.C. 166, 358 S.E.2d 47 (1987).]

B. Jurisdiction

1. Subject matter jurisdiction.
   a. The district court division is the proper division without regard to the amount in controversy for the trial of actions for annulment and divorce. [G.S. 7A-244.]

i. The requirement in G.S. 50-8 that the complaint be verified is applicable to a complaint for divorce from bed and board. [G.S. 50-8 (providing that "[i]n all actions for divorce the complaint shall be verified"); *Boyd v. Boyd,* 61 N.C. App. 334, 300 S.E.2d 569 (1983) (trial court lacks subject matter jurisdiction over an action for absolute divorce if the complaint is not verified).] For more on correcting the problem created by an unverified complaint, see Cheryl Howell, *Can a Verification Problem Be Corrected After a Divorce Complaint Is Filed?* UNC Sch. of Gov't: On the Civil Side Blog (May 29, 2015), http://civil.sog.unc.edu/can-a-verification-problem-be-corrected-after-a-divorce-complaint-is-filed.

b. The six-month residency requirement in G.S. 50-8 is applicable to an action for divorce from bed and board. [*Lynch v. Lynch,* 302 N.C. 189, 274 S.E.2d 212 (1981) (no subject matter jurisdiction when plaintiff had only resided in the state for a few weeks before filing action for divorce from bed and board); *Eudy v. Eudy,* 288 N.C. 71, 215 S.E.2d 782 (1975), *overruled on other grounds by Quick v. Quick,* 305 N.C. 446, 290 S.E.2d 653 (1982).]

2. In rem or quasi in rem jurisdiction.

a. G.S. 1-75.8(3) provides for in rem and quasi in rem jurisdiction over actions for divorce involving a North Carolina resident.

b. North Carolina law treats absolute divorce and divorce from bed and board the same for purposes of personal jurisdiction. [1 Lee's North Carolina Family Law § 6.24(B) (5th ed. 1993); see Section I.A.2, above.]

C. Venue

1. Venue is proper in the county in which either the plaintiff or the defendant resides. [G.S. 50-3 (applicable to "all divorces").]

2. See Section I.B, above, for more on venue.

D. Parties

1. Necessary parties.

a. Spouses are the only necessary parties to a divorce action. [*Thomas v. Thomas*, 43 N.C. App. 638, 260 S.E.2d 163 (1979) (in context of an absolute divorce, stating that there are but two necessary parties to an action for divorce: husband and wife).]

b. Children are neither proper nor necessary parties to an action for divorce between their parents. [*Thomas v. Thomas*, 43 N.C. App. 638, 260 S.E.2d 163 (1979) (in context of an absolute divorce).]

2. Incompetency.

a. G.S. 50-22 authorizes the following individuals to commence, defend, maintain, arbitrate, mediate, or settle any action authorized by G.S. Chapter 50 on behalf of an incompetent spouse, subject to the limitation in Section II.D.2.b, below:

i. A duly appointed agent who has the power to sue and defend civil actions on behalf of an incompetent spouse and who has been appointed pursuant to a durable power of attorney executed in accordance with G.S. Chapter 32C;

ii. A guardian appointed in accordance with G.S. Chapter 35A; or

iii. A guardian ad litem appointed in accordance with G.S. 1A-1, Rules 17 and 25(b). [G.S. 50-22.]

b. Only a competent spouse may file an action for absolute divorce from an incompetent spouse. [G.S. 50-22; *Freeman v. Freeman,* 34 N.C. App. 301, 237 S.E.2d 857 (1977) (considering whether general guardian could maintain an action for absolute divorce on behalf of an incompetent person, stating that divorce action is so personal and volitional that the general rule is, absent statutory authority, an action for divorce cannot be maintained by a general guardian on behalf of an incompetent person).]

i. In an action by a competent spouse for absolute divorce, the incompetent spouse must be represented by one of the persons listed in Section II.D.2.a, above. [G.S. 1A-1, Rule 17(b)(2); G.S. 50-22.]

E. Grounds

1. A plaintiff seeking divorce from bed and board on the grounds set out in G.S. 50-7 must allege and prove acts of misconduct by defendant. [*Perkins v. Perkins,* 85 N.C. App. 660, 355 S.E.2d 848, *review denied,* 320 N.C. 633, 360 S.E.2d 92 (1987), *superseded on other grounds by statute as stated in Wells v. Wells*, 132 N.C. App. 401, 512 S.E.2d 468 (1999).] It is unclear whether plaintiff also must show that the misconduct was not provoked by plaintiff's actions. [*Compare Perkins* (to establish a ground for divorce from bed and board, plaintiff must allege and prove acts of misconduct by defendant and show that the misconduct was not provoked by plaintiff's actions), and *Butler v. Butler,* 1 N.C. App. 356, 161 S.E.2d 618 (1968) (for divorce from bed and board on indignities ground, plaintiff must set out with particularity acts defendant has committed and assert that such acts were without provocation), with *Shingledecker v. Shingledecker*, 103 N.C. App. 783, 407 S.E.2d 589 (1991) (recognizing that cases decided prior to enactment of Rules of Civil Procedure found complaints subject to dismissal if they failed to allege that acts constituting grounds for divorce from bed and board were without provocation).] For a recent case holding that the trial court's failure to find that indignities committed by defendant were "without adequate provocation" did not require reversal of the order awarding alimony, see *Dechkovskaia v. Dechkovskaia,* 232 N.C. App. 350, 358, 754 S.E.2d 831, 837 (recognizing that many of the "old cases discussing indignities under the former statutes on fault-based divorce and divorce from bed and board did require a very specific factual allegation that there was no provocation for the indignities offered" but noting that it was not clear that a finding on provocation is required by the current statute defining marital misconduct, G.S. 50-16.1A, or by case law), *review denied,* 367 N.C. 506, 758 S.E.2d 870 (2014).] For more on *Dechkovskaia,* see *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2.

2. Abandonment. [G.S. 50-7(1).]

a. One spouse abandons the other where she brings their cohabitation to an end without justification, without the consent of the other spouse, and without intent of renewing it. [*Panhorst v. Panhorst,* 277 N.C. 664, 178 S.E.2d 387 (1971) (in alimony context); *Cunningham v. Cunningham,* 171 N.C. App. 550, 615 S.E.2d 675 (2005) (in alimony context); *Roberts v. Roberts*, 68 N.C. App. 163, 314 S.E.2d 781 (1984) (divorce

from bed and board); *Sorey v. Sorey,* 233 N.C. App. 682, 757 S.E.2d 518 (2014) (a spouse's failure to object to the other spouse's decision to leave the marital home does not necessarily constitute consent to abandonment; 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; wife's request for postseparation support denied).]

b. 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. [*Morris v. Morris,* 46 N.C. App. 701, 266 S.E.2d 381, *aff'd per curiam,* 301 N.C. 525, 272 S.E.2d 1 (1980); *Corbett v. Corbett,* 67 N.C. App. 754, 313 S.E.2d 888 (1984) (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*).]

c. The usual fact pattern involves one spouse leaving the marital residence with the spouse that stays alleging abandonment. [*See Richardson v. Richardson,* 268 N.C. 538, 151 S.E.2d 12 (1966) (husband left home; wife alleged and proved abandonment).]

d. But the leaving spouse may allege and prove abandonment if he was compelled to leave by acts of the other spouse. [*See Panhorst v. Panhorst,* 277 N.C. 664, 178 S.E.2d 387 (1971) (departing spouse does not abandon the other spouse if the departing spouse leaves home because of other spouse's affirmative acts of physical or mental cruelty, or affirmative acts of a willful nature, such as a willful failure to provide adequate support); *Bailey v. Bailey,* 243 N.C. 412, 90 S.E.2d 696 (1956) (wife forced to leave and was constructively abandoned when husband permitted his grown children by a prior marriage to remain in the home in a drunken condition, and to curse, abuse, and harass wife, and when husband told her to get her things out of the house); *McDowell v. McDowell,* 243 N.C. 286, 90 S.E.2d 544 (1955) (wife compelled to leave husband by reason of his willful failure and refusal to provide her with reasonable support and necessary medical attention).]

e. Abandonment can be found without either spouse leaving the home. [*Ellinwood v. Ellinwood*, 94 N.C. App. 682, 381 S.E.2d 162 (1989) (husband constructively abandoned wife when his complete immersion in work over a twenty-year period rose to a level of willful spousal misconduct above the normal and sometimes commonplace marital problems involving busy professionals); *Triplett v. Triplett,* 38 N.C. App. 364, 248 S.E.2d 69 (1978) (wife could maintain action for divorce from bed and board and alimony while husband was in the same house with her; husband found to have constructively abandoned wife by failing to provide support). *But see Oakley v. Oakley,* 54 N.C. App. 161, 282 S.E.2d 589 (1981) (a spouse who has neither left the marital home nor withheld support cannot be found to have abandoned the other spouse merely by sleeping in a separate bedroom).]

f. While willful failure to provide adequate support may be evidence of abandonment, the mere fact that a spouse provides adequate support does not preclude a finding of abandonment. [*Richardson v. Richardson,* 268 N.C. 538, 151 S.E.2d 12 (1966) (a spouse may not defeat an action for abandonment by making voluntary payments that the spouse may abandon at will); *Pruett v. Pruett,* 247 N.C. 13, 100 S.E.2d 296

(1957); *Bowen v. Bowen,* 19 N.C. App. 710, 200 S.E.2d 214 (1973) (husband found to have abandoned wife even though he provided wife with financial support during separation).]

g. Abandonment is a legal conclusion that must be based upon factual findings supported by competent evidence. [*Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985) (citing *Steele v. Steele*, 36 N.C. App. 601, 244 S.E.2d 466 (1978)) (considering abandonment as ground for alimony), *rev'd in part on other grounds*, 318 N.C. 404, 348 S.E.2d 593 (1985).]

h. Allegations of actual physical violence are not required when a divorce is sought on the ground of constructive abandonment. [*Bailey v. Bailey,* 243 N.C. 412, 90 S.E.2d 696 (1956).]

i. 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) (discussing constructive abandonment as ground for alimony).]

j. For more on abandonment as a ground for divorce from bed and board, see N.C.P.I.—Civil 815.50—Divorce from Bed and Board—Issue of Abandonment.

k. For more on this topic, see *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2.

3. Malicious turning out-of-doors of other spouse. [G.S. 50-7(2).]

a. 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 and 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).]

b. For more on this ground for divorce from bed and board, see N.C.P.I.—Civil 815.52—Divorce from Bed and Board—Issue of Malicious Turning Out-of-Doors.

4. Cruel or barbarous treatment endangering the life of the other spouse. [G.S. 50-7(3).]

a. The remedies in G.S. Chapter 50B are available to a party seeking divorce from bed and board on grounds of cruel or barbarous treatment that endangers the life of another. [G.S. 50-7(3).]

b. 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).]

c. For more on this ground for divorce from bed and board, see N.C.P.I.—Civil 815.54—Divorce from Bed and Board—Issue of Cruelty.

5. Indignities rendering the condition of the other spouse intolerable and his or her life burdensome. [G.S. 50-7(4).]

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

b. 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)). *See also 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)) (in denying alimony based on indignities, 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").]

c. Allegations of actual physical violence are not required when a divorce is sought on the ground of indignities. [*Bailey v. Bailey,* 243 N.C. 412, 90 S.E.2d 696 (1956) (citing *Pearce v. Pearce,* 226 N.C. 307, 37 S.E.2d 904 (1946)).]

d. 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, her extreme lack of care and destruction of the marital home, and her possession of condoms even though husband and wife had no sexual relationship, constituted indignities entitling husband to a divorce from bed and board. [*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; order requiring husband to pay alimony affirmed), *review denied*, 367 N.C. 524, 762 S.E.2d 443 (2014).]

e. That 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, constituted indignities entitling wife to a divorce from bed and board. [*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).]

f. In a case considering indignities when awarding alimony, the trial court's 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 the 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 attempted isolation" of plaintiff and the parties' children "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).]

g. For discussion on whether the party claiming indignities must prove lack of provocation, see Section II.E.1, above.

h. For more on this ground for divorce from bed and board, see N.C.P.I.—Civil 815.56—Divorce from Bed and Board—Issue of Indignities.

i. For more on this topic, see *Postseparation Support and Alimony,* Bench Book, Vol. 1, Chapter 2.

6. Excessive use of alcohol or drugs so as to render the condition of the other spouse intolerable and life burdensome. [G.S. 50-7(5).]

a. Allegation that defendant had been a 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).]

b. For more on this ground for divorce from bed and board, see N.C.P.I.—Civil 815.58—Divorce from Bed and Board—Issue of Excessive Use of Alcohol or Drugs.

7. Adultery. [G.S. 50-7(6).]

a. Adultery was added in 1985 as a ground for a divorce from bed and board. [S.L. 1985-574 § 1, effective Oct. 1, 1985 (also amending G.S. 50-7 so that the conduct of either party could constitute the grounds for divorce set out in the statute).]

b. There is little appellate case law on this ground in the context of divorce from bed and board. In *Slight v. Slight,* 200 N.C. App. 321, 683 S.E.2d 467 (2009) (**unpublished**), the court granted a divorce from bed and board based on adultery, finding that "salacious" emails between a wife and her ex-husband (who was not the plaintiff in the *Slight* divorce action) indicating that the two were having an affair, and wife's testimony that she had created an online dating profile, constituted competent evidence of wife's infidelity.

c. For more on this ground for divorce from bed and board, see N.C.P.I.—Civil 815.60—Divorce from Bed and Board—Issue of Adultery.

d. For more on adultery, see *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2.

F. Defenses

1. Defenses available in an action for divorce from bed and board.

a. Condonation.

i. 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).]

ii. If the condition is violated, i.e., the misconduct is repeated, the original offense is revived. [*Malloy v. Malloy,* 33 N.C. App. 56, 234 S.E.2d 199 (1977) (citing *Lassiter v. Lassiter,* 92 N.C. 129 (1885)).]

iii. 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) (but a court may consider the issue of a plaintiff's condonation when the plaintiff's pleadings allege cohabitation subsequent to the defendant's misconduct, even absent such allegations in the defendant's pleading).]

iv. There is no condonation from the fact that the parties continue to live under the same roof if it affirmatively appears that they do not have sexual intercourse. [*Privette v. Privette*, 30 N.C. App. 305, 227 S.E.2d 137 (1976) (citing 1 Lee's North Carolina Family Law § 87 (1963)) (no condonation of husband's continued acts of cruelty and indignities when parties continued to live in the same residence in separate bedrooms).]

v. For a jury instruction on condonation in the alimony context, see N.C.P.I.—Civil 815.71—Alimony—Issue of Condonation.

vi. For more on condonation in the alimony context, see *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2.

2. Recrimination.

a. Recrimination allows a spouse to defend an action for divorce from bed and board by asserting that the moving spouse is not so entitled because she was also guilty of a ground for divorce for bed and board. [*See* 1 Lee's North Carolina Family Law § 6.20(B) (5th ed. 1993).]

b. The doctrine of recrimination provides, in effect, that if both parties have a right to a divorce from bed and board, neither of the parties has. [*Harrington v. Harrington,* 286 N.C. 260, 210 S.E.2d 190 (1974), *superseded on other grounds by statute as stated in Smith v. Smith*, 42 N.C. App. 246, 256 S.E.2d 282 (1979).]

c. Recrimination is an affirmative defense that a defendant must prove with the same character of evidence and the same certainty as if the defendant were setting it up as a ground for divorce. [*Corbett v. Corbett,* 67 N.C. App. 754, 313 S.E.2d 888 (1984).]

3. For discussion of the defense of connivance, see 1 Lee's North Carolina Family Law § 6.18 (5th ed. 1993).

4. Resumption of marital relations is not a defense to a pending action for divorce from bed and board.

a. Reconciliation while the action is pending is not a defense to a divorce from bed and board. [*Howell v. Tunstall,* 64 N.C. App. 703, 308 S.E.2d 454 (1983) (citing *Adams v. Adams,* 262 N.C. 556, 138 S.E.2d 204 (1964)) (that the parties cohabitated after the complaint for divorce from bed and board was filed did not prevent the court from granting a divorce from bed and board on grounds of habitual drunkenness and indignities).]

b. If parties reconcile and resume cohabitation as man and wife after a divorce from bed and board is granted, the effect of the divorce from bed and board is destroyed. No

court action to end such divorce is necessary. [*Howell v. Tunstall,* 64 N.C. App. 703, 308 S.E.2d 454 (1983).]

G. Procedure

1. Content of the complaint for divorce from bed and board. The complaint must:
   a. Include a statement that the plaintiff or defendant has been a resident of North Carolina for at least six months prior to the filing of the complaint; [G.S. 50-8; *Sauls v. Sauls,* 288 N.C. 387, 218 S.E.2d 338 (1975); *Eudy v. Eudy,* 288 N.C. 71, 215 S.E.2d 782 (1975), *overruled on other grounds by Quick v. Quick,* 305 N.C. 446, 290 S.E.2d 653 (1982).]
   b. Be verified [G.S. 50-8; G.S. 1A-1, Rule 11(b).] when it is filed; [*Boyd v. Boyd,* 61 N.C. App. 334, 300 S.E.2d 569 (1983) (not sufficient to obtain verification before the complaint and summons are served on the defendant).]
   c. Set out the names and ages of any minor children of the marriage or the fact that there are no children of the marriage; [G.S. 50-8.]
   d. Allege the existence of the marriage; [1 Lee's North Carolina Family Law § 6.25 (5th ed. 1993).]
   e. The requirement that, when there were minor children, the complaint include the Social Security numbers of plaintiff and defendant, if known, was deleted by S.L. 2013-93, § 1, effective June 12, 2013.
2. Sufficiency of the pleadings.
   a. Historically, courts have required specific pleading of the grounds for divorce from bed and board and that the moving party did not provoke the marital misconduct. North Carolina cases, as well as the modern notions of notice pleadings and no-fault divorce, suggest a relaxation of special pleading requirements for divorce. [*See* 1 Lee's North Carolina Family Law § 6.25 (5th ed. 1993).]
   b. *Compare Perkins v. Perkins,* 85 N.C. App. 660, 355 S.E.2d 848 (to establish a ground for divorce from bed and board, plaintiff must allege and prove acts of misconduct by defendant and show that the misconduct was not provoked by plaintiff's actions), *review denied,* 320 N.C. 633, 360 S.E.2d 92 (1987), *superseded on other grounds by statute as stated in Wells v. Wells*, 132 N.C. App. 401, 512 S.E.2d 468 (1999), and *Butler v. Butler,* 1 N.C. App. 356, 161 S.E.2d 618 (1968) (for divorce from bed and board on indignities ground, plaintiff must set out with particularity acts defendant has committed and that such acts were without provocation), *with Shingledecker v. Shingledecker*, 103 N.C. App. 783, 407 S.E.2d 589 (1991) (recognizing that cases decided prior to enactment of Rules of Civil Procedure found complaints subject to dismissal if they failed to allege that acts constituting grounds for divorce from bed and board were without provocation).] For a recent case holding that the trial court's failure to find that indignities committed by defendant were "without adequate provocation" did not require reversal of an order awarding alimony, see *Dechkovskaia v. Dechkovskaia,* 232 N.C. App. 350, 358, 754 S.E.2d 831, 837 (recognizing that many of the "old cases discussing indignities under the former statutes on fault-based divorce and divorce from bed and board did require a very specific factual allegation that there was no provocation for the indignities offered" but noting that it was not clear that

a finding on provocation is required by the current statute defining marital misconduct, G.S. 50-16.1A, or by case law), *review denied,* 367 N.C. 506, 758 S.E.2d 870 (2014).] For more on *Dechkovskaia,* see *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2.

3. The material facts in a complaint for a divorce are deemed denied. [G.S. 50-10(a).]
   a. Allegations in a counterclaim for divorce from bed and board are deemed denied pursuant to G.S. 50-10(a). [*Skamarak v. Skamarak*, 81 N.C. App. 125, 343 S.E.2d 559 (1986) (all allegations in defendant's counterclaim, wherein he sought a divorce from bed and board based on abandonment and indignities, were deemed denied, rejecting defendant's argument that the allegations had been admitted based on plaintiff's failure to file a reply).]
4. A court may not grant a divorce from bed and board unless it has been requested. [*Clarke v. Clarke,* 47 N.C. App. 249, 267 S.E.2d 361 (1980) (error to award plaintiff a divorce from bed and board when alimony without divorce only claim asserted).]
5. Evidence.
   a. Trial court did not err in admitting in action for divorce from bed and board sexually explicit emails between defendant wife and third party. [*Evans v. Evans,* 169 N.C. App. 358, 610 S.E.2d 264 (2005) (no violation of Electronic Communications Privacy Act, as communications were stored on family computer and were not intercepted contemporaneously with transmission).]
6. The reference procedure in G.S. 1A-1, Rule 53 is not available in action "for divorce from bed and board . . . or actions in which a ground of annulment or divorce is in issue." [G.S. 1A-1, Rule 53(a)(1).]
7. In an action for divorce from bed and board, if either or both of the parties has sought and obtained marital counseling from persons listed in the statute, the person or persons rendering counseling are not competent to testify in the divorce action concerning information acquired while rendering the counseling. [G.S. 8-53.6.]

H. Judgment

1. Findings of fact.
   a. The trial court may not enter a judgment of divorce from bed and board until the judge or jury finds the material facts. [G.S. 50-10(a).]
   b. A judgment of divorce from bed and board order must be supported by sufficient findings of fact and conclusions of law. [*Steele v. Steele,* 36 N.C. App. 601, 244 S.E.2d 466 (1978) (trial court should make adequate findings of fact, i.e., specific acts of misconduct, to support the conclusion that one or more grounds in G.S. 50-7 were established).]
   c. A consent judgment of divorce from bed and board that contains no findings of fact as to the grounds for divorce from bed and board is void. [*Allred v. Tucci,* 85 N.C. App. 138, 354 S.E.2d 291 (judgment is void even if parties consented to its entry because without findings of fact, the court acted beyond its jurisdiction in entering the judgment), *review denied,* 320 N.C. 166, 358 S.E.2d 47 (1987).]

2. Other relief.

   a. An order for divorce from bed and board may include provisions for alimony, child custody, or child support where these claims were joined in the complaint for divorce from bed and board. [See Section I.F.5, above, for joinder of these claims.]

   b. An order for divorce from bed and board that contains provisions for alimony, child support, or protective relief may also order possession of real property as a way to effectuate those provisions. [G.S. 50-16.7(a) (alimony may be paid by a security interest in or possession of real property); 50-13.4(e) (child support may be paid by a security interest in or possession of real property); 50B-3(a)(2) (domestic violence protective order may grant as relief possession of the residence to a party and may exclude the other party therefrom).]

      i. *See Harper v. Harper,* 50 N.C. App. 394, 273 S.E.2d 731 (1981) (whether parties are living separate and apart or are living together when action is filed, absent allegations and proof sufficient to support an award of alimony or divorce, which *Harper* plaintiff did not seek, one spouse may not maintain an action to evict the other, get sole custody of the children, and obtain an order for child support) (when *Harper* was decided, fault was required to divorce and the applicable child support statute did not allow payment of child support by a security interest or possession of property); S.L. 1981-472, § 1, effective May 28, 1981, amended the child support statute to make it consistent with the alimony statute allowing payment by possession of real property).

      ii. The amendment to the child support statute mentioned immediately above was to "clarify when a court can award possession of the house as a part of child support." [Quoted language is from title of S.L. 1981-472.] However, according to two commentators, some trial courts have still referred to *Harper v. Harper,* 50 N.C. App. 394, 273 S.E.2d 731 (1981), to interpret G.S. 50-13.4, despite the fact that the statute has been amended, making it unclear whether the child support statutes authorize possession of the home prior to separation. [*See* Amy L. Britt and Alicia Jurney Whitlock, *Can't Live With 'Em Can't Live Without 'Em: An Analysis of the Trial Court's Authority to Hear and Decide Child Related Claims in North Carolina Post-Baumann,* 34 Campbell L. Rev. 449, 455 (2011–2012) (emphasis in original) (also stating that "before *Baumann*, the general belief among most North Carolina family law practitioners was that possession could only be ordered before separation as part of a Chapter 50B domestic violence protective order, or as part of an order for child support, post-separation support, or alimony entered *after* a divorce from bed and board had been granted").]

      iii. Pursuant to *Baumann-Chacon v. Baumann,* 212 N.C. App. 137, 710 S.E.2d 431 (2011), at least when one party expresses an intent to leave the marital residence as soon as custody is settled, a parent may bring an action for child custody and support against her spouse when the parents have neither physically separated nor asserted a claim for divorce from bed and board.

   c. There is no statute or published appellate opinion that authorizes a trial court to award possession of real property to a party who prevails on a claim for divorce

from bed and board in the absence of the provisions for alimony, child support, and domestic violence set out in Section II.H.2.b, above.

i. In *Slight v. Slight,* 200 N.C. App. 321, 683 S.E.2d 467 (2009) (**unpublished**), the trial court did not err in granting plaintiff possession of marital residence as part of divorce from bed and board, even though plaintiff did not request alimony or child support. The court of appeals in *Slight* cited *Triplett v. Triplett,* 38 N.C. App. 364, 248 S.E.2d 69 (1978), to support its statement that divorce from bed and board is "merely a judicial decision ordering a spouse out of the house."

ii. In *Triplett v. Triplett,* 38 N.C. App. 364, 366, 248 S.E.2d 69, 70 (1978), the appellate court affirmed the award to plaintiff of alimony and sole possession of the home and furnishings, noting that plaintiff sought a divorce from bed and board and alimony and that "such an action may be the only method by which the injured spouse can obtain a writ for exclusive possession of the home so as to keep the offending spouse from continuing to stay in the home." The opinion in *Slight v. Slight,* 200 N.C. App. 321, 683 S.E.2d 467 (2009) (**unpublished**), does not address the fact that the plaintiff in *Triplett* sought and obtained an award of alimony, while the *Slight* plaintiff sought neither alimony nor child support.

3. Effect of a judgment of divorce from bed and board.

a. On alimony rights.

i. An order for divorce from bed and board may establish marital misconduct as that term in used in an action for alimony. [See G.S. 50-16.1A(3), setting out nine acts that constitute marital misconduct, five of which are grounds for divorce from bed and board: abandonment, malicious turning out-of-doors, cruel or barbarous treatment, indignities, and excessive use of alcohol or drugs. *See Evans v. Evans,* 169 N.C. App. 358, 610 S.E.2d 264 (2005) (indignities is ground for divorce for bed and board and also amounts to marital misconduct for the purpose of determining right to postseparation support).]

ii. Thus, an order for divorce from bed and board may establish marital misconduct that a judge in an alimony action is required by G.S. 50-16.3A(b)(1) to consider as a factor when deciding the amount and duration of alimony.

b. On property rights.

i. A divorce from bed and board has no effect upon property held by the spouses as tenants by the entirety. [1 Lee's North Carolina Family Law § 6.21(B) (5th ed. 1993). *See also Dealer Supply Co. v. Greene,* 108 N.C. App. 31, 422 S.E.2d 350 (1992) (recognizing that a divorce from bed and board does not terminate or change tenancy by the entirety in any way), *review denied,* 333 N.C. 343, 426 S.E.2d 704 (1993).]

c. On support and custody rights.

i. An order of divorce from bed and board does not affect support rights and obligations or rights to the care and custody of children. [1 Lee's North Carolina Family Law §§ 6.21(D), (E) (5th ed. 1993).]

ii. After a final judgment has been entered in an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce involving a

minor child's parents, the prior action for divorce, etc. does not preclude either parent from filing a separate action seeking child support in the same county or district or in a different county or district unless the prior divorce, annulment, or alimony judgment also determined the parents' child support obligations. [*See Powers v. Parisher*, 104 N.C. App. 400, 409 S.E.2d 725 (1991) (husband's prior action that sought only an absolute divorce, to which there was no answer or counterclaim, did not preclude wife's later independent child support proceeding), *review denied,* 331 N.C. 286, 417 S.E.2d 254 (1992).]

d. On estate rights.

i. A spouse from whom a divorce from bed and board has been obtained has no right to a year's allowance, to petition for an elective share, or to take a life estate in lieu thereof and loses all rights of intestate succession in the estate of the other spouse. [G.S. 31A-1(a)(1) and (b)(1), (3), (4). *See Allred v. Tucci,* 85 N.C. App. 138, 354 S.E.2d 291 (recognizing that pursuant to this statute, a divorce from bed and board causes a forfeiture of a spouse's rights in his spouse's estate), *review denied,* 320 N.C. 166, 358 S.E.2d 47 (1987).]

ii. A divorce from bed and board does not affect the right of either spouse to take pursuant to the will of the other. [1 Lee's North Carolina Family Law § 6.21(C) (5th ed. 1993).] This is different than an absolute divorce or annulment. [*See* G.S. 31-5.4 (an absolute divorce or annulment revokes all provisions in a will in favor of the testator's former spouse).]

I. Attorney Fees

1. A court may award costs in an action for divorce, before or after judgment, as may be incurred by either spouse from the sole and separate estate of either spouse, as may be just. [G.S. 6-21(4).]
2. G.S. 6-21 states that for divorce actions, "costs" include "reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow."

J. Appeal

1. Generally, orders granting divorce from bed and board are final orders, but when the parties in a case raised numerous additional issues regarding custody and support and the order specifically deferred the custody issue until after mediation, the order did not judicially determine all the issues raised by the pleadings and at trial; thus, appeal was interlocutory. [*Washington v. Washington,* 148 N.C. App. 206, 557 S.E.2d 648 (2001); *Kale v. Kale*, 25 N.C. App. 99, 212 S.E.2d 234 (there is no such thing as a divorce from bed and board pendente lite), *cert. denied,* 287 N.C. 259, 214 S.E.2d 431 (1975).] However, G.S. 50-19.1, added by S.L. 2013-411, § 2, effective Aug.23, 2013, provides that 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, child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order of judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action.
2. For a discussion of G.S. 50-19.1 and appeal in the divorce context, see Section I.I, above.

III. Annulment

A. Generally

1. Presumption that a marriage is valid.
    a. Upon proof that a marriage ceremony took place, it will be presumed that it was legally performed and resulted in a valid marriage. The burden of proof rests upon the person attacking the validity of the marriage to prove by the greater weight of the evidence grounds to void or annul the marriage to overcome the presumption of a valid marriage. [*Pickard v. Pickard,* 176 N.C. App. 193, 625 S.E.2d 869 (2006); *Mussa v. Palmer-Mussa*, 366 N.C. 185, 731 S.E.2d 404 (2012) (citing *Kearney v. Thomas,* 225 N.C. 156, 33 S.E.2d 871 (1945)).]
    b. It is presumed that a marriage entered into in another state is valid under the laws of that state in the absence of contrary evidence. The party attacking the validity of a foreign marriage has the burden of proof. [*Parker v. Parker,* 46 N.C. App. 254, 265 S.E.2d 237 (1980) (citing *Overton v. Overton,* 260 N.C. 139, 132 S.E.2d 349 (1963)).]
2. Void marriages.
    a. The district court, on application by either party to a marriage contracted contrary to the prohibitions in, or declared void by, G.S. Chapter 51, Marriage, may declare the marriage void from the beginning, subject to G.S. 51-3. [G.S. 50-4; see Section III.A.3.d, below, for discussion of certain marriages as voidable, despite statutory language declaring them void.]
        i. A prayer for an order to declare a ceremony invalid has been considered as an application under G.S. 50-4 to declare a marriage **void** based on improper solemnization. [*Duncan v. Duncan,* 232 N.C. App. 369, 754 S.E.2d 451, *review denied, dismissed*, 367 N.C. 531, 762 S.E.2d 208 (2014).]
        ii. G.S. 50-4 has been used to declare the portion of a marriage following an invalid ceremony **voidable**, even though the validity of the marriage following a second, valid ceremony was not at issue and neither party sought to annual the marriage in its entirety. [*Duncan v. Duncan,* 232 N.C. App. 369, 754 S.E.2d 451, *review denied, dismissed*, 367 N.C. 531, 762 S.E.2d 208 (2014).]
    b. A void marriage or one void ab initio is one that is a nullity from its inception and may be impeached at any time. [*Sawyer v. Slack,* 196 N.C. 697, 146 S.E. 864 (1929); *Pickard v. Pickard,* 176 N.C. App. 193, 625 S.E.2d 869 (2006) (citing *Geitner v. Townsend,* 67 N.C. App. 159, 312 S.E.2d 236 (1984)).]
    c. A marriage between persons either of whom has a husband or wife living at the time of such marriage is void. [G.S. 51-3; *Lane v. Lane,* 115 N.C. App. 446, 445 S.E.2d 70 (citing *Taylor v. Taylor,* 321 N.C. 244, 362 S.E.2d 542 (1987)) (in North Carolina, a bigamous marriage is void and a nullity and may be collaterally attacked at any time), *review denied,* 338 N.C. 311, 452 S.E.2d 311 (1994).]
    d. The only void marriage is a bigamous marriage. [*Mussa v. Palmer-Mussa*, 366 N.C. 185, 731 S.E.2d 404 (2012).] See Section III.A.3.d, below.

e. For pattern jury instructions as to void marriages, see the following:

i. N.C.P.I.—Civil 815.04—Void Marriage—Issue of Bigamy;

ii. N.C.P.I.—Civil 815.00—Void Marriage—Issue of Lack of Personal Consent;

iii. N.C.P.I.—Civil 815.02—Void Marriage—Issue of Lack of Proper Solemnization;

iv. N.C.P.I.—Civil 815.06—Void Marriage—Issue of Marriage to Close Blood Kin. [See the next section, considering these marriages voidable.]

3. Voidable marriages.

a. A "voidable marriage remains valid 'for all civil purposes, until annulled by a competent tribunal *in a direct proceeding*.' " [*Duncan v. Duncan,* 232 N.C. App. 369, 372, 754 S.E.2d 451, 454 (emphasis in original) (quoting *Geitner v. Townsend,* 67 N.C. App. 159, 161, 312 S.E.2d 236, 238 (1984)), *review denied, dismissed*, 367 N.C. 531, 762 S.E.2d 208 (2014); *Pickard v. Pickard,* 176 N.C. App. 193, 196, 625 S.E.2d 869, 872 (2006) (quoting *Geitner*).]

i. When one party sues for divorce, a counterclaim by the other party seeking an order to declare the marriage invalid is a "direct proceeding." [*Duncan v. Duncan,* 232 N.C. App. 369, 754 S.E.2d 451, *review denied, dismissed*, 367 N.C. 531, 762 S.E.2d 208 (2014).]

b. By statute, a marriage contracted under a representation and belief that the female is pregnant, followed by a continuous one-year separation of the parties, commenced within forty-five days of marriage, shall be voidable unless a child was born to the parties within ten lunar months of the date of separation. [G.S. 51-3.]

c. A marriage based on a ceremony in North Carolina not properly solemnized as required by G.S. 51-1 is voidable. [*Duncan v. Duncan,* 232 N.C. App. 369, 754 S.E.2d 451 (citing *Fulton v. Vickery,* 73 N.C. App. 382, 326 S.E.2d 354 (1985), and *State v. Lynch,* 301 N.C. 479, 272 S.E.2d 349 (1980)) (husband met burden of showing that 1989 marriage officiated by a minister ordained by the Universal Life Church was not properly solemnized under version of G.S. 51-1 then in effect; court of appeals expressed no opinion regarding voidability of marriages solemnized by a Universal Life Church minister under current G.S. 51-1), *review denied, dismissed*, 367 N.C. 531, 762 S.E.2d 208 (2014).]

d. Even though G.S. 51-3 provides that the following marriages "shall be void," the marriages are voidable only. [1 Lee's North Carolina Family Law § 3.16(A) (5th ed. 1993).]

i. A marriage between two persons nearer of kin than first cousins,

ii. A marriage between double first cousins,

iii. A marriage between a male person under 16 years of age and any female,

iv. A marriage between a female person under 16 years of age and any male,

v. A marriage between persons either of whom is at the time physically impotent,

vi. A marriage between persons either of whom is at the time incapable of contracting from want of will or understanding. [*See Pickard v. Pickard,* 176 N.C. App. 193, 625 S.E.2d 869 (2006) (Tyson, J., dissenting) (only bigamous marriages are absolutely void, with all others being voidable); *Parks v. Parks,* 218 N.C.

245, 10 S.E.2d 807 (1940) (age defect under Virginia law gave rise to a voidable marriage); *Sawyer v. Slack,* 196 N.C. 697, 146 S.E. 864 (1929) (marriage of an underage female without parental consent required by statute was not void but voidable); *Geitner v. Townsend,* 67 N.C. App. 159, 312 S.E.2d 236 (citing *Ivery v. Ivery*, 258 N.C. 721, 129 S.E.2d 457 (1963)) (recognizing that a capacity defect results in voidable marriage but finding party competent to make decision to marry), *review denied,* 310 N.C. 744, 315 S.E.2d 702 (1984).]

e. A marriage based on a ceremony in North Carolina properly solemnized as required by G.S. 51-1 but without the license required by G.S. 51-6 "is valid, and neither void nor voidable." [*In re Estate of Peacock,* 788 S.E.2d 191, 195 (N.C. Ct. App.) (a ceremony conducted in the presence of a minister authorized to perform marriages, who declared that the celebrants were husband and wife, resulted in a marriage, despite the beliefs of the celebrants that the ceremony was a religious ceremony only; minister's similar belief was not relevant in determining whether a valid marriage resulted), *review denied*, 793 S.E.2d 227 (N.C. 2016).]

4. Differences between divorce and annulment.

a. Grounds for annulment must exist at the time of the marriage. Grounds for divorce can arise subsequent to the marriage. [1 Lee's North Carolina Family Law § 3.6 (5th ed. 1993).]

b. Annulment decrees that a valid marriage never existed. Divorce ends a marriage that was valid. [1 Lee's North Carolina Family Law § 3.6 (5th ed. 1993).]

B. Jurisdiction

1. Subject matter jurisdiction.

a. The district court division is the proper division without regard to the amount in controversy for the trial of actions for annulment. [G.S. 7A-244; 50-4.]

2. In rem or quasi in rem jurisdiction.

a. G.S. 1-75.8(3) provides for in rem and quasi in rem jurisdiction over actions for annulment involving a North Carolina resident.

C. Venue

1. Venue for annulment is the county in which either the plaintiff or the defendant reside.

2. G.S. 50-3 probably applies to annulment. [*See Sawyer v. Slack,* 196 N.C. 697, 146 S.E. 864 (1929) (while not addressing venue, stating that the procedure for an action to annul is the same as an action for divorce, except for the divorce requirement of jurisdictional facts).]

D. Parties

1. Statutory provisions.

a. Parties to the marriage sought to be annulled are proper parties. [*See* G.S. 50-4 (either party to a marriage may apply for annulment). But see discussion of standing at Section III.F.5, below.]

b. When a person under 18 obtains a marriage license by fraud or misrepresentation, the following are proper parties to seek annulment:

i. A parent of the underage party;

ii. A person, agency, or institution having legal custody or serving as a guardian of the underage party; or

iii. A guardian ad litem appointed to represent the underage party pursuant to G.S. 51-2.1(b). [G.S. 51-2(c).]

2. Persons other than spouses have maintained annulment actions in certain circumstances.

a. Any person may bring a void (bigamous) marriage to the attention of a court. [1 Lee's North Carolina Family Law § 3.19 (5th ed. 1993).]

b. During the spouse's lifetime.

i. A guardian for an incompetent person may bring an action to annul the marriage of the incompetent person during the lifetime of the incompetent. [*Ivery v. Ivery*, 258 N.C. 721, 129 S.E.2d 457 (1963). *See also Clark v. Foust-Graham,* 171 N.C. App. 707, 615 S.E.2d 398 (2005) (daughter, acting as guardian ad litem, filed action to annul father's marriage during father's lifetime on the grounds of incompetency, lack of consent, undue influence, and impotence).]

ii. This is different than absolute divorce. See Section I.C.2, above.

c. After the death of the spouse.

i. A plain reading of G.S. 51-3 evinces the legislature's intent to bar a postmortem annulment action brought by a sufficiently interested party only if (1) one of the spouses in a void or voidable marriage has died **and** (2) the marriage was followed by cohabitation and the birth of issue. [*Clark v. Foust-Graham*, 171 N.C. App. 707, 615 S.E.2d 398 (2005).]

ii. A person whose legal rights depend upon whether the marriage is valid or void may bring an action to annul the marriage of an incompetent person **after** the death of the incompetent, unless the marriage was followed by cohabitation and the birth of issue. [*Ivery v. Ivery*, 258 N.C. 721, 129 S.E.2d 457 (1963) (decedent's brother and heir-at-law could bring after the decedent's death an action to annul his marriage based on incompetency). *See also Clark v. Foust-Graham,* 171 N.C. App. 707, 615 S.E.2d 398 (2005) (daughter, in her capacity as executrix of decedent father's estate, was entitled to pursue annulment suit after father's death).]

E. Grounds

1. Bigamy. [G.S. 51-3.]

a. A bigamous marriage is a marriage between persons either of whom has a spouse living at the time of such marriage. [G.S. 51-3.]

b. A bigamous marriage is void and a nullity and may be collaterally attacked at any time. [*Lane v. Lane,* 115 N.C. App. 446, 445 S.E.2d 70 (citing *Taylor v. Taylor,* 321 N.C. 244, 362 S.E.2d 542 (1987)), *review denied,* 338 N.C. 311, 452 S.E.2d 311 (1994).]

c. The only void marriage is a bigamous marriage. [*Mussa v. Palmer-Mussa*, 366 N.C. 185, 731 S.E.2d 404 (2012).] See Sections III.A.2.c, d, above.

d. Of the grounds set out in G.S. 51-3, only bigamy is available after the death of a party if the marriage was followed by cohabitation and the birth of issue. [G.S. 51-3; see Section III.F.2, below.]

e. If sufficient evidence establishes the second marriage, it is presumed valid until the attacking party demonstrates that the second marriage is invalid. [*Mussa v. Palmer-Mussa*, 366 N.C. 185, 731 S.E.2d 404 (2012) (citing *Kearney v. Thomas,* 225 N.C. 156, 33 S.E.2d 871 (1945)); *In re Estate of Anderson,* 148 N.C. App. 501, 559 S.E.2d 222 (2002) (recognizing that North Carolina courts presume the validity of a second marriage unless the contrary is proved). *See also Parker v. Parker,* 46 N.C. App. 254, 265 S.E.2d 237 (1980) (the second marriage is presumed to be valid and the first marriage is presumed to be dissolved by divorce).]

f. Party seeking to void or annul a marriage has the burden to prove by the greater weight of the evidence grounds to overcome the presumption of a valid marriage. [*Pickard v. Pickard,* 176 N.C. App. 193, 625 S.E.2d 869 (2006) (citing *Geitner v. Townsend,* 67 N.C. App. 159, 312 S.E.2d 236 (1984)); *Mussa v. Palmer-Mussa*, 366 N.C. 185, 731 S.E.2d 404 (2012) (the attacking party cannot rely on any presumption favoring a first marriage, as it must yield to the presumption favoring the second marriage); *Parker v. Parker,* 46 N.C. App. 254, 265 S.E.2d 237 (1980) (proof that one party had not obtained a divorce is not sufficient to overcome the presumption); *Scott v. Murray,* 232 N.C. App. 337, 757 S.E.2d 525 (2014) (**unpublished**) (citing *Hendrix v. L.G. DeWitt, Inc.,* 19 N.C. App. 327, 198 S.E.2d 748 (1973)) (record search in one county that did not produce a decree dissolving the first marriage is not sufficient to rebut presumption of a valid divorce between those parties).]

g. To overcome the presumption that the second marriage is valid, plaintiff must show that (1) defendant's prior marriage was lawful and (2) defendant's prior marriage had not been dissolved at the time plaintiff and defendant were married. [*Mussa v. Palmer-Mussa*, 366 N.C. 185, 731 S.E.2d 404 (2012) (citing *Kearney v. Thomas,* 225 N.C. 156, 33 S.E.2d 871 (1945)).] The trial court must make findings addressing whether the plaintiff met the burden of proof. [*Simpson v. Avila,* 227 N.C. App. 649, 745 S.E.2d 374 (2013) (**unpublished**) (findings did not meet *Mussa* requirements when they did not indicate that plaintiff met his burden to show that defendant's first marriage had not been dissolved; findings that the evidence regarding defendant's divorce from her prior husband, which included four potential dates of divorce, was "conflicting" was not sufficient).]

h. The trial court properly dismissed plaintiff's action for annulment on grounds of bigamy when plaintiff did not meet his burden of proving that wife was married to another man when she married him. Decision based on uncontested findings that, at wife's purported first marriage, the parties did not obtain a marriage license and that the person presiding over that ceremony was not authorized or qualified to perform marriages. [*Mussa v. Palmer-Mussa*, 366 N.C. 185, 731 S.E.2d 404 (2012).]

i. Bigamy is a Class I felony. [G.S. 14-183.]

2. Marriage within prohibited degree of kinship. [G.S. 51-3.]

a. Prohibited degree of kinship is between any two persons nearer of kin than first cousins or between double first cousins. [G.S. 51-3.]

b. A relationship chart is attached as an appendix to this chapter. [See G.S. 104A-1 on computing degrees of kinship.]

c. When two siblings from one family marry two siblings from another family, the children of the two unions are double first cousins. [1 Lee's North Carolina Family Law § 2.9 n.106 (5th ed. 1993).]

d. Half-blood relationships are counted as whole-blood. [G.S. 51-4.]

3. Underage party. [G.S. 51-3.]

a. Marriage of person over age 16 and under 18.

i. Persons over age 16 and under age 18 may marry only if written consent is filed by an appropriate party with the register of deeds as required by G.S. 51-2(a1).

b. Marriage of person under age 16.

i. Marriage between persons either of whom is under 16 is a ground for annulment unless:

(a) The female is pregnant or

(b) A child has been born to the parties and is still living. [G.S. 51-3.]

c. Marriage of person over age 14 and under age 16.

i. The following persons more than 14 years of age but less than 16 years of age may marry pursuant to the procedure for judicial authorization to marry set out in G.S. 51-2.1:

(a) A female who is pregnant or has given birth to a child may marry the putative father of the child, either born or unborn.

(b) A male who is the putative father of a child, either born or unborn, may marry the mother of the child. [G.S. 51-2(b); 51-2.1.]

ii. When a person more than 14 years of age but less than 16 years desires to marry a person more than 16 years of age but less than 18, the marriage of the person between 14 and 16 must be pursuant to the procedure for judicial authorization to marry as set out in G.S. 51-2.1 and marriage of the person between 16 and 18 must be with the appropriate consent as set out in G.S. 51-2(a1). [Advisory Opinion: Validity of Marriage of Underage Persons; Session Law 2001-62, N.C.G.S. § 51-1, 2, 2A, 3 and 16, Op. N.C. Att'y Gen. (Oct. 9, 2001), www.ncdoj.com/About-DOJ/Legal-Services/Legal-Opinions/Opinions/Validity-of-Marriage-of-Underage-Persons.aspx.]

d. Marriage of person under age 14.

i. It is unlawful for any person under age 14 to marry. [G.S. 51-2(b1).]

4. Impotency. [G.S. 51-3.]

a. Marriage between persons either of whom is at the time of the marriage physically impotent is a ground for annulment. [G.S. 51-3.]

b. While no cases in North Carolina define impotency, cases from other jurisdictions define impotency as the inability to have sexual intercourse, as opposed to the inability to have children. [1 Lee's North Carolina Family Law § 3.20 (5th ed. 1993).]

5. False representation of pregnancy. [G.S. 51-3.] The following circumstances are grounds for annulment:
    a. A marriage contracted under a representation and belief that the female is pregnant;
    b. Followed by separation of the parties within forty-five days of the marriage, if the separation continues for one year; **and**
    c. No child is born to the parties within ten lunar months of the date of separation. [G.S. 51-3.]
6. Want of will or understanding. [G.S. 51-3.]
    a. Marriage between persons either of whom is at the time of the marriage incapable of contracting from want of will or understanding is a ground for annulment. [G.S. 51-3. *See Geitner v. Townsend,* 67 N.C. App. 159, 312 S.E.2d 236 (party's mental capacity at the precise time when the marriage is celebrated controls its validity or invalidity), *review denied,* 310 N.C. 744, 315 S.E.2d 702 (1984).]
    b. The test of mental capacity to contract a marriage is whether the person understands the special nature of the contract of marriage and the corresponding duties and responsibilities, which is determined from the facts and circumstances of each case. [*Ivery v. Ivery*, 258 N.C. 721, 129 S.E.2d 457 (1963); *Geitner v. Townsend,* 67 N.C. App. 159, 312 S.E.2d 236 (citing *Ivery*), *review denied,* 310 N.C. 744, 315 S.E.2d 702 (1984).]
    c. An adjudication of incompetency is not conclusive on the issue of later capacity to marry and does not bar a party from entering a contract to marry. [*Geitner v. Townsend,* 67 N.C. App. 159, 312 S.E.2d 236 (finding of incompetency and appointment of a guardian in 1961 did not preclude jury determination that ward had capacity to marry in 1980), *review denied,* 310 N.C. 744, 315 S.E.2d 702 (1984).]
    d. Undue influence may be a ground for annulment under the "want of will" language in G.S. 51-3. [*Clark v. Foust-Graham,* 171 N.C. App. 707, 714, 615 S.E.2d 398, 402–03 (2005) (quoting the statute) (trial court did not err by submitting undue influence to the jury as a potential ground for annulment; "if a person's consent to marry was procured by undue influence, he was 'incapable of contracting from want of will,' making the marriage voidable" under G.S. 51-3).]
        i. Undue influence exists where there has been "a fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result." [*Clark v. Foust-Graham,* 171 N.C. App. 707, 713, 615 S.E.2d 398, 402 (2005) (evidence supporting jury's finding of undue influence included that husband was elderly and suffering from dementia and/or Alzheimer's disease, had little association with family and friends before the marriage but constant association with and supervision by wife, marriage was sudden, and husband was confused at ceremony).]
        ii. There are four general elements of undue influence:
            (a) A person who is subject to influence,
            (b) An opportunity to exert influence,
            (c) A disposition to exert influence, and

(d) A result indicating undue influence. [*Clark v. Foust-Graham,* 171 N.C. App. 707, 615 S.E.2d 398 (2005) (citing *In re Will of Dunn,* 129 N.C. App. 321, 500 S.E.2d 99 (1998)).]

7. Fraud.

a. When a license to marry is procured by any person under age 18 by fraud or misrepresentation, a parent of the underage party, a person, agency, or institution having legal custody or serving as a guardian of the underage party, or a guardian ad litem appointed to represent the underage party pursuant to G.S. 51-2.1(b) is a proper party to bring an action to annual the marriage. [G.S. 51-2(c).]

b. Applying Georgia law, trial court correctly annulled parties' marriage for fraud when plaintiff misstated by five the number of previous marriages. [*Mayo v. Mayo,* 172 N.C. App. 844, 617 S.E.2d 672 (Georgia statutory language required voluntary consent for contract of marriage untainted by fraud and required parties to disclose on the application for a marriage license number of previous marriages and their dispositions; wife disclosed two prior marriages instead of seven), *review denied,* 360 N.C. 65, 623 S.E.2d 586 (2005).]

F. Defenses

1. Ratification of a nonbigamous marriage.

a. A marriage voidable because one party was underage may be ratified by subsequent conduct of the parties recognizing the marriage. [*Sawyer v. Slack,* 196 N.C. 697, 146 S.E. 864 (1929) (stating rule); *Parks v. Parks,* 218 N.C. 245, 10 S.E.2d 807 (1940) (husband who was underage by Virginia law, place of the marriage, ratified what was a voidable marriage when he cohabited with defendant upon their return to North Carolina).]

b. It does not appear that ratification has been raised as a defense to other grounds for annulment.

2. In a nonbigamous marriage, death of a party after cohabitation and birth of issue.

a. A marriage followed by cohabitation and the birth of issue may not be annulled after the death of a party except for bigamy. [G.S. 51-3. *See Clark v. Foust-Graham,* 171 N.C. App. 707, 615 S.E.2d 398 (2005).]

b. The court in *Clark v. Foust-Graham,* 171 N.C. App. 707, 615 S.E.2d 398 (2005), also analyzed the right to bring an annulment action under G.S. 1A-1, Rule 25(a), which provides that "[n]o action abates by reason of the death of a party if the cause of action survives." Finding that an annulment action survives under Rule 25(a) unless it is a cause of action where the relief sought could not be enjoyed or unless granting it would be nugatory after death, the court found that an action for annulment brought on husband's behalf did not abate upon his death.

3. Judicial estoppel.

a. "Judicial estoppel, or preclusion against inconsistent positions, is an equitable doctrine designed to protect the integrity of the courts and the judicial process. . . . Judicial estoppel forbids a party from asserting a legal position inconsistent with one taken earlier in the same or related litigation." [*Price v. Price,* 169 N.C. App. 187, 191,

609 S.E.2d 450, 452 (2005) (quoting *Medicare Rentals, Inc. v. Advanced Servs.,* 119 N.C. App. 767, 769–70, 460 S.E.2d 361, 363 (1995)).]

b. Judicial estoppel requires a court to consider whether:

i. A party's subsequent position is clearly inconsistent with an earlier position;

ii. The party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding might pose a threat to judicial integrity by leading to inconsistent court determinations or the perception that either the first or the second court was misled;

iii. The party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. [*Pickard v. Pickard,* 176 N.C. App. 193, 625 S.E.2d 869 (2006).]

c. Husband's request for an annulment properly denied on judicial estoppel grounds based on his sworn assertion in a stepparent adoption proceeding that he and defendant were married. [*Pickard v. Pickard,* 176 N.C. App. 193, 625 S.E.2d 869 (2006).]

d. Husband was not judicially estopped from contesting the validity of a 1989 marriage when he had not asserted in any judicial proceeding that the 1989 marriage was valid. [*Duncan v. Duncan,* 232 N.C. App. 369, 754 S.E.2d 451, *review denied, dismissed*, 367 N.C. 531, 762 S.E.2d 208 (2014).]

4. Equitable estoppel.

a. Husband was equitably estopped from contesting the validity of a 1989 marriage when both parties were equally negligent in relying on the credentials of a person not authorized under G.S. 51-1 to solemnize a marriage. [*Duncan v. Duncan,* 232 N.C. App. 369, 754 S.E.2d 451 (citing *Mayer v. Mayer,* 66 N.C. App. 522, 311 S.E.2d 659 (1984)), *review denied, dismissed*, 367 N.C. 531, 762 S.E.2d 208 (2014).]

5. Lack of standing to collaterally attack a prior adjudication of divorce.

a. Husband's action for annulment properly dismissed because husband lacked standing to collaterally attack wife's divorce decree on ground that it was fraudulently obtained when decree was on its face regular in every respect. [*Heiser v. Heiser,* 71 N.C. App. 223, 321 S.E.2d 479 (1984) (citing *Maxwell v. Woods,* 47 N.C. App. 495, 267 S.E.2d 516, *review denied,* 301 N.C. 236, 283 S.E.2d 132 (1980)) (husband a stranger to wife's divorce proceeding from former husband and was not prejudiced), *review denied,* 313 N.C. 329, 329 S.E.2d 386, *cert. denied,* 474 U.S. 824, 106 S. Ct. 80 (1985).]

b. Husband lacked standing to attack collaterally prior adjudication of divorce regular on its face between his wife and her former husband, as he was a stranger to that decree and was not prejudiced as to some pre-existing right by the decree. [*Maxwell v. Woods,* 47 N.C. App. 495, 267 S.E.2d 516 (husband brought declaratory judgment action to have wife's divorce decree from former husband declared void so that his subsequent marriage to wife would be void ab initio), *review denied,* 301 N.C. 236, 283 S.E.2d 132 (1980).]

G. Procedure

1. Choice of law.
    a. To determine whether a marriage is void, the district court must look to the laws of the jurisdiction where the marriage took place. [*Hurston v. Hurston,* 179 N.C. App. 809, 635 S.E.2d 451 (2006) (marriage was void ab initio under District of Columbia statute); *Mayo v. Mayo,* 172 N.C. App. 844, 617 S.E.2d 672 (applying Georgia law in annulment action when parties were married in Georgia and lived a portion of their married life there), *review denied,* 360 N.C. 65, 623 S.E.2d 586 (2005). *See also Fungaroli v. Fungaroli,* 53 N.C. App. 270, 279, 280 S.E.2d 787, 793 (1981) (noting the general conflicts rule that the "validity of a marriage is determined by the law of the state with the most significant relationship to the spouses and the marriage" and further that "a marriage valid where contracted is valid everywhere").]
2. The material facts in a complaint for an annulment are deemed denied. [G.S. 50-10(a).]
3. A judgment for annulment cannot be entered by default. [*Hawkins ex rel. Thompson v. Hawkins,* 192 N.C. App. 248, 664 S.E.2d 616 (2008).]
4. The reference procedure in G.S. 1A-1, Rule 53 is not available in an action "to annul a marriage . . . or actions in which a ground of annulment or divorce is in issue." [G.S. 1A-1, Rule 53(a)(1).]
5. Whether an annulment action can be brought after a judgment of divorce has been entered for the same parties.
    a. In *Mayo v. Mayo,* 172 N.C. App. 844, 617 S.E.2d 672, *review denied,* 360 N.C. 65, 623 S.E.2d 586 (2005), an annulment was granted after the entry of a judgment for absolute divorce, but that issue was not properly submitted to the appellate court for review.
    b. In *Lane v. Lane,* 115 N.C. App. 446, 445 S.E.2d 70, *review denied,* 338 N.C. 311, 452 S.E.2d 311 (1994), after absolute divorce husband learned his marriage to wife was bigamous and filed a motion in the cause seeking termination of temporary alimony, reimbursement for temporary alimony payments, and dismissal of the equitable distribution (ED) action. Noting that a bigamous marriage may be collaterally attacked at any time, the court found that the trial court erred when it denied husband's motion for directed verdict. Wife's argument that husband was estopped by res judicata from seeking to terminate alimony and dismiss ED rejected.
    c. It has been suggested that once a judgment of divorce has been entered, which implies a valid marriage, res judicata should preclude a later action for annulment. [1 Lee's North Carolina Family Law § 3.15 (5th ed. 1993).] *But see Lane v. Lane,* 115 N.C. App. 446, 445 S.E.2d 70, *review denied,* 338 N.C. 311, 452 S.E.2d 311 (1994), immediately above.
6. North Carolina court is not required to give full faith and credit to an annulment order from another state that violates North Carolina public policy.
    a. Virginia decree of annulment not entitled to full faith and credit by the courts of North Carolina because, among other reasons, it would violate North Carolina's public policy to give full faith and credit to the Virginia decree where husband went to another state and sought an annulment in contradiction of his previous

representations to a North Carolina court of a valid marriage, solely to extinguish wife's right to alimony, all the while disregarding orders entered in North Carolina in proceedings that he commenced. [*Fungaroli v. Fungaroli,* 53 N.C. App. 270, 280 S.E.2d 787 (1981).] But see Section I.A.1.g, above, discussing same-sex marriage.

H. Judgment

1. The trial court may not enter a judgment of annulment until the judge or jury finds the material facts. [G.S. 50-10(a).]
2. Effect of a judgment of annulment.
   a. On the legitimacy of a child.
      i. A child born of a voidable or a bigamous marriage is legitimate notwithstanding annulment of the marriage. [G.S. 50-11.1.]
   b. On child support.
      i. A child's right of support exists independently of marriage. [See 1 Lee's North Carolina Family Law § 3.12 (5th ed. 1993) and G.S. 50-13.4(b), making parents primarily liable for support.]
      ii. After a final judgment has been entered in an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce involving a minor child's parents, the prior action for divorce, etc. does not preclude either parent from filing a separate action seeking child support in the same county or district or in a different county or district unless the prior divorce, annulment, or alimony judgment also determined the parents' child support obligations. [*See Powers v. Parisher*, 104 N.C. App. 400, 409 S.E.2d 725 (1991), *review denied,* 331 N.C. 286, 417 S.E.2d 254 (1992).]
   c. On postseparation support or alimony.
      i. Postseparation support may be ordered in an action for annulment. [G.S. 50-16.1A(4).]
      ii. No statute authorizes an award of alimony in an action for annulment.
   d. On property rights.
      i. Since an annulment treats the spouses as if they were never married, they are not entitled to any property rights that depend on the marriage. Other remedies, such as a resulting or constructive trust, contract law, or equitable principles, may be available to effect a property division. [1 Lee's North Carolina Family Law § 3.14 (5th ed. 1993).]
   e. On estate rights.
      i. Annulment revokes provisions in a testator's will in favor of the testator's spouse. [G.S. 31-5.4.]
      ii. A spouse whose marriage has been annulled has no right to a year's allowance, to petition for an elective share, or to take a life estate in lieu thereof and loses all rights of intestate succession in the estate of the other spouse. [G.S. 31A-1(a)(1) and (b)(1), (3), (4). *See In re Estate of Hanner*, 146 N.C. App. 733, 554 S.E.2d 673 (2001) (objection by children of deceased father to second wife's election of a

life estate under G.S. 29-30; children claimed marriage invalid because decree dissolving second wife's previous marriage was flawed, but children failed to overcome the presumption of second marriage's validity).]

iii. A spouse whose marriage has been annulled loses the right to administer the estate of the other spouse. [G.S. 31A-1(a)(1) and (b)(5). *See In re Estate of Anderson,* 148 N.C. App. 501, 559 S.E.2d 222 (2002) (proceeding pursuant to G.S. 28A-9-1 to have spouse in allegedly bigamous marriage removed as administrator of the estate of the other spouse).]

f. On the beneficiary of a revocable trust.

i. Annulment revokes all provisions in the trust in favor of the settlor's former spouse, including but not by way of limitation, any provision conferring a general or special power of appointment on the former spouse and any appointment of the former spouse as trustee. [G.S. 36C-6-606.]

ii. Provisions revoked by annulment are revived by the settlor's remarriage to the former spouse. [G.S. 36C-6-606.]

iii. "Former spouse" includes a purported former spouse. [G.S. 36C-6-606.]

I. Appeal

1. Generally, the appellate court must determine whether the evidence supports the trial court's conclusion as to the validity of the marriage between the plaintiff and defendant. [*Parker v. Parker,* 46 N.C. App. 254, 265 S.E.2d 237 (1980) (question presented on appeal was whether the evidence supported the trial court's conclusion that there was no valid marriage between the parties); *Mussa v. Palmer-Mussa*, 366 N.C. 185, 731 S.E.2d 404 (2012) (when reviewing a G.S. 1A-1, Rule 41(b) dismissal of a complaint for annulment, appellate court must determine whether the trial court's findings of fact are supported by competent evidence and whether those findings support the court's conclusions of law, with the analysis beginning with plaintiff's marriage to defendant).]

Appendix A. Relationship Chart

STATUTE

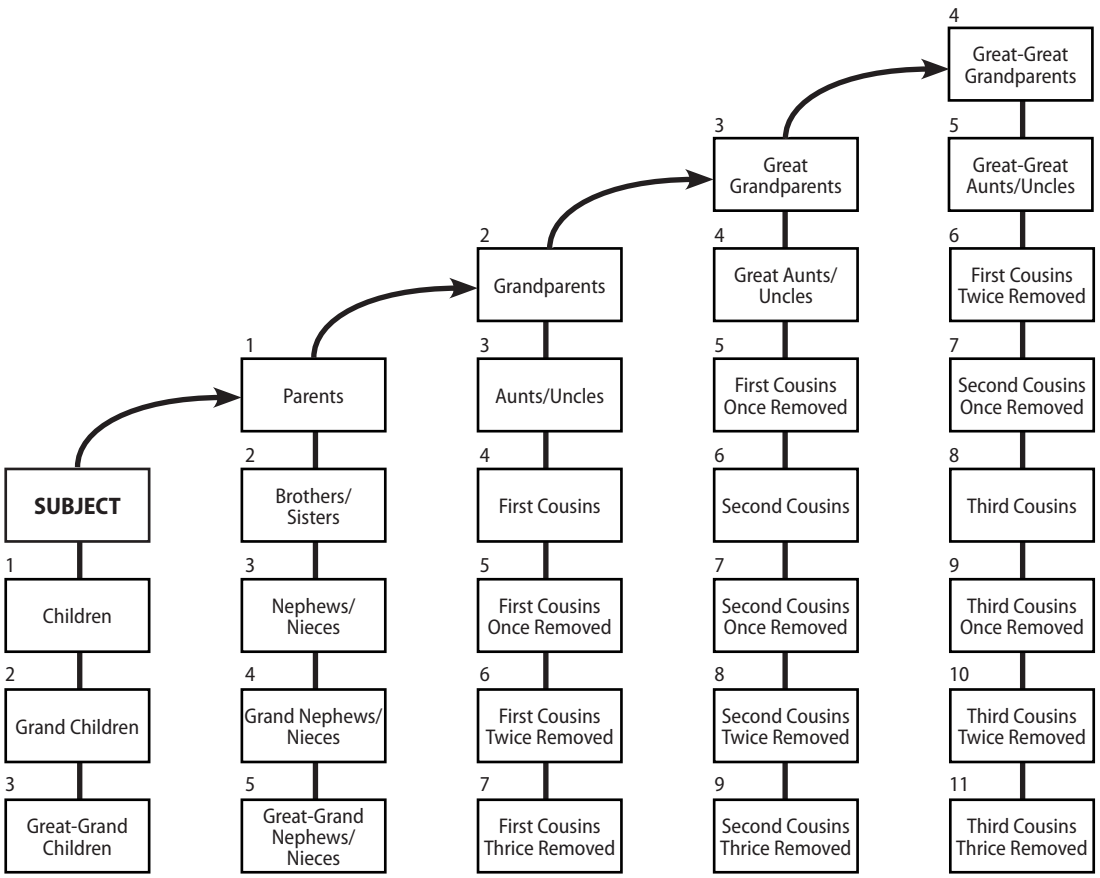
G.S. 104A-1. Degrees of kinship; how computed.

In all cases where degrees of kinship are to be computed, the same shall be computed in accordance with the civil law rule, as follows:

(1) The degrees of lineal kinship of two persons is computed by counting one degree for each person in the line of ascent or descent, exclusive of the person from whom the computing begins; and

(2) The degree of collateral kinship of two persons is computed by commencing with one of the persons and ascending from him to a common ancestor, descending from that ancestor to the other person, and counting one degree for each person in the line of ascent and in the line of descent, exclusive of the person from whom the computation begins, the total to represent the degree of such kinship.

Table of Consanguinity (Figures Show Degree of Relationship)



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