# MANAGEMENT STRATEGIES
# FOR
# CHILD CUSTODY CASES

Here are a few ideas to consider for managing child custody cases:

## I. DISCOVERY CONFERENCES

Rule 26 (f) Discovery meeting, discovery conference, discovery plan. –
(1) No earlier than 40 days after the complaint is filed in an action, any party's attorney or an unrepresented party may request a meeting on the subject of discovery, including the discovery of electronically stored information. If such a request is filed, the parties shall meet in the county in which the action is pending not less than 21 days after the initial request for a meeting is filed and served upon the parties, unless agreed otherwise by the parties or their attorneys and unless an earlier time for the meeting is ordered by the court or agreed by the parties. Even if the parties or their attorneys do not seek to have a discovery meeting***, at any time after commencement of an action the court may direct the parties or their attorneys to appear before it for a discovery conference.***
(2) During a discovery meeting held pursuant to subdivision (f)(1) of this rule, the attorneys and any unrepresented parties shall (i) consider the nature and basis of the parties' claims and defenses and the possibilities for promptly settling or resolving the case and (ii) discuss the preparation of a discovery plan as set forth in subdivision (f)(3) of this rule. Attorneys for the parties, and any unrepresented parties, that have appeared in the case are jointly responsible for arranging the meeting, for being prepared to discuss a discovery plan, and for attempting in good faith to agree on a discovery plan. The meeting may be held by telephone, by videoconference, or in person, or a combination thereof, unless the court, on motion, orders the attorneys and the unrepresented parties to attend in person. If a discovery plan is agreed upon, the plan shall be submitted to the court within 14 days after the meeting, and the parties may request a conference with the court regarding the plan. If the parties do not agree upon a discovery plan, they shall submit to the court within 14 days after the meeting a joint report containing those parts of a discovery plan upon which they agree and the position of each of the parties on the parts upon which they disagree. Unless the parties agree otherwise, the attorney for the first plaintiff listed on the complaint shall be responsible for submitting the discovery plan or joint report.

(3) A discovery plan shall contain the following: (i) a statement of the issues as they then appear; (ii) a proposed plan and schedule of discovery, including the discovery of electronically stored information; (iii) with respect to electronically stored information, and if appropriate under the circumstances of the case, a reference to the preservation of such information, the media form, format, or procedures by which such information will be produced, the allocation of the costs of preservation, production, and, if necessary, restoration, of such information, the method for asserting or preserving claims of privilege or of protection of the information as trial-preparation materials if different from that provided in subdivision (b)(5) of this rule, the method for asserting or preserving confidentiality and proprietary status, and any other matters addressed by the parties; (iv) any limitations proposed to be placed on discovery, including, if appropriate under the circumstances of the case, that discovery be conducted in phases or be limited to or focused on particular issues; (v) when discovery should be completed; and (vi) if appropriate under the circumstances of the case, any limitations or conditions pursuant to subsection (c) of this rule regarding protective orders.

(4) If the parties are unable to agree to a discovery plan at a meeting held pursuant to subdivision (f)(1) of this rule, they shall, upon motion of any party, appear before the court for a discovery conference at which the court shall order the entry of a discovery plan after consideration of the report required to be submitted under subdivision (f)(2) of this rule and the position of the parties. The order may address other matters, including the allocation of discovery costs, as are necessary for the proper management of discovery in the action. An order may be altered or amended as justice may require.

The court may combine the discovery conference with a pretrial conference authorized by Rule 16.

## II. PRETRIAL CONFERENCES

Rule 16. Pre-trial procedure; formulating issues.

(a) In any action, the judge may in his discretion direct the attorneys for the parties to appear before him for a conference to consider

(1) The simplification and formulation of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability or necessity of a reference of the case, either in whole or in part;

(6) Matters of which the court is to be asked to take judicial notice;

(7) Such other matters as may aid in the disposition of the action.

If a conference is held, the judge may make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

Rule 7 of the General Rules of Practice for the Superior and District Courts, 276 NC 735, also requires pre-trial conferences in civil cases other than uncontested divorces, defaults, and magistrate cases & appeals:

"***There shall be a pre-trial conference in every civil case***....At least twenty-one days prior to trial date, the plaintiff's attorney shall arrange a pre-trial conference with the defendant's attorney to be held not later than seven days before trial date. At such conference a pre-trial order shall be prepared and signed by the attorneys."

## III. REQUIRE PARTIES TO ATTEND CUSTODY MEDIATION BEFORE CONDUCTING TEMPORARY CUSTODY HEARINGS

50-13.1 (b) Whenever it appears to the court, from the pleadings or otherwise, that an action involves a contested issue as to the custody or visitation of a minor child, the matter, where there is a program established pursuant to G.S. 7A-494, shall be set for mediation of the unresolved issues as to custody and visitation before or concurrent with the setting of the matter for hearing unless the court waives mediation pursuant to subsection (c). Issues that arise in motions for contempt or for modifications as well as in other pleadings shall be set for mediation unless mediation is waived by the court. Alimony, child support, and other economic issues may not be referred for mediation pursuant to this section. The purposes of mediation under this section include the pursuit of the following goals:

(1) To reduce any acrimony that exists between the parties to a dispute involving custody or visitation of a minor child;

(2) The development of custody and visitation agreements that are in the child's best interest;

(3) To provide the parties with informed choices and, where possible, to give the parties the responsibility for making decisions about child custody and visitation;

(4) To provide a structured, confidential, nonadversarial setting that will facilitate the cooperative resolution of custody and visitation disputes and minimize the stress and anxiety to which the parties, and especially the child, are subjected; and

(5) To reduce the relitigation of custody and visitation disputes.

(c) For good cause, on the motion of either party or on the court's own motion, the court may waive the mandatory setting under Article 39A of Chapter 7A of the General Statutes of a contested custody or visitation matter for mediation. Good cause may include, but is not limited to, the following: a showing of undue hardship to a party; an agreement between the parties for voluntary mediation, subject to court approval; allegations of abuse or neglect of the minor child; allegations of alcoholism, drug abuse, or domestic violence between the parents in common; or allegations of severe psychological, psychiatric, or emotional problems. A showing by either party that the party resides more than fifty miles from the court may be considered good cause.

(d) Either party may move to have the mediation proceedings dismissed and the action heard in court due to the mediator's bias, undue familiarity with a party, or other prejudicial ground.

(e) Mediation proceeding shall be held in private and shall be confidential. Except as provided in this Article, all verbal or written communications from either or both parties to the mediator or between the parties in the presence of the mediator made in a proceeding pursuant to this section are absolutely privileged and inadmissible in court. The mediator may assess the needs and interests of the child, and may interview the child or others who are not parties to the proceedings when he or she thinks appropriate.

(f) Neither the mediator nor any party or other person involved in mediation sessions under this section shall be competent to testify to communications made during or in furtherance of such mediation sessions; provided, there is no privilege as to communications made in furtherance of a crime or fraud. Nothing in this subsection shall be construed as permitting an individual to obtain immunity from prosecution for criminal conduct or as excusing an individual from the reporting requirements of Article 3 of Chapter 7B of the General Statutes or G.S. 108A-102.

(g) Any agreement reached by the parties as a result of the mediation shall be reduced to writing, signed by each party, and submitted to the court as soon as practicable. Unless the court finds good reason not to, it shall incorporate the agreement in a court order and it shall become enforceable as a court order. If some or all of the issues as to custody or visitation are not resolved by mediation, the mediator shall report that fact to the court.

## IV. REQUIRE ATTORNEYS AND PARTIES TO BE PREPARED

*Exhibits labeled and exchanged.
*Legal issues briefed?
*Trial notebooks?
*Witnesses present.

## V. TESTIMONY BY TELEPHONE/SKYPE/ FACETIME OR BEFORE A COURT IN ANOTHER STATE OR AT SOME OTHER LOCATION

§ **50A-372**. Testimony by electronic means. In a proceeding brought under this Part, a party or witness who is not reasonably available to appear personally may appear and provide testimony and present evidence by electronic means unless the court finds good cause to require a personal appearance. (2013-27, s. 3.)

§ 50A-111. Taking testimony in another state.

(a) In addition to other procedures available to a party, a party to a child-custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this State for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.

(b) A court of this State may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this State shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

(c) Documentary evidence transmitted from another state to a court of this State by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission. (1979, c. 110, s. 1; 1999-223, s. 3.)

## VI. GUARDIANS AD LITEM FOR CHILDREN

What authority is there to appoint a GAL for the child in a child custody proceeding? Can this be done under NCGS 1A-1, Rule 17 ? Is there any authority under Chapter 50 or Chapter 50A ? Under local rules of the district?

## VII. PARENTING COORDINATORS

### § 50-91. Appointment of parenting coordinator.

(a) The court may appoint a parenting coordinator at any time during the proceedings of a child custody action involving minor children brought under Article 1 of this Chapter if all parties consent to the appointment. The parties may agree to limit the parenting coordinator's decision-making authority to specific issues or areas.

(b) The court may appoint a parenting coordinator without the consent of the parties upon entry of a custody order other than an ex parte order, or upon entry of a parenting plan only if the court also makes specific findings that the action is a high-conflict case, that the appointment of the parenting coordinator is in the best interests of any minor child in the case, and that the parties are able to pay for the cost of the parenting coordinator.

(c) The order appointing a parenting coordinator shall specify the issues the parenting coordinator is directed to assist the parties in resolving and deciding. The order may also incorporate any agreement regarding the role of the parenting coordinator made by the parties under subsection (a) of this section. The court shall give a copy of the appointment order to the parties prior to the appointment conference. Notwithstanding the appointment of a parenting coordinator, the court shall retain exclusive jurisdiction to determine fundamental issues of custody, visitation, and support, and the authority to exercise management and control of the case.

(d) The court shall select a parenting coordinator from a list maintained by the district court. Prior to the appointment conference, the court must complete and give to the parenting coordinator a referral form listing contact information for the parties and their attorneys, the court's findings in support of the appointment, and any agreement by the parties. (2005-228, s. 1.)

**§ 50-92. Authority of parenting coordinator.**

(a) The authority of a parenting coordinator shall be specified in the court order appointing the parenting coordinator and shall be limited to matters that will aid the parties:

(1) Identify disputed issues.

(2) Reduce misunderstandings.

(3) Clarify priorities.

(4) Explore possibilities for compromise.

(5) Develop methods of collaboration in parenting.

(6) Comply with the court's order of custody, visitation, or guardianship.

(b) Notwithstanding subsection (a) of this section, the court may authorize a parenting coordinator to decide issues regarding the implementation of the parenting plan that are not specifically governed by the court order and which the parties are unable to resolve. The parties must comply with the parenting coordinator's decision until the court reviews the decision. The parenting coordinator, any party, or the attorney for any party may request an expedited hearing to review a parenting coordinator's decision. Only the judge presiding over the case may subpoena the parenting coordinator to appear and testify at the hearing.

(c) The parenting coordinator shall not provide any professional services or counseling to either parent or any of the minor children. The parenting coordinator shall refer financial issues to the parties' attorneys. (2005-228, s. 1.)

**§ 50-93. Qualifications.**

(a) To be eligible to be included on the district court's list of parenting coordinators, a person must meet all of the following requirements:

(1) Hold a masters or doctorate degree in psychology, law, social work, counseling, medicine, or a related subject area.

(2) Have at least five years of related professional post-degree experience.

(3) Hold a current license in the parenting coordinator's area of practice, if applicable.

(4) Participate in 24 hours of training in topics related to the developmental stages of children, the dynamics of high-conflict families, the stages and effects of divorce, problem solving techniques, mediation, and legal issues.

(b) In order to remain eligible as a parenting coordinator, the person must also attend parenting coordinator seminars that provide continuing education, group discussion, and peer review and support. (2005-228, s. 1.)

## VIII. APPOINTMENT OF EXPERTS

## IX. LUNCH AND LEARN PROGRAMS

Here is an example of a Lunch and Learn manuscript:

**CHILD SUPPORT**
**IMPUTING INCOME TO A PARTY**

The general rule is that child support is determined based on a parent's **actual** income at the time the award is made. ***See Head v. Mosier, 197 NCApp 328, 677 SE2d 191 (2009).***

The Child Support Guidelines (and some case law) allow a parent's **earning capacity** to sometimes be used in calculating child support. If the court finds that a parent is deliberately suppressing income in order to avoid or minimize the child support obligation and that the parent's unemployment or underemployment us the result of bad faith, then the trial court may calculate child support based on the parent's **potential** income. ***Guidelines.***

An intentional reduction in income, without more, is not sufficient to merit imputation of income; bad faith is required. ***Metz v. Metz, 711 SE2d 737 (2011).***

However, bad faith may be shown by a party's "naïve indifference" to the children's need for financial support. ***Roberts v. McAllister, 174 NC App 369, 621 SE2d 191 (2005); McKyer v. McKyer, 179 NC App 132, 632 SE 2d 828 (2006).***

Bad faith associated with suppression of income is determined on a case-by-case basis. ***Pataky v. Pataky, 160 NC App 289, 585 SE2d 404 (2003).***

The determination of whether or not to impute income to a parent who is voluntarily unemployed is based in part on the conduct of the parent. ***Wolf v. Wolf, 151 NC App 523, 566 SE 2d 516 (2002).***

The case of ***Roberts v. McAllister, 174 NC App 369, 621 SE2d 191 (2005)*** established that, in determining whether or not a parent has acted in bad faith, the court should consider whether the parent:

1. failed to exercise his reasonable capacity to earn an income;
2. deliberately avoided her family's financial responsibilities;
3. acted in deliberate disregard of his support obligations;
4. refused to look for or accept gainful employment;
5. willfully refused to obtain or take a job;
6. purposely failed to apply herself to her business;
7. intentionally depressed his income to an artificially low amount; or
8. intentionally left his employment to go into some other business.

**When the parent gets fired:**

***Wolf v. Wolf, 151 NC App 523, 566 SE2d 516 (2002) -*** Dad found to be voluntarily unemployed where his actions at work irritated and embarrassed his employer resulting in what the court found was an "entirely predictable termination." The court imputed income at the amount Dad was earning in the position from which he was fired. Upheld.

***Metz v. Metz, 711 SE2d 737 (2011) -*** Dad's unemployment was the foreseeable result of being convicted for the sexual abuse of his child, and the court imputed income at the level he had been earning at his job before he was fired. Upheld.

**When the parent quits:**

***King v. King, 153 NC App 181, 568 SE2d 864 (2002) -*** Mom voluntarily stopped working as a real estate agent, purportedly because the time required for her to attend to her child support case interfered with her ability to work. Trial court imputed income. Upheld by Court of Appeals.

***Cook v. Cook, 159 NC App 657, 583 SE2d 696 (2003) -*** Where the court found that Dad's resignation from his job was not done in bad faith, it was error to the court to impute earnings merely because he resigned.

**When the parent retires:**

***Mason v. Erwin, 157 NC App 284, 579 SE2d 120 (2003) -*** Dad took early retirement when his current wife won the lottery. Appropriate for the trial court to impute income.

***Osborne v. Osborne, 129 NC App 34, 497 SE2d 113 (1998) -*** Dad took early retirement when child was three years old, but Dad still had many skills and remained eligible to work for his former employer without decreasing his retirement benefits. Trial court imputed income. Upheld by the Court of Appeals.

**When the parent is underemployed:**

***McKyer v. McKyer, 179 NC App 132, 632 SE 2d 828 (2006) -*** Dad worked only one day per week at a golf driving range, had not looked for other work, did not contribute significantly to child's financial needs. Trial court imputed income. Court of Appeals held this was proper, but remanded for additional findings about the amount to be imputed.

***Andrews v. Andrews, 719 SE2d 128 (2011) -*** Trial court properly used imputed income for Dad and denied his motion to modify child support where he voluntarily resigned his job as an engineer ($172,000 per year) to start a church at a salary of $52,800 per year and Dad testified that he did this without considering his ability to meet his child support obligation.

If a parent is physically or mentally incapacitated, or if a parent is caring for a child under three years of age and for whom child support is being determined, then the court may not impute income to that parent. ***Guidelines.***

**Here are two recent cases dealing with imputation of income:**

***Lasecki v. Lasecki, ___ NCApp ___ (April 5, 2016)***

In this case, the parties had a Separation Agreement providing for Dad to pay child support and alimony. One year later, Dad filed a child support complaint, alleged that his income had decreased, and asked for Guidelines support. Mom counterclaimed for specific performance.

The trial court entered a judgment for arrears and found that the amount provided for in the Separation Agreement was reasonable in light of the circumstances at the time the case was heard. The trial court also ordered specific performance of the Separation Agreement. The trial judge stated that he was **not** imputing income to Dad and that Dad was **not** acting in bad faith. However, the trial judge did often refer to Dad's earning capacity when determining that the amount of support in the Separation Agreement was reasonable, and when deciding that Dad had the ability to comply with the order of specific performance.

The Court of Appeals determined that the trial court very clearly did impute income to Dad when it considered his earning capacity instead of his actual present income at the time of trial. The Court of Appeals held that the trial court should NOT have concluded that the child support amount in the Separation Agreement was reasonable after considering Dad's earning capacity rather than his actual income *without first finding that Dad was deliberately depressing his income in bad faith.* **Never use earning capacity without a showing of bad faith.**

***Lueallen v. Lueallen, ___ NC App __ (Sept. 6, 2016)***

The trial court concluded that Mom was deliberately depressing her income in bad faith disregard of her child support obligation where

*she quit a teaching job without first securing another job,

*she said that she had been looking for other work but had not actually applied for anything, and

*she stated in an email to Dad that she didn't think mothers should have to pay child support.

The trial court imputed income to Mom in the amount that she testified she would earn if she became fully employed. The Court of Appeals affirmed.

The Court of Appeals also noted that trial courts in support cases should attach the child support worksheet to the child support order to show how support was determined.