

Family Law Update

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**CHERYL HOWELL
NOVEMBER 2009**

Domestic Violence

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LEGISLATION



SL 2009-425

Pets

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- Chapter 50B protective order may include provisions:
 - Providing for the care custody and control of any animal
 - Prohibiting "cruelly treating or abusing an animal"

- Effective August 5, 2009

SL 2009-115
Effective July 24, 2009

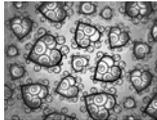
- Summons issued in Chapter 50B proceeding shall require Answer to be filed within 10 days of service of process
- Definition of "Valid Protective Order" includes *ex parte* orders
 - Violation of a 50B *ex parte* is a crime
 - In response to *State v. Byrd*, 363 NC 214 (2009)

**Alienation of Affection
Criminal Conversation**

LEGISLATION
SL 2009-400
"AN ACT TO CLARIFY PROCEDURES IN CIVIL
ACTIONS FOR ALIENATION OF AFFECTION
AND CRIMINAL CONVERSATION"

Alienation of Affection

- Elements of Tort:
 - Was a marriage with love and affection between husband and wife
 - That love and affection was alienated, and
 - Malicious acts of defendant produced the loss of love and affection



McCutchen
360 NC 280 (2006)

- Cause of action accrues when alienation is complete
 - Mischief of alienation is a continuing one

- Statute of limitation is 3 years from the date the action accrues
 - Statute begins to run when alienation is complete

McCutchen
360 NC 280 (2006)

- Genuine love and affection can continue after separation

- So actions of defendant after the date of separation can support the tort
 - Overruling *Pharr v. Beck*, 147 NC App 268 (2001)

Criminal Conversation

- Elements of Tort



- Actual marriage between the spouses

- Sexual intercourse between defendant and plaintiff's spouse

Nunn v. Allen
154 NC App 523 (2002)

- Tort of Criminal Conversation can be based on acts occurring after separation
- Existence of separation is not a bar to action



Misenheimer
360 NC 620 (2006)

- 3 year statute of limitation applies to criminal conversation
- Limitation period is tolled until tort is discovered or should have been discovered

New GS 52-13

- No act after the date of separation shall give rise to either tort
- Limitation period for both is 3 years from the last act of defendant
- Actions can only be brought against natural persons
 - No claims against businesses or corporations

New GS 52-13



- Effective date
- “Applies to actions arising from acts occurring on or after October 1, 2009”

Custody



- Standing
- Electronic Visitation



Standing



- GS 50-13.1(a)
 - “any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided.”

Standing

- *Petersen v. Rogers*, 337 NC 397 (1994)
 - “GS 50-13.1 was not intended to confer upon strangers the right to bring custody or visitation actions against parents of children unrelated to such strangers.”

Third Party Standing

- Only parties who allege and prove a sufficient relationship with the child have the right to file a claim alleging that a parent has lost his or her constitutionally protected status.
 - Relationship “in the nature of a parent and child” is sufficient
 - Determination made on case-by-case basis
 - *Ellison v. Ramos*, 130 NC App 389 (1998) (caretaker)
 - *Seyboth v. Seyboth*, 147 NC App 63 (2001) (step-parent)

Quets v. Needham

- Florida “open adoption agreement”
- Mom’s parental rights terminated
- Mom filed NC action for visitation



TPR and Standing



- Natural parent whose rights have been terminated has no standing to bring custody or visitation action
 - *Krauss v. Wayne County DSS*, 347 NC 371 (1997)
 - *Quets v. Needham*, NC App (July 2009)

Collateral Agreements



- “If a person executing a consent and the adoptive parent enter into an agreement regarding visitation, communication, support or other rights and duties with respect to the minor, this agreement shall not be a condition precedent to the consent itself, failure to perform shall not invalidate a consent already given, and *the agreement itself shall not be enforceable.*”
 - GS 48-3-610

Quets v. Needham



- Open adoption agreements do not confer standing for visitation or custody
- Even if enforceable in state where entered



Standing



- **Relatives [always?] have standing**
 - *Yurek v. Shaffer*, NC App (August 09)
 - ✦ Sister and brother-in-law of father had standing to bring custody action against parents
 - *Cf Tilley v. Diamond*, unpublished, 184 NC App 758 (2007)
 - ✦ Grandfather's neighbors did not have standing

Visitation



- **SL 2009-314**
 - "AN ACT ... DEFINING VISITATION TO INCLUDE VISITATION BY ELECTRONIC COMMUNICATION"
- **Effective July 9, 2009**



Electronic Visitation



- **Can order visitation by telephone, email, instant messaging, video teleconferencing, Internet or other electronic means**
- **Court must consider technology available to parties and the cost of the technology**
- **Cannot use electronic visitation as substitute for in-person visitation**
- **Cannot use technology to "justify or support relocation"**
 - *Cf Evans v. Evans*, 138 NC App 135 (2000)

Child Support

- Agreements
- Proof of Income
- Criminal Contempt



Agreements

- Generally, parties can enter into contracts defining support obligations
- Despite contracts, parent always can ask court for support order



Unincorporated Agreements

- Court must presume agreed amount is appropriate
- Presumption rebutted by showing agreement is insufficient to meet present needs of child
- If rebutted, court uses guidelines to set support
 - *Pataky v. Pataky*, 160 NC App 289 (2003)

Carson v. Carson



- Moving party rebutted presumption
- Trial court applied guidelines to set prospective support *and* retroactive support back 3 years from filing date



2006 Child Support Guidelines



- For “retroactive support” [also called “prior maintenance”] court may either:
 - Use guidelines to determine obligation, *or*
 - Determine obligor’s fair share of actual expenditures

Carson v. Carson



- Absent an emergency, court cannot order retroactive support when obligor has paid support required by an unincorporated agreement between the parties.
 - Cites *Fuchs v. Fuchs*, 260 NC 635 (1963)



Carson v. Carson

- “Nowhere in the statute [GS 50-13.4(c1)] does the legislature authorize the Conference [of Chief District Court Judges] to override existing case law in formulating the Guidelines.”
- *Cf Willard v. Willard*, 130 NC App 144 (1998) (3 year/15% change sufficient to show changed circumstances even if 15% change is due to increased income)

Incorporated Agreements

- Once agreement becomes a court order by incorporation, amount is subject to modification
- Change must occur since incorporation
 - *Smart v. Smart*, COA July 2009



Income

- *Midgett*, NC App (August 2009)
 - Order must find actual present income
 - Findings must be supported by evidence
 - Guidelines require both parties to submit “documentation of current and past income”
 - Sanctions available for failure to provide information

Income

- *Eggleston*, NC App (September 2009)
 - Can use bank account records of expenditures and deposits to prove income
 - "Maintenance" from third parties is included in income
 - "Maintenance" means "financial support given by one person to another."

Criminal Contempt

- GS 5A-12: Authorized Punishment
 - Censure
 - Fine up to \$500, and/or
 - Imprisonment up to 30 days



**SL 2009-335
Criminal Contempt**

- Also can impose imprisonment up to 120 days
 - IF sentence is suspended "upon conditions reasonably related to the contemnor's payment of child support."
- Applies to acts committed on or after Dec 1, 2009

Boseman v. Jarrell



- Same sex "Domestic Partners" beginning in 1998
- Child born to Jarrell in 2002 through artificial insemination
- Both acted as parents
- Boseman adopted child in 2005 in Durham County
- Boseman filed for custody in 2006 in New Hanover County

Custody



- Trial court rulings:
 - No authority to set aside adoption
 - This is a parent v. parent custody case
 - Best Interest analysis applies
 - Best Interest is Joint Custody
 - Just in case
 - ✦ Jarrell waived constitutional right to exclusive custody by conduct inconsistent with her protected status

Court of Appeals



- Trial court did have authority to consider Rule 60(b)(4) motion requesting court to set aside adoption entered in another county
- Adoption was not void
- This is a parent v. parent case
- Best interest test applied

Adoptions

- According to COA in *Boseman*, GS Chapter 48 allows three types of adoptions:
 - Agency placements
 - Direct placements, and
 - Step-parent adoptions
- Adoption in this case was a “direct placement adoption with a waiver of the full terms of parental consent and legal obligations specified in GS 48-1-106(c) and 48-3-606”

Waived Provisions

- GS 48-1-106(C):
 - An adoption decree “severs the relationship of parent and child between individual adopted and that individual’s biological or previous adoptive parent. ...[T]he former parents are divested of all rights with respect to the adoptee.”
- GS 48-3-606(9):
 - Consent must show that individual executing consent understands that when adoption is final, all rights and obligations of the adoptee’s former parents with respect to the adoptee will be extinguished; every “aspect of the legal relationship between the adoptee and the former parent will be terminated.”

Boseman Adoption

- Trial court “waived” two statutory provisions
- Declared both parties to be parents of the child
- No direct appeal taken
 - See GS 48-2-607(a)(party to adoption cannot appeal)

Boseman v. Jarrell



- Was adoption void *ab initio*?
- Void only if trial court exceeded subject matter jurisdiction
 - Legal error is not sufficient to void judgment

Subject Matter Jurisdiction



- “Where jurisdiction is statutory and the Legislature requires the court to exercise its jurisdiction in a certain manner, to follow a certain procedure, ... an act of the court beyond these limits is in excess of its jurisdiction.”
- However, “courts have repeatedly rejected contentions that courts lack subject matter jurisdiction where statutory procedures and requirements are not met.”

Boseman v. Jarrell



- “We must look to the language of Chapter 48 as an expression of our General Assembly’s intent to determine whether the irregularities in the adoption here exceeded the adoption court’s jurisdiction or were merely contrary to law.”

Boseman v. Jarrell

- GS 48-1-100
 - Construe chapter liberally to promote purpose of chapter
 - One purpose is to provide minor with "love, care, security, and support."
- "Waiver of provisions accrues to the detriment only of the would-be-former parent, while actually conferring benefits on minor child who gains an additional adult who is legally obligated to his care and support."

Boseman v. Jarrell

- Adoption not void because trial court did not exceed its subject matter jurisdiction because "irregularities" promoted purpose of adoption statute
- Result would have been the same with an "unmarried heterosexual couple"

*Boseman v. Jarrell
Summary*

- Custody between adoptive parent and parent: apply best interest test to determine custody
- Direct placement adoptions with waiver of statutory provisions are not void
- No opinion/decision as to whether the direct placement adoptions with waivers are legally correct

Alimony Agreements

- Unincorporated agreement cannot EVER be modified by a court
- Incorporated agreement
 - "True" alimony can be modified
 - "True" alimony ends on cohabitation, remarriage and death
 - Property settlement cannot be modified and does not terminate

Incorporated Alimony Agreements

- If agreement is integrated, payment provisions are property settlement and not "true" alimony
- If agreement is not integrated, alimony is "true" alimony
- Agreement is integrated when payments are reciprocal consideration for property settlement provisions of agreement
- Absent clear integration clause, agreements presumed NOT integrated

Cases

- *Michael v. Michael*, NC App (August 09)
 - Agreement clearly integrated so no termination upon remarriage
 - Agreement defined payments as property settlement and parties explicitly waived alimony
 - Court cannot consider intent of parties where language is clear
- *Underwood v. Underwood*, NC App (Sept. 09)
 - Same rule applies to consent judgment, even though there was never a contract between the parties
 - Specific statement in judgment that payments are "reciprocal consideration for property settlement"
