

## Family Law Update

Cheryl Howell  
October 2013



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## Civil Domestic Violence

- ▶ **Consent DVPO**
  - *Void* without conclusion of law that defendant committed act of domestic violence
    - *Kenton*, 724 SE2d 79 (2012)
    - *Kennedy v. Morgan*, 726 SE2d 193 (2012)
  - S.L. 2013-237 (H 209)
    - Consent orders **entered on or after October 1, 2013** do not need findings/conclusions if both parties agree in writing no findings/conclusions are required



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## Mutual DVPOs

- ▶ “Protective orders entered, including consent orders, shall not be mutual in nature except where both parties file a claim *and the court makes detailed findings of fact* indicating both parties acted as aggressors, that neither party acted primarily in self-defense, and that the right of each party to due process is preserved.”
  - GS 50B-3(b)



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### Civil Domestic Violence

- ▶ Attorney Fees
  - S.L. 2013-390 for actions filed on/after October 1, 2013:
    - “No court costs or attorney fees shall be assessed for the filing, issuance, registration, or service of a protective order or petition for a protective order or witness subpoena, *except as provided in GS 1A-1, Rule 11*”
  - GS 50B-3(a): Protective order may grant the following relief:
    - “(10) Award attorney fees to either party”

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### Civil Domestic Violence

- ▶ *Tyll v. Willets*, NC App (August 20, 2013)
  - 50C case
  - “Victim” for 50C action excludes people in a ‘personal relationship’ covered by 50B
  - Brother/sister is not a 50B personal relationship without evidence showing they are “current or former household members”

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### Civil No-Contact Order

- ▶ *Tyll v. Willets*, NC App (August 20, 2013)
  - Statutory definition of ‘harassment’ is a “definitional Gordian knot”
  - If no intent to cause physical harm, plaintiff must prove actual substantial emotional distress
  - “Significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.”
    - “annoyed” or “pestered” is insufficient
    - See also *Ramsey v. Harman*, 191 NC App 146 (2008)

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### Civil No-Contact Order

- ▶ Attorney Fees
  - S.L. 2013-390 for actions filed on/after October 1, 2013:
    - "No court costs or attorney fees shall be assessed for the filing or service of the complaint, or the service of any orders, *except as provided in GS 1A-1, Rule 11*"
    - GS 50C-2(b)
  - GS 50C-5(b): Court may grant the following relief in its orders under this Chapter:
    - "(7) Order other relief deemed necessary and appropriate by the court, including assessing attorneys' fees to either party"

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### Civil No-Contact Order

- ▶ Procedure: GS 50C-8(a)
  - *If ex parte is granted*, motion for permanent no-contact order shall be set for hearing within 10 days from the date of the motion
  - *If ex parte is denied*, the trial on motion for permanent no-contact order shall be set within 30 days from the date of the denial.
  - S.L. 2013-390, applies to actions filed on or after October 1, 2013.

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### Absolute Divorce

- ▶ Effective June 5, 2013, complaints and judgments for absolute divorce **no longer need to contain social security numbers**
  - SL 2013-93 (H 114)

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## Application of Foreign Law

▶ “A court ... shall not apply a foreign law in any legal proceeding involving, or recognize a judgment involving, a claim for absolute divorce, divorce from bed and board, child custody, child support, alimony or equitable distribution if doing so would violate a fundamental constitutional right of one or more natural persons who are parties to the proceeding.”

- SL 2013-416 (H 522),GS Article 7A, 1-87.2 et. seq.
- Effective September 1, 2013

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## Application of Foreign Law

- No enforcement of choice of law or forum selection clause if enforcement would result in violation of a fundamental constitutional right of a party
- No granting of a motion to transfer to foreign venue or forum if transfer would likely lead to violation of a fundamental constitutional right of a party
- Parties can waive or limit their constitutional rights by specific waiver

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## Appeals

- ▶ Attorney fees:
  - *Duncan*, 749 SE2d 799 (NC 2013):Party can appeal claim even if issue of attorney fee remains pending
  - *McKinney*, 745 SE2d 356 (NC App 2013): Trial court can address attorney fees, including fees for appeal, after appeal is complete
- ▶ Final adjudication of individual claims
  - SL 2013-411(H 122)
    - Final adjudication of divorce, DBB, custody, support, alimony, or ED can be appealed even if other claims remain pending; *judicial certification no longer required*

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Postseparation Support and Alimony

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Modification of Alimony

- ▶ Modification requires showing of **substantial change in actual ability of supporting spouse to pay or in financial needs of dependent spouse**
- ▶ “Fluctuation” in income of supporting spouse is not sufficient to support modification without showing impact on ability to pay
  - *Kelly v. Kelly*, 747 SE2d 268 (NC App 2013)

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Support Provisions in Separation Agreements

- ▶ “A provision [in a separation agreement] **waiving, releasing or establishing rights and obligations to postseparation support, alimony, or spousal support shall remain valid following a period of reconciliation and subsequent separation,**” if the contract is written, properly executed and “the provision waiving the rights or obligations is clearly stated in the contract”.
  - S.L. 2013-140

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## Child Custody

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## Custody Jurisdiction

- ▶ **Temporary Emergency Jurisdiction: GS 50A-204**
  - Only if child is in NC
  - Only if order contains **findings of fact** showing emergency (findings required for subject matter jurisdiction)
    - *In re Matter of E.J.*, 738 SE2d 204 (2013)
  - If other state **has acted or is acting**, court must contact other judge and order must contain ending date
    - *In re J.W.S.*, 194 NC App 439 (2008)
  - If other state **has not acted and does not act**, NC will obtain home state jurisdiction; no need to contact other state
    - *In re K.M. and J.H.*, NC App (2013)

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## Grandparent Custody and Visitation

- ▶ **4 statutes:**
  - **GS 50-13.1** allows custody or visitation if parents unfit or otherwise have acted inconsistent with protected status (waived constitutional right to exclusive custody)
  - **3 visitation statutes** require '*on-going dispute* between parents' or relative/step-parent adoption
- ▶ **Are consent orders valid without findings/conclusions re: waiver of constitutional rights?**
  - Not if waiver is a matter of '**standing**'
    - *Tilley v. Diamond*, unpublished, 184 NC App 758 (2007)
    - *Myers v. Baldwin*, 205 NC App 696 (2010)
  - **?? Wellons v. Wellons**, NC App (Aug. 2013)??

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### Other issue in *Wellons*.....

- ▶ Contempt
  - Purge condition that father “continue to abide by previous orders of the court” was impermissibly vague

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### Custody Modification

- ▶ Trial court cannot ‘clarify’ ambiguities in visitation schedule or order dad to anger management without first concluding there has been a substantial change
  - Visitation disputes do not have ‘self-evident’ impact on kids
- ▶ Parent should not unilaterally withhold visitation when concerned for safety of children but should seek emergency relief pursuant to GS 50-13.5
- ▶ *Davis v. Davis*, NC App (2013)

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### Uniform Deployed Parents Custody and Visitation Act

- ▶ Trial court may not consider parent’s past deployment or possible future deployment as *only* basis in determining best interest
- ▶ When parent deploys, parties can enter into *binding temporary agreement*
  - Agreement supersedes custody order during deployment
  - Parties cannot suspend/change child support
  - Can delegate “*caretaking responsibilities*” to 3<sup>rd</sup> parties
- ▶ If parties cannot agree, entitled to *expedited temporary custody hearing*
  - Court can delegate “*caretaking responsibilities*” to 3<sup>rd</sup> parties
  - Court can temporarily modify support obligation

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## Child Support

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## Various things....

- ▶ **Modification**
  - 3 year / 15% rule applies even if first order was not a guideline order
  - *Hess v. Herman-Hess*
- ▶ **Interpretation of Support Agreements/Contempt**
  - Father wrong to determine daughter with 1.68 GPA was not 'diligently' applying herself to pursuit of college education
  - *Barker v. Barker*
- ▶ **Service of Process**
  - Delivery receipt for delivery service must be signed by named defendant?????
  - *Hamilton v. Johnson*

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## Equitable Distribution

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**SL 2013-103**  
Effective October 1, 2013

- ▶ **Tenancy by the Entirety**
  - "It is presumed that all real property creating a tenancy by the entirety acquired after the date of marriage and before the date of marriage is marital property."
    - GS 50-20(b)(1)
- ▶ **How rebut presumption?**
  - By showing, **by the greater weight of the evidence**, that the property falls within one of the categories of separate property
  - A conveyance of separate property to tenancy by the entirety is presumed to be a gift to the marriage
    - *Walter v. Walter*, 149 NC App 723 (2002)
    - *McLeod*, 74 NC App 144 (1985)
  - Prove not a gift?
    - Cases say **only by clear, cogent and convincing evidence** of no donative intent
  - If a gift, then it will be separate only if such intention is stated in the conveyance. GS 50-20(b)(2).

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**S.L. 2013-103**  
Effective October 1, 2013

- ▶ **Divisible debt**
  - "**Passive** increases and **passive** decreases in marital debt and financing charges and interest related to marital debt."
  - So **active** increases and **active** decreases no longer classified as divisible debt
  - Postseparation debt payments back to being distribution factor for payments made on or after October 1, 2013???

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**Postseparation Payments**

- ▶ Party is entitled to "**some consideration**" for postseparation payments from separate funds when those payments benefit the marital estate.
  - *Bodie v. Bodie*, 727 SE2d 11 (2012)
- ▶ No \$ for \$ 'credit' is required
  - *Peltzer v. Peltzer*, 732 SE2d 357 (2012)
- ▶ COA has said court can:
  - Order reimbursement
  - Give 'credit' to paying spouse
  - Increase percentage of distribution
    - *Loving v. Loving*, 118 NC App 501 (1995)
    - *Washburn*, unpublished, NC App (2013)

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## Postseparation Payments

- ▶ But COA also has said, no consideration allowed if parties stipulate that equal is equitable.
  - See *Miller v. Miller*, 97 NC App 77 (1990)
  - Postseparation payments are a **distribution factor** pursuant to GS 50-20(c)(11a) and (12)

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## Retirement Accounts

- ▶ ED judgment that distributes a defined benefit pension plan (such as Military Retirement) **MUST** include a finding as to the **DOS value** of that pension
  - *Washburn v. Washburn, unpublished, COA (2013)*
    - Wife not allowed to establish value on remand
    - Retirement fell out of ED
  - *Seifert v. Seifert*, 319 NC 367 (1987)
  - *Bishop v. Bishop*, 113 NC App 725 (1994)

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## "PENSION, RETIREMENT, OR OTHER DEFERRED COMPENSATION"

- ▶ Coverture Fraction?
- ▶ GS 50-20.1(d)
  - "The award shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the vested and nonvested pension, retirement, or other deferred compensation benefits, to the total amount of time of employment."

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### Watkins v. Watkins

- ▶ **Must we use the coverture fraction to classify defined contribution plans?**
  - Not always
  - GS 50-20.1 applies only to "deferred" compensation
  - If owner has access to funds in account, it is not "deferred"
  - Spouse had access to funds in 401K, so trial court was correct to trace out actual contributions
  - Spouse had no access to funds in defined benefit pension, so trial court erred in not applying coverture fraction

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### Hill v. Hill: various things.....

- ▶ **Retained earnings in Subchapter S corporation** are marital (or divisible property) when distributions made to owner
- ▶ **Postseparation payments made pursuant to PSS order** are not divisible debt and payor cannot receive 'credit' in ED
- ▶ Trial court cannot use 'listing price' to value real property
- ▶ When determining **net value**, subtract encumbrances from FMV but do not subtract **costs associated with sale** of property

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### Classifying Mixed Property

- ▶ When both the separate and marital estates contribute to the acquisition of equity in real property, **each estate is entitled to an interest in the property in the ratio its contribution bears to the total investment in the property**
  - *Wade v. Wade*, 72 NC App 372 (1985)
  - *Mishler v. Mishler*, 90 NC App 72 (1988)
- ▶ In this way, each estate receives its actual contribution and a proportionate share of any return on investment (meaning a share of any appreciation of the real property during the marriage)

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## Classifying a house - easy right?

▶ *Ross v. Ross*

- **Total amount** contributed to acquisition of property up to *date of separation*: \$155,142.27
  - \$21,000 was husband's separate equity from before marriage (13.5% of total contribution)
  - \$134,142.27 was marital funds paying mortgage (86.5% of total contribution)
- **DOS** equity in house was 86.5% marital
- **DOS** equity in house was 13.5% separate
- **Postseparation increase** in equity in house must be classified using same ratio of marital to separate interest existing on DOS
  - So - 86.5% increase is divisible property
  - 13.5% of increase is separate property of husband

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