

**Family Law Case Update**  
Cheryl Howell  
June 2014

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**Child Custody**

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**§ 50A-207. Inconvenient forum.**

(a) A court of this State which has jurisdiction under this Article to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

(b) Before determining whether it is an inconvenient forum, a court of this State shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

- (1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (2) The length of time the child has resided outside this State;
- (3) The distance between the court in this State and the court in the state that would assume jurisdiction;
- (4) The relative financial circumstances of the parties;
- (5) Any agreement of the parties as to which state should assume jurisdiction;
- (6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
- (7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
- (8) The familiarity of the court of each state with the facts and issues in the pending litigation.

(c) If a court of this State determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child-custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(d) A court of this State may decline to exercise its jurisdiction under this Article if a child-custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding. (1979, c. 110, s. 1; 1999-223, s. 3.)

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### Temporary or Permanent Order?

- ▶ Does not say 'entered without prejudice'
- ▶ Sets no 'reconvening' time
- ▶ Entered 7 months ago
- ▶ Grants primary physical custody to mom
- ▶ Grants only daytime visitation to dad on some weekends
  - States that dad's visitation is "curtailed until he complies with the spirit and letter of the previous orders in this case."

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### Temporary Order

- ▶ Order is temporary if it:
  - States that it is entered "without prejudice"
  - Sets clear reconvening time, or
  - Leaves issues unresolved
- ▶ Temporary can convert to permanent
  - In place too long without reason related to litigation
  - Order that does not address all issues will not convert

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### *Hennessey*

- ▶ 2 points:
  - Attorney fees: when action brought pursuant to GS 50-13, attorney fees are awarded only in accordance with GS 50-13.6. Unincorporated separation agreement has no effect
  - Your order: because order is not entered until reduced to writing, signed and filed, you are not bound by anything you say from the bench

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### Parent's right to contact.....

▶ G.S. 50-13.5:

(i) District Court; Denial of Parental Visitation Right; Written Finding of Fact. – In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

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### Respass

▶ G.S 50-13.5(i) means what it says

▶ *Price vs. Howard* and a parent's constitutional rights regarding his/her children are not implicated in a case between two parents

- *Moore v. Moore*, 160 NC App 569 (2003) is 'disavowed'

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### Modification

▶ Stipulation that there has been a substantial change in circumstances is "invalid and ineffective"

- Are consent orders different?????

▶ It is duty of trial judge to conclude there has been changed circumstances

- *Spoon v. Spoon*
- *Thomas v. Thomas*

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## Relocation

- ▶ Move that happened *before* previous custody order could be basis for modification where impact of move did not manifest until *after* previous custody order
  - *Spoon*
- ▶ Good cases to review when drafting findings to support conclusion that move affects or will affect the welfare of the child:
  - *Spoon v. Spoon*
  - *Green v. Kelischek*
  - *See also Thomas v. Thomas* (not a relocation case but good findings of fact regarding effects of change on child)

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## Domestic Violence

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## *State v. Elder*

- ▶ “Catch-all” provision in GS 50B-3(a)(13)
  - DVPO can include “any additional prohibitions or requirements the court deems necessary to protect any party or any minor child.”
- ▶ Cannot use the catch-all to expand authority granted by GS 50B-3.1
  - Judge *can* order surrender
  - Judge *cannot* order seizure

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### 50B Procedure

- ▶ Ex parte DVPO entered and hearing set for 10 days after entry of DVPO
- ▶ Defendant served 5 days before hearing
- ▶ At hearing, defendant objects to trial on merits before he has at least 10 days to file an answer
- ▶ Trial court overrules his objection and conducts trial on the merits; enters one year DVPO
- ▶ Okay????

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### *Henderson*

- ▶ Yes - okay
- ▶ GS 50B-2 requires that a hearing be held 10 days after entry of an ex parte DVPO
- ▶ Statute allows defendant "no more than 10 days" to file an Answer but does not give defendant 10 days to file
- ▶ Because statute requires 10 day hearing after an ex parte, it 'necessarily' authorizes the trial on the merits at that point in time.

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### *Rudder*

- ▶ 50B statute shows clear legislative intent that continuances of hearing after entry of ex parte DVPO should be limited in number
- ▶ Where ex parte order expired after being continued in effect for more than one year, trial court had no authority to conduct trial on the merits of complaint and enter one year DVPO
- ▶ You need to write something in Box #2 on Ex Parte DVPO AOC form CV-304 when you grant ex parte DVPO

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50C Civil No-Contact Orders

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**Contempt**

- ▶ GS 50C-10 provides that punishment of violations shall be by *civil* contempt
- ▶ While a purge for civil contempt cannot be a form of compensatory damages, it can be a fine made payable to other party
- ▶ Amount of fine is within discretion of court but contempt order must contain findings to support conclusion that contemnor has ability to pay

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Child Support

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### Judgments for Arrears

#### *Pulley v. Frazier*

- ▶ GS 50-13.4 authorizes judgments on arrears which include an order for periodic payments
- ▶ Judgments can be enforced for 10 years following entry
- ▶ Judgments cannot be 'renewed' but a party can file independent action seeking a new judgment based on the old judgment
- ▶ The new judgment for arrears also can include order for periodic payments

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### Questioning a *Pro Se* litigant

- ▶ *Evidence Rule 611* gives trial judge the authority to question a witness to gather information necessary to resolve the case
- ▶ Questioning should be focused to procure only the information needed to decide the issues before the court
- ▶ *Rettig v. Rettig, unpublished opinion*

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### GS 50-13.13

- ▶ Relief from child support order based on proof that obligor is not father of the child
- ▶ Motion must be filed within *a year* of date moving party knows or should know he is not father
- ▶ Motion must allege requirements of GS 50-13.13(b)
- ▶ Court must find 'good cause to believe' moving party is not the father *before* ordering genetic testing
  - *James and Yoes v. Sutton, unpublished*

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## Orders from other states.....

- ▶ Defenses to registration are limited to those set out in GS 52C-6-607
  - *Kendall*
- ▶ Once an order is registered, all provisions in the order – even those unrelated to the support obligation – can be enforced in this State
  - *Moore v. Marshall*

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## *Respass*

- ▶ Retroactive child support must be based on evidence of actual expenditures
  - *But see* HB 1092
- ▶ Imputing income
  - Bad faith established by conduct that reasonable person would know would lead to job loss
  - Amount imputed must be based on evidence of past wages or minimum wage
- ▶ Attorney fees
  - Can consider income of spouse of person being asked to pay fees
  - No need to specifically find party has ability to pay

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## Alimony Postseparation Support

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### *Parsons*

- ▶ Financial affidavits are evidence
- ▶ In determining reasonable needs, court can consider expenses likely to arise in the future
  - Evidence of future house maintenance expenses was not “too speculative”

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### Marital Misconduct

- ▶ Indignities
  - Requires pattern of conduct; isolated incidence is insufficient
  - Must spouse seeking to prove indignities prove lack of provocation????????
    - *Dechkovskaia*

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### Marital Misconduct

- ▶ Abandonment
  - Fact that husband did not object to wife's leaving the marital home did not preclude conclusion that wife abandoned husband

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## Civil Contempt

- ▶ Trial court's extensive "inventory of plaintiff's financial circumstances" supported conclusion that he had the ability to comply with the \$20,000 purge
- ▶ Finding that plaintiff could pay within 60 days of entry of contempt order was a sufficient finding of present ability to comply
  - *Gordon v. Gordon*

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## Equitable Distribution

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## Legislative Changes

- ▶ S.L. 2013-103
  - Tenancy by the Entirety
  - Postseparation payment of marital debt
- ▶ Effective October 1, 2013
- ▶ Family Law Bulletin #26
  - [sogpubs.unc.edu/electronicversions/pdfs/flb26.pdf](http://sogpubs.unc.edu/electronicversions/pdfs/flb26.pdf)

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## Divisible Property

- ▶ *Binder v. Binder, unpublished opinion*
  - Distributions from marital corporation to husband after separation
  - Separate property to extent the distributions were compensation for husband's work after separation
  - Divisible property to extent they were income earned from the marital corporation *without* postseparation effort by husband

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## *Johnson . Johnson*

- ▶ \*\*\*\*Trial court cannot distribute a pension without finding value of pension on the date of separation
- ▶ Wife not entitled to "credit" for postseparation mortgage payments when house and mortgage were distributed to her in the final distribution

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## *Simon v. Simon*

- ▶ Retained earnings of subchapter S corp is property of the corporation until actually distributed to shareholders
  - Caution: retained earnings are shown on shareholder's tax return even if they have not been distributed
  - Do not classify and distribute in ED unless there is actual *evidence* of distribution to shareholders

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### *Simon v. Simon*

- ▶ Distributions from corporation after the DOS will be separate property of receiving spouse only if receipt is based on postseparation actions/effort/work of that spouse
  - *Passive* distributions are divisible property
- ▶ Where parties separated in Sept 2006, trial court should not have classified distributions for 2006 as entirely separate property
  - Receiving spouse had burden to show how much was the result of his postseparation efforts
  - Is there a presumption that the distributions are divisible???

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### *Dechkovskaia*

- ▶ Property cannot be classified in marital unless one or both spouses *owned* the property on the date of separation
  - Houses titled in name of child of the parties could not be marital property
- ▶ ED judge can impose constructive or resulting *trust* on property in favor of one or both spouses but not unless title holder is joined as a party to ED action

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