

**Family Law Update  
Cases Decided Between  
June 18, 2019 and October 1, 2019**

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## Custody

### Cases Decided Between June 18, 2019 and October 1, 2019

#### UCCJEA; modification jurisdiction

- Order terminating parental rights was vacated on appeal because trial court did not have subject matter jurisdiction to modify a California custody order.
- Where one parent resided in California at the time the North Carolina proceeding was initiated, only a California court could determine it no longer had continuing exclusive jurisdiction or determine that North Carolina was a more convenient forum.
- Where California had not made a determination that it no longer had continuing exclusive jurisdiction or that North Carolina was a more convenient forum, North Carolina had no subject matter jurisdiction to enter order terminating mother's parental rights where mother resided in California at the time the TPR petition was filed in North Carolina.
- Mother's waiver of personal jurisdiction did not confer subject matter jurisdiction on the North Carolina court.

**In the Matter of D.A.Y., \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (June 18, 2019).** A juvenile court in California entered a custody order in 2013 regarding the child at issue in this case. In the custody order, the juvenile court terminated juvenile court jurisdiction but transferred jurisdiction to the California family court for future modification proceedings. Following the entry of the California order, father and child lived in North Carolina. Mother moved to Nevada for two years but then returned to California.

In 2018, father filed a petition in North Carolina seeking to terminate mother's parental rights. Father alleged North Carolina was the home state of the child at the time the petition was filed and alleged that the California court had lost continuing exclusive jurisdiction because the juvenile court had terminated jurisdiction and mother moved had out of the state.

The trial court agreed with father and concluded North Carolina had jurisdiction to modify the California order. The trial court entered an order terminating mother's parental rights and mother appealed.

The court of appeals vacated the termination order after concluding North Carolina did not have subject matter jurisdiction to modify the California order.

A North Carolina court may modify another state's child custody determination if the requirements of GS 50A-203 are met. First, North Carolina must have jurisdiction to make an initial custody determination. North Carolina would have been able to make an initial determination in this situation because North Carolina was the child's home state at the time the petition was filed. However, modification jurisdiction also requires one of the following:

- (1) a court of another jurisdiction has determined it no longer has exclusive, continuing jurisdiction or that a court of this state would be a more convenient forum, or

(2) a court of this state or the other state determines that the child and the child's parents do not presently reside in the other state.

The court of appeals held that neither one of these two conditions were met in this case. The California court did not determine it no longer had continuing exclusive jurisdiction when the juvenile court terminated its jurisdiction for the purpose of transferring the case to that state's family court and the California court did not determine North Carolina was the more convenient forum. The alternative condition also had not been met because the North Carolina court could not determine at the time the petition was filed in North Carolina "that the child and the child's parents do not presently reside in the other state." All parties agreed that while mother had left California for a period of two years, she resided in California at the time the petition was filed in North Carolina.

### **Juvenile court; UCCJEA hearing requirements; communication with judge in another state**

- Once a juvenile petition is filed, the juvenile court retains jurisdiction until the jurisdiction of the court is terminated by court order or until the child reaches the age of 18 or is otherwise emancipated. This means a juvenile case is “pending” in NC until the NC juvenile court terminates jurisdiction or the child turns 18 or is otherwise emancipated.
- An order relieving DSS of future action and releasing/discharging the GAL and court appointed counsel is not an order terminating juvenile court jurisdiction.
- When a juvenile court’s jurisdiction terminates, orders previously entered by the juvenile court in that case cannot be modified or enforced, unless the order is one listed in GS 7B-201(b). Unless the court has created a GS 7B-911 custody order or terminated the rights of a parent, the custodial rights of the parties revert to the status they were before the petition was filed. GS 7B-201(b).
- When child and guardians/custodians relocated to Tennessee after NC juvenile court entered order relieving DSS of further action, North Carolina juvenile court had option to retain jurisdiction and continue juvenile court jurisdiction over the case; terminate the juvenile court jurisdiction and allow the custodial rights of the parties to revert to the status they were before the juvenile petition was filed; terminate the juvenile court jurisdiction and enter a civil custody order pursuant to GS 7B-911; or determine Tennessee is the more convenient forum pursuant to GS 7B-207 and stay the NC proceedings until Tennessee acts.
- Because the trial court needs to make findings of fact to support a determination that another state is a more convenient forum, the trial court must conduct an evidentiary hearing before entering an order. Trial court in this case erred by entering order ‘transferring’ case to Tennessee without evidence in the record to support a ruling that Tennessee was the more convenient forum.
- GS 50A-110 allows the trial court to communicate with court in other state but the trial court must allow parties the opportunity “to participate in the communication” or “to present facts and legal arguments before a decision on jurisdiction is made.”
- When trial court communicates with a court of another state, GS 50A-110 requires that a record be made of the communication. Email from NC judge’s judicial assistant to parties informing parties that judge has talked with judge in Tennessee was a ‘record’ within the meaning of the statute.

**In the Matter of C.M.B., \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (August 6, 2019).** Mother appealed an order staying NC juvenile proceedings and ‘transferring’ jurisdiction to Tennessee. Court of appeals reversed and remanded the case for the trial court to hold an evidentiary hearing to determine whether Tennessee is the more convenient forum to make a custody determination or to determine whether the NC juvenile court should terminate jurisdiction under GS 7B-201 or GS 7B-911.

Neglect proceeding and consent order. The minor child was adjudicated neglected and placed with her maternal great aunt. DSS was relieved of reunification efforts with the child’s mother and the permanent plan for the child was custody and guardianship with a relative. The great aunt and uncle were appointed joint guardians of and given legal and physical care, custody, and control of the child. The mother’s attorney was discharged. Three years later, after guardians the minor child had moved to Tennessee, a Consent Order was entered between mother and the

guardians; neither DSS nor a GAL participated. The order provided that the minor child would remain in the custody of the guardians and mother would have visitation.

Subsequent actions in Tennessee and North Carolina. Three years after the Consent Order, the guardians filed a motion in Tennessee to register the custody order and requested it be modified by suspending mother's visitation. The Tennessee court entered an order 'transferring' the case to itself and entered an emergency order granting guardians motion to modify mother's visitation.

Mother filed motions in the North Carolina juvenile proceeding requesting "emergency" revocation of the guardians' status and asking that mother be appointed guardian instead, asserting that the guardians had violated the custody order, and asking North Carolina to invoke jurisdiction as being the "more appropriate forum."

The guardians filed a motion in North Carolina to "stay" mother's pending motions or to transfer jurisdiction to Tennessee, arguing that North Carolina was an "inconvenient forum" under GS 50A-207. After speaking to the judge in Tennessee, the North Carolina court entered an order allowing the guardians' motion to "stay" the North Carolina proceeding and "transfer" jurisdiction; mother appealed.

Jurisdiction. The court of appeals noted that while the parties and the trial courts in both states were treating the case as though it was a GS Chapter 50 custody proceeding because of the last Consent Order entered in the case, the case actually continued to be the juvenile neglect proceeding originally initiated under GS Chapter 7B. While the juvenile court had relieved DSS, the GAL, and the parents' attorneys of further obligation and waived future review hearings, the court did not terminate its jurisdiction. Pursuant to GS 7B-201(a), the juvenile court's jurisdiction continues until the minor turns 18 or is otherwise emancipated unless the trial court terminates its jurisdiction. The court also noted that while the court clearly had the option to terminate juvenile jurisdiction and create a Chapter 50 custody order pursuant to GS 7B-911, the court had not done so in this case.

Insufficient evidence. The court of appeals held that while the juvenile court had the jurisdiction and authority to enter an order staying the NC proceeding and allowing Tennessee to proceed with the case if the juvenile court made the findings of fact required by GS 7B-201, there was insufficient evidence in the record for the juvenile court to make these findings in this case because the juvenile court did not conduct an evidentiary hearing at all before entering the order. Therefore, there was no evidence in the record at all. The court of appeals vacated the order staying the juvenile proceeding and designating Tennessee as the more convenient forum and remanded the proceeding to the juvenile court.

Options for trial court on remand. The court of appeals ordered the juvenile trial court to hold a new hearing to determine whether to terminate jurisdiction under GS 7B-201 or whether to stay the NC proceeding and allow Tennessee to proceed as the more convenient forum pursuant to GS 50A-207. The court of appeals also reminded the trial court of the option to terminate the juvenile court jurisdiction and establish a Chapter 50 custody order pursuant to GS 7B-911.

Communication with judge in another state. The court of appeals held that any communication with the Tennessee court must follow the requirements of GS 50A-110. The court must create a ‘record’ of any communication with the Tennessee court. In this case, the email from the NC judge’s legal assistant to the parties informing the parties that the judge had talked with the Tennessee judge was a record within the meaning of the statute. In addition, when a judge in NC speaks to a judge in another state, the parties must either be allowed to participate in the conversation OR they must be allowed to “present facts and legal arguments before a decision on jurisdiction is made.”

**Uniform Deployed Parents Custody and Visitation Act (UDPCVA), GS 50A-350, et. seq.**  
**[see blog post set out below for summary of provisions of the Act]**

- Although orders issued under the UDPCVA are temporary by definition, an order under the UDPCVA is a final order addressing the UDPCVA claim and therefore can be immediately appealed.
- An order issued under the UDPCVA is independent of any pending Chapter 50 custody claim and can be appealed immediately pursuant to GS 50-19.1 if the Chapter 50 claims remains pending in the trial court at the time the UDPCVA order is entered.
- Only parents can initiate a claim pursuant to the UDPCVA.
- If a trial court grants rights to a nonparent in an order entered pursuant to the UDPCVA, the nonparent “shall” be made a party to the action until the grant of authority to the nonparent terminates.
- Where existing custody order or agreement between the parents addresses “custodial responsibility” for the child in the circumstance of a deployment, the trial court cannot enter an order contrary to the existing order or agreement pursuant to the UDPCVA unless the circumstances require a modification of the existing provisions.
- “Custodial responsibility” is an “umbrella term” in the act, encompassing caretaking authority, decision-making authority and limited contact.
- Modification of provisions in an existing order or agreement regarding custodial responsibility during deployment is allowed when required by the circumstances; a showing of a substantial change in circumstance is not required.
- If an existing order or agreement does not address limited contact for a nonparent during deployment, the UDPCVA requires that ‘limited contact’ be granted to a nonparent with a “close and substantial relationship” with the child unless the court determines the contact is contrary to the child’s best interest.

**Roybal v. Rauli, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (July 16, 2019).** Father appealed custody order involving issues of first impression regarding the UDPCVA. The court of appeals affirmed the order in part and remanded for the trial court to granted limited contact to stepmother unless the court finds the contact is contrary to the child’s best interest.

Trial court’s decision under the UDPCVA. Before father deployed overseas as a member of the military, he filed a motion requesting that his wife, the stepmother of his two children from a prior marriage, be granted caretaking authority pursuant to the UDPCVA. He requested that the stepmother be granted “caretaking and decision-making authority, or in the alternative, limited contact” with both children. At the time father filed the motion, there were two existing custody orders between father and the mother of the children; one order for each child. The trial court

found that a prior court order addressed custodial responsibility during deployment for the daughter but granted stepmother limited contact with the daughter. The trial court denied father's motion as to the younger child, a son, after concluding that the custody order dealing with him addressed custody rights during deployment.

Right to appeal order entered pursuant to UDPCVA. Addressing whether the order of the trial court was subject to immediate appeal, the court of appeals noted that orders issued under the UDPCVA are by definition temporary because the act provides that any order entered pursuant to the act will terminate "60 days from the date the deploying parent gives notice of having returned from deployment to the other parent" or "death of the deploying parent." However, because the order resolves the claim completely, the order is a final order for purposes of appeal. In addition, because a claim filed pursuant to the UDPCVA is independent from any other Chapter 50 claim regarding custody that may be pending, an order entered pursuant to the UDPCVA can be appealed immediately pursuant to GS 50-19.1 even if other claims in the case remain pending in the trial court.

Parties. The UDPCVA provides that only parents can bring a claim under the act. However, GS 50A-375(b) provides that if a nonparent is granted 'limited contact' pursuant to the act, the nonparent "shall be made a party to the action until the grant of limited contact is terminated." The trial court did not make the stepmother a party in this case even though the order granted her contact. The court of appeals held that the trial court erred in failing to make her a party and instructed that it do so on remand, but also held that the trial court had treated her as a 'de facto' party by giving her custody rights and ordering her to act in accordance with the terms of the deployment order. The court held that the failure of the trial court to formally add her as a 'necessary party' did not deprive the appellate court of jurisdiction to hear the appeal.

Impact of existing custody order regarding daughter. The UDPCVA provides that, in allocating custodial responsibility for a child during deployment, a court must apply the terms of an existing court order or agreement between the parties that addresses custodial responsibility of a child during deployment unless "the circumstances require" modification of those terms. GS 50A-373. In this case, the custody order regarding the daughter addressed both physical and legal custody during periods of "temporary military duty that would impact the regular weekly schedule" set out in the order. While both parents argued this language did not address deployment, the court of appeals disagreed and held that it was a "prior judicial order designating custodial responsibility in the event of deployment" pursuant to GS 50A-373(1).

The court of appeals also held that while the act generally does require a trial court to abide by the terms of an existing order, the trial court can modify the terms "if circumstances require" modification. The court is not required to find a substantial change in circumstances; the standard in the Act is intentionally lower. Even with this lower standard, the court of appeals held that the trial court did not abuse its discretion when it determined there was no need to modify the terms of the existing order regarding daughter's physical and legal custody during deployment.

The court of appeals also held that even if the existing custody order regarding daughter did not address custodial responsibility during deployment, the trial court has discretion to determine

whether it is in the child's best interest to grant caretaking authority to a nonparent and can grant decision-making authority to a nonparent only when the deploying parent is not able to exercise his decision-making authority and it is in the child's best interest to allow the nonparent to have the decision-making authority. The trial court did not abuse its discretion regarding the daughter's best interest and there was no evidence indicating father would not be able to exercise decision-making authority during deployment.

#### Required Limited Contact with daughter for stepmother

Even though the custody order between the parents addressed custodial responsibility during deployment, the order did not address limited contact by a nonparent. Therefore, the trial court was required to grant limited contact with a nonparent who is either "a family member or an individual with whom the child has a close and substantial relationship, unless the court finds that contact would be contrary to the best interest of the child." GS 50A-375. The schedule and amount of limited contact awarded is within the discretion of the court and the court in this case did not abuse its discretion when it awarded stepmother less time than father had with the child under the custody order.

Impact of temporary custody order regarding son and stepmother's required limited contact. The court of appeals rejected father's argument that the temporary custody order previously entered as to the son was not a "prior judicial order" for purposes of GS 50A-373, holding that the term "prior judicial order" encompasses both permanent and temporary custody orders. The prior order addressed custodial responsibility during deployment and therefore precluded the trial court from awarding stepmother caretaking or decision-making authority regarding the son as there was no showing that the terms of the temporary order needed to be modified to meet the best interests of the child.

As with the custody order relating to the daughter, the temporary custody order regarding the child did not address limited contact of a nonparent during deployment, so stepmother was entitled to limited contact with the son if she can show 1) she has a "close and substantial relationship" with the son and that 2) contact is not contrary to the child's best interest. Because the trial court denied limited contact between stepmother and the son based on the erroneous belief that such contact was barred by the temporary custody order, this part of the order was remanded to the trial court for reconsideration.

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#### **Blog post, On The Civil Side, Feb. 27, 2015**

##### **Custody When A Military Parent Deploys**

Since I discussed service members in my recent post about the Servicemembers Civil Relief Act, it's a good time to review North Carolina's [Uniform Deployed Parents Custody and Visitation Act, GS 50A-350, et. seq.](#) effective since October 1, 2013. The Act is important for military families and for judges struggling to resolve custody issues when a military parent must deploy.

### **Required Communication**

First the Act requires that any deploying parent notify the other parent of a pending deployment not less than seven days after finding out about it. **Deployment** is defined in as:

“The movement or mobilization of a service member to a location for more than 90 days, but less than 18 months, pursuant to an official order that (i) is designated as unaccompanied; (ii) does not authorize dependent travel; or (iii) otherwise does not permit the movement of family members to that location.”  
GS 50A-351(9).

After notice is provided, each parent is required to provide the other with a plan for addressing **Custodial Responsibility** during deployment.

### **Agreements Between Parents**

Part 2 of the Act authorizes parents to enter into agreements that are enforceable by courts and that temporarily supersede any existing custody order. The agreements terminate when deployment ends unless terminated earlier by agreement or by court order.

These agreements address **Custodial Responsibility** during deployment. The parents may grant **Caretaking Authority** to each other and to nonparents and specify what **Decision-Making Authority** accompanies that authority. Parents also may grant **Limited Contact** to nonparents. Those terms are defined as:

- Custodial Responsibility : “A comprehensive term that includes any and all powers and duties relative to caretaking authority and decision-making authority for a child. The term includes custody, physical custody, legal custody, parenting time, right to access, visitation, and the right to designate limited contact with the child.”
- Caretaking authority: “The right to live with and care for a child on a day-to-day basis, including physical custody, parenting time, right to access, and visitation.”
- Decision-making responsibility: “The power to make important decisions regarding a child, including decisions regarding the child’s education, religious training, health care, extracurricular activities, and travel. The term does not include day-to-day decisions that necessarily accompany a grant of caretaking authority.”
- Limited Contact : “The opportunity for a nonparent to visit with a child for a limited period of time. The term includes authority to take the child to a place other than the residence of the child.”

GS 50A-351.

## Expedited Judicial Proceeding When Parents Cannot Agree

After receiving notice of deployment, either parent may file for a temporary order regarding custodial responsibility during deployment if the parties are unable to resolve issues on their own. The court must conduct an expedited hearing if the motion is filed before a parent deploys. If there is any previously entered court order or agreement addressing deployment, the court must enforce it unless the court determines enforcement is not in the child's best interest. GS 50A-373. Otherwise, the court must allocate custody rights and responsibilities in accordance with the best interest of the child at the time of deployment. All orders must provide for "liberal communication" between the deployed parent and the child "through electronic means", unless communication is not in the best interest of the child. GS 50A-377.

Any order entered pursuant to the Act terminates upon the parent's return from deployment.

## Child Support

Agreements between the parents **cannot** alter any existing child support obligation. If the court enters a custody order pursuant to the Act, it also can enter a temporary child support order if the court has jurisdiction pursuant to UIFSA, GS Chapter 52C.

## Rights for Nonparents

Either an agreement between the parents or a court order may grant rights to a nonparent. These rights terminates when deployment ends.

Parents can agree to nonparent contact and authority as they deem appropriate. GS 50A-361(a) specifies that a nonparent has standing to enforce an agreement while it is in effect, but:

“[t]he agreement derives from the parents’ custodial responsibility and does not create an independent, continuing right to caretaking authority, decision-making authority or limited contact in an individual to whom caretaking responsibility is given.”

In addition, GS 50A-374 allows the court to grant:

- **caretaking authority** to a nonparent “who is an adult family member of the child or an adult with whom the child has a close and substantial relationship if it is in the best interest of the child;” and
- **decision-making authority** to a nonparent if the deploying parent is unable to exercise authority.

Unless the other parent consents to more, any grant of **caretaking authority** by the court to a nonparent must be limited to:

“an amount of time not greater than (i) the time granted to the deploying parent in an existing permanent custody order, ...or (ii) in the absence of an existing permanent custody order, the amount of time that the deploying parent habitually has cared for the child before being notified of deployment...”.

GS 50A-374.

Upon motion of the deploying parent, a court **must** grant **limited contact** to a nonparent who is either a family member or an individual with whom the child has a close and substantial relationship unless the court determines the contact is not in the child's best interest. GS 50A-375. The Act defines family member as "[a] sibling, aunt, uncle, cousin, stepparent, or grandparent of a child, and an individual recognized to be in a familial relationship with the child," and defines close and substantial relationship as "[a] relationship in which a significant bond exists between a child and a nonparent."

As with agreements, any grant of rights to a nonparent by a court is temporary and "does not create an independent, continuing right to caretaking authority, decision-making authority or limited contact to an individual to whom it is granted." GS 50A-376.

### **Disclaimer**

These are just the highlights. Be sure to read the entire Act when dealing with a case where a deploying servicemember is involved.

### **Nonparent custody claim; standing; conduct inconsistent with protected status**

- Trial court did not err in concluding plaintiff had no standing to bring custody action against defendants, the natural parents of the child.
- Even though plaintiff had a "parent-like relationship" with the child while she lived with mother, that relationship ended when she and mother separated approximately 18 months before plaintiff filed the complaint for custody. Standing must exist at the time the plaintiff initiates the action.
- Trial court did not err in concluding plaintiff failed to allege and prove both parents waived their constitutional right to exclusive custody of the child.
- NC Supreme Court affirmed this opinion per curium after review.

**Chavez v. Wadlington and Wadlington, \_ N.C. App. \_, 821 S.E.2d 289 (October 2, 2018), affirmed per curium, \_ N.C. \_, \_S.E.2d.\_ (September 27, 2019).** Plaintiff filed a complaint seeking custody of two children. Defendants are the natural parents of the children. Defendants were married at the time the children were born and remained married at the time plaintiff filed her complaint. Defendants separated after the children were born and plaintiff entered into a "long-term, committed and exclusive" relationship with defendant mother that lasted approximately 7 years. During that time, plaintiff and mother lived together and raised the children together, at times identifying themselves as the parents of the children. Mother and plaintiff separated and plaintiff's relationship with the children ended. Approximately 18 months after the relationship ended, plaintiff filed this action seeking custody of the children. The complaint alleged that plaintiff "was centrally involved in the care, upbringing and development" of the children during her relationship with mother and that mother "intended to and did create a permanent parental relationship" between plaintiff and the children.

The trial court granted defendants motion to dismiss the complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of Civil Procedure. The trial court concluded plaintiff did not have standing to seek custody of the children because plaintiff had no relationship with the children at the time plaintiff filed the complaint for custody and because plaintiff failed to allege and prove defendants waived their constitutional right to exclusive custody of the children.

The majority of the panel of the court of appeals affirmed the trial court dismissal, but there was a dissent. The majority held that although plaintiff clearly had a “parent-like” relationship with the children while she lived with mother and the children, that relationship ended when she began living separate and apart from them. According to the majority, the relationship must exist at the time plaintiff files the complaint because standing must exist when the plaintiff files the complaint. Dissenting opinion argues that the relationship established while plaintiff lived with the children was sufficient to grant her standing to seek custody.

The majority of the court of appeals also affirmed the trial court’s conclusion that plaintiff failed to establish that both parents waived their constitutional right to custody by conduct inconsistent with their protected status as parents. The court of appeals held “as a non-parent third party, plaintiff lacks standing to seek custody unless she overcomes the presumption that defendants have the superior right to the care, custody, and control of the children.” In this case, the trial court held that plaintiff failed to allege or prove “either defendant is unfit or has abandoned or neglected the children” and the court of appeals affirmed. Dissent argued plaintiff established that both parents waived their constitutional rights by creating a parent-like relationship between plaintiff and the children without intending that the relationship be temporary.

### **Censure of trial judge**

- Supreme Court censured trial judge for intentional misuse of contempt authority while attempting to force compliance with the visitation provisions of a custody order.

**In re J.F., \_ N.C. \_, \_ S.E.2d \_ (September 27, 2019).** Supreme Court adopted recommendation of Judicial Standards Commission that respondent district court judge be censured for her intentional misuse of her judicial authority. The court held that the intentional failure to follow appropriate contempt procedure violated Canons 1, 2A, 3A(3) and 3A(4) and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of GS 7A-376.

### Jurisdiction following juvenile proceeding

- At time Chapter 50 custody complaint was filed, the trial court had no jurisdiction to consider the claim because a juvenile abuse, neglect and dependency action was pending.
- When the juvenile court terminated jurisdiction without entering a Chapter 50 custody order pursuant to GS 7B-911, the custody rights of the parents reverted to the status they were before the juvenile petition was filed.
- As there was no existing custody order when the juvenile court terminated jurisdiction and all of the orders entered in the custody case following the termination of the juvenile court jurisdiction had been temporary orders, the plaintiff was not required to allege a substantial change in circumstances in order for the court to proceed to enter a final custody order resolving his custody claim filed while the juvenile proceeding was pending.

**McMillan v. McMillan, \_ N.C. App. \_\_, \_ S.E.2d \_ (October 1, 2019).** Appeal of permanent custody order granting primary physical custody to mother and visitation to dad.

- In 2010, shortly after the child’s birth, DSS initiated a neglect proceeding. After DSS filed the neglect petition but before the child’s adjudication, father filed a complaint for custody.
- After the child’s adjudication in 2011, the Chapter 50 custody action was “administratively removed from the active court calendar and ordered closed by the Forsyth County District Court....”
- In 2012, a juvenile court order was entered that stated the court “ ‘entered an order pursuant to N.C.G.S. 50- 13.1, 50-13, 50-13.5 and 50-13.7, as provided in G.S. 7B-911, awarding joint custody of the child’ to Plaintiff and Defendant” and stating that “the Court terminates juvenile court jurisdiction and there shall be no further scheduled Court reviews.” However, no civil custody order was in fact entered.
- In 2014, father (plaintiff) filed a motion in the custody case that had been administratively closed in 2011, his motion stating that he requested a modification of custody. From 2014-2016, the parties “operated under various memoranda of judgment/orders addressing temporary custody.”
- In 2018, the court entered an order awarding permanent primary legal and physical custody to mother (defendant) and secondary custody to father.
- Father appealed raising subject matter jurisdiction.

The court of appeals affirmed the trial court order.

The court rejected father’s first argument that the trial court lacked jurisdiction to enter the custody order because the juvenile court did not properly terminate the jurisdiction of the juvenile court when it attempted to do so in the 2012 order. Father argued that because the juvenile court failed to follow the procedure in GS 7B-911 when it failed to enter a Chapter 50 custody order, the jurisdiction of the juvenile court did not terminate and precluded the court from acting in the Chapter 50 case. The court of appeals agreed that the juvenile court did not enter a GS 7B-911 order even though it clearly intended to do so. However, the 2012 order did terminate juvenile jurisdiction pursuant to GS 7B-201 because the order stated that “the Court

terminates the juvenile court jurisdiction.” Because the jurisdiction of the juvenile court was terminated in 2012, the trial court had jurisdiction to act on the custody claim thereafter.

The court of appeals also rejected father’s second argument that the trial court had no subject matter jurisdiction to enter the permanent custody order because his 2014 motion in the cause in the custody case did not allege a substantial change in circumstances. The court of appeals expressly does not reach the issue of whether an allegation of a substantial change is required to invoke the subject matter jurisdiction of the court to modify a custody order because the court held the permanent order on appeal was an initial determination of custody rather than a modification. The juvenile court did not enter a Chapter 50 custody order and there had been no existing custody order at the time the juvenile proceeding was initiated. All of the orders entered between the filing of father’s motion in the cause and the final hearing had been temporary orders, so the order on appeal was the first permanent custody order entered regarding this child.

## **Custody Legislation**

### **S.L. 2019-172 (H 469). An act to amend the laws pertaining to Parenting Coordinators.**

**Effective October 1, 2019**

Amends the statutes relating to parenting coordinators (PCs) found in GS 50-90 through 50-100 as follows:

Adds a definition of “party” to GS 50-90 to clarify that a party is any person granted legal or physical custodial rights to a child in a child custody proceeding;

**Appointment of a PC**. Makes amendments to GS 50-91, including:

- Clarifies that a court has the authority to reappoint a PC;
- Allows court to appoint a PC at any point in time after a custody order other than an ex parte order has been entered or upon entry of a contempt order involving a custody issue, rather than only at the time a custody order is entered, when conditions supporting appointment are met. Specifies that no changed circumstances are required for the court to be able to appoint a PC after a custody order has been entered; and
- Requires that the PC be contacted before the PC is appointed to make sure the PC is willing to be appointed.

**The authority of the PC:** Makes changes to the provisions in GS 50-92 including:

- Expands the authority the court can grant to a PC to include matters that will aid the parties “in complying with the court’s custody order, resolving disputes regarding issues that were not specifically addressed in the custody order, or ambiguous or conflicting terms in the custody order.” Adds extensive list of specific areas of authority that can be granted to the PC as set forth in GS 50-92(a).
- Grants the PC the authority to decide any issue within the PC’s scope of authority and provides that the decision of the PC “shall be enforceable as an order of the court” that will stay in effect until changed by the PC, a subsequent PC, or the court.
- Allows a party to ask the court to review a decision of the PC but provides that parties must comply with the decision of the PC unless the court decides the decision is not in the best interest of the child or decides that the decision of the PC exceeded the PC’s authority.

**Required qualifications of the PC:** Makes changes to GS 50-93 including:

- Removes ‘medicine or a related subject area’ as a degree that will qualify a person to be a PC, so now a PC must have masters or doctorate in psychology, law, social work or counseling.
- Clarify that the PC must hold a NC license in his/her area of practice, rather than a license from any state.

**The appointment conference:** Makes changes to GS 50-94 including:

- Provides that no appointment conference is required if the court is extending the appointment of a PC, appointing a subsequent PC, or if the parties consent to the waiver of an appointment conference by signing the order appointing the PC.
- Prohibits the appointment of a PC until a custody order has been entered or is being simultaneously entered.

**Fee disputes.** Amends GS 50-95 regarding the role of the trial court in settling fee disputes between the PC and the parties. If requested by the PC, the court can conduct a hearing and review the fees. The court retains jurisdiction to resolve fee disputes after the PC appointment ends as long as the PC requests court review “in a timely manner”.

**Communication.** Amends GS 50-96 to require parties to execute releases necessary for the PC to communicate with any person having information relating to the PC’s duties. Also specifies that the PC has discretion to determine whether to meet or communicate with the children.

**PC reports.** Amends GS 50-97 to allow rather than require the PC to file a report with the court when the PC believes the custody order is not in the best interest of the child, that the PC is not

qualified to address issues in the case, that a party is not complying with a decision of the PC, or that the PC appointment should be modified or terminated.

**Authority of court to act upon report of PC.** Also amends GS 50-97 to clarify the authority of the court to issue a show cause order initiating a contempt proceeding against the party the PC alleges is not complying with the custody order, not complying with a decision of the PC or not paying the PC fee. When the PC files a report, the court must conduct an expedited hearing that shall occur within 4 weeks of the filing of the report unless the PC requests a longer period of time or unless the court has issued an order directing the party to appear and show cause regarding contempt. Also authorizes the court to issue temporary custody orders after a hearing on a PC's report if a temporary custody order is in the child's best interest.

**PC records.** Removes provisions in GS 50-98 that required PC to release certain records to parties upon request of the parties. Allows PC the discretion to release records when PC deems it appropriate to do so. Parties can ask the court to issue a subpoena to compel production of the PC records. Other parties and the PC must be given opportunity to object to the release or the manner of the release of the documents.

**Modification or termination of the PC.** Amends GS 50-99 to allow the court to amend or terminate the appointment of the PC for good cause shown on its own motion, on the request of either party or by the consent of the parties. Good cause includes but is not limited to a lack of progress, a determination that the parties no longer need assistance, impairment of a party that interferes with the party's participation, and the unwillingness or inability of the PC to continue to serve.

## Child Support

### Cases Decided Between June 18, 2019 and October 1, 2019

#### Modification; UIFSA

- NC child support order affirmed despite competing child support action filed and pending in Maryland because North Carolina court maintained continuing exclusive jurisdiction to modify the previously entered child support order.
- NC had exclusive jurisdiction to modify the NC support order even though mother and child moved to Maryland because father continued to reside in NC.
- NC support order that required father to pay support to mother was a modification of the initial support order that required mother to pay support to father; changing which parent was the “obligor” did not make the new order an initial determination. A support order is about providing support to a child; it is not about designating one parent or the other as the ‘obligor’.
- The lack of an express conclusion by the trial court that a substantial change in circumstances had occurred does not render a modification order deficient as long as the findings of fact in the order establish that there has been a substantial change in circumstances.

**Watkins v. Benjamin, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (August 20, 2019).** Before separating in 2012, the parties lived with their children in NC. In 2015, after mother moved to Maryland while dad and the children remained in NC, the NC court ordered mother to pay child support to father.

After a modification of the custody order between the parties to grant primary custody of the children to mother in Maryland, mother filed a complaint in Maryland seeking child support. The Maryland court granted father’s motion to dismiss for lack of subject matter jurisdiction.

While the Maryland action was pending on appeal, mother filed a motion to modify in the North Carolina child support case. The North Carolina trial court concluded that it retained exclusive continuing jurisdiction to modify child support even though both children now resided in Maryland because father continued to reside in North Carolina. See 52C-2-205. The trial court modified the support order to require father to make prospective child support payments to mother. Mother appealed and argued that the NC court did not have jurisdiction to enter the support order because of the action pending in Maryland.

Subject matter jurisdiction. The court of appeals affirmed the trial court, concluding that NC had continuing exclusive jurisdiction to modify the NC child support order. The appellate court rejected mother’s argument that because the original 2015 support order did not require father to pay support, the present proceeding actually was an initial determination of support rather than a modification. If an initial determination, Maryland would have jurisdiction to act and NC would be prohibited from acting pursuant to GS 52C-2-204. The court of appeals held that because NC had entered an order of support for these particular children, any subsequent support order for these particular children is a modification. The purpose of a child support proceeding is to set support for specific children; the purpose is not to identify which parent is an obligor. Changes in

custody do not require or justify new support cases/proceedings. Instead, existing orders must be modified to reflect new custody arrangements.

Showing of changed circumstances. The court of appeals also turned down mother's request to remand the matter to the trial court due to a lack of a specific conclusion in the order that there had been a substantial change in circumstances since the entry of the original support order; the lack of an express conclusion to that effect does not render the modification deficient so long as the findings in the order reflect that a substantial change in circumstances has occurred.

### **Ordering payment of arrears**

- Trial court erred when it ordered father to pay mother the \$24,400 he owed for past due child support at a rate of \$100 per month for a period of over 20 years when father had the ability to pay the entire amount at the time of the hearing.
- A parent has no right to unilaterally reduce child support when a child reaches the age of majority if the support is owed pursuant to a court order that provides for the support of more than one child.
- Trial court cannot reduce arrears based on a parent's voluntary payment of other expenses related to the child or consider a parent's voluntary payments in determining the schedule for the repayment of arrears.

**Dillingham v. Dillingham, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (September 17, 2019).** The child support order for four children was based on the income and expenses of the parties and the needs of the children rather than the Guidelines due to the high income of the parties. Father paid support as required by the support order until the oldest child began attending college. At that point, he unilaterally reduced his support payment without seeking modification from the court. Similarly, when the second oldest child began attending college, he further reduced the amount he paid.

Mother filed a motion for contempt based on father's failure to pay all amounts required by the order. The trial court found father failed to pay but did not act willfully. The trial court reasoned that although he did not have the legal right to reduce his payments, he paid substantial additional expenses on behalf of the two older children throughout the period of time he was not paying the full amount of support required by the court order. The trial court ordered that he repay the \$24,400 arrears by paying \$100 a month until the arrears are paid in full. The order allowed father to repay the entire amount at any point but also allowed him the choice to pay over 20 years.

On appeal, mother argued that the trial court abused its discretion by allowing father so much time to repay the arrears when he earned a salary of over \$1,700,00 at the time of the hearing and had the ability to pay the entire amount at that time. The court of appeals agreed, stating that "the only purpose we can find for the trial court's extension of payment over 20 years without even the benefit of interest at the legal rate is to punish mother for filing a motion to enforce the child support where father was providing entirely voluntary support to their two adult children." The court of appeals remanded and instructed that while the trial court has discretion to set a payment

schedule for the repayment of arrears, that discretion must be exercised reasonably. In addition, the court of appeals stated that “father’s voluntary payment of expenses for the children and other expenses not required by the order [for support] must be excluded from its determination of whether to award mother recovery of the child support underpayment and arrearages” and “must be excluded from the trial court’s determination of how and when father must pay the arrearages.”

### **Modification; changed circumstances**

- A showing that the person paying support has experienced a substantial increase in income is not sufficient alone to establish a substantial change in circumstances.
- Trial court erred in concluding that husband’s sale of business interests resulted in income to him. Liquidation of an asset, even if the liquidation is in the form of an installment sale where the seller receives the sale price in installments over time, does not result in income to the liquidating spouse unless there is evidence showing the spouse made capital gains on the sale. Only the gain would be income.
- The fact that father stopped making voluntary payments above and beyond the amount required by the consent order was not a substantial change in circumstances absent a showing of a change in the needs of the child or dependent spouse.

**Shirey v. Shirey, \_ N.C. App. \_, \_ S.E.2d \_ (October 1, 2019).** Consent judgment set child support and alimony to be paid by father to mother. After father’s income increased and he sold business interests distributed to him in the property distribution provisions of the consent order, and he ceased making voluntary payments to mother above and beyond the amounts required by the consent order, mother filed a motion to modify requesting that alimony and child support be increased. After concluding that support needed to be modified to enable the child and mother to continue “to maintain their accustomed standard of living”, the trial court ordered father to pay increased amounts for both child support and alimony.

On appeal, the court of appeals held that the trial court erred in modifying support because mother failed to show changed circumstances. According to the court of appeals, an increase in income of a party alone is insufficient to support a conclusion that there has been a substantial change for either child support or alimony modification. In addition, the court held that the trial court erred in finding husband’s sale of his business interests resulted in income to husband where wife did not show husband made a profit on the sale. The liquidation of an asset does not result in income; the asset simply converts to a cash asset. The fact that the cash received in exchange for the asset is paid in installments over time does not change the nature of the funds to income. To show husband earned income from the sale of the business interests, wife would need to show he earned capital gains on the sale.

Finally, the court of appeals held that the fact father stopped making voluntary payments for both the child and mother was not a substantial change without an additional showing of a change in the needs of the child or the mother.

**Domestic Violence Protective Orders  
Cases Decided Between June 18, 2019 and October 1, 2019**

**Text messages; proof of substantial emotional distress; past history of DV**

- Text messages from defendant to plaintiff constituted harassment that placed plaintiff in fear of continued harassment to such an extent as to inflict substantial emotional distress.
- Where defendant had no custody rights regarding the children of the parties other than very limited supervised visitation and his text messages were in direct violation of a no-contact court order provision, the messages served no legitimate purpose even though they referenced the children.
- Evidence of plaintiff's fear of defendant, her distress and anxiety caused by his actions, and her lifestyle alterations in response to his actions was sufficient to support the finding that plaintiff suffered substantial emotional distress.
- The trial court's detailed findings of fact regarding defendant's history of domestic violence towards plaintiff were more than "vague findings of a general history of abuse" and were sufficient to help support the conclusion that defendant committed an act of domestic violence when he sent text messages to plaintiff.

**Bunting v. Bunting, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (July 16, 2019).** Trial court entered a DVPO against defendant after concluding that six text messages he sent to plaintiff Defendant constituted domestic violence in that the messages caused her to dear continued harassment that rose to a level sufficient to inflict substantial emotional distress. Affirmed.

The parties were previously married and have two children. Over the course of five years, plaintiff obtained DVPOs four times against defendant, renewing them when allowed and filing for new ones after the original orders expired. Acts of domestic violence included threats by defendant to kill plaintiff, threats to kill himself, and kidnapping of one of the children. Defendant repeatedly violated the DVPOs and was held in contempt multiple times. Although he was initially permitted to contact plaintiff regarding matters related to the children, his repeated violations led the court to prohibit defendant from contacting plaintiff in any manner in a custody order entered in 2013 which gave plaintiff sole legal and physical custody of the children. In 2017, plaintiff filed a complaint and motion for a DVPO alleging defendant sent her six text messages that were unsolicited, in violation of the no-contact provision of the existing custody order, and caused plaintiff distress, anxiety, and fear. After a hearing the trial court granted the DVPO.

Harassment, legitimate purpose. The court of appeals rejected defendant's argument on appeal that the text messages he sent to plaintiff did not constitute harassment because the messages were about the children and served a legitimate purpose. Harassment is defined in GS 14-277.3A(b)(2) as "[k]nowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." The court of appeals held that because defendant had no custody rights regarding the children other than extremely limited supervised visitation once a month and because defendant was prohibited by the custody order from making any contact with plaintiff, the trial court did not err in concluding the texts had no legitimate purpose.

Emotional distress. The court of appeals also rejected defendant’s argument that there was no evidence plaintiff suffered from substantial emotional distress as a result of the text messages. The court held that plaintiff’s testimony about her fear of defendant based on his long history of threats and harassment, that the messages caused her anxiety and distress, and that she altered her daily routine after being contacted by defendant out of fear for herself and her family was sufficient evidence to support the trial court’s finding that she actually suffered substantial emotional distress.

Adequate findings of fact. The court of appeals also rejected defendant’s argument that the trial court erred by making “vague findings about a general history of domestic violence” between the parties. The court held that plaintiff’s “copious, detailed evidence” of defendant’s history of threats, abusive conduct, and harassment supported the trial court’s findings of fact, which in turn support the conclusion that defendant committed acts of domestic violence.

**\*\*Superseding opinion previously filed on December 18, 2018\*\***

**Notice pleading; act of domestic violence**

- Rule of Civil Procedure 8(a)(1) requires a pleading to provide defendant with notice of the nature and basis of plaintiff’s claim sufficient to allow defendant to answer and prepare for trial.
- A trial court cannot use an allegation of domestic violence not included in the complaint that was introduced into evidence over the objection of the defendant as the basis for its decision to grant a protective order unless the complaint provided defendant with sufficient notice to prepare to defend the allegation.
- The trial court erred in granting DVPO based in part on the conclusion that defendant’s aggressive driving constituted an act of domestic violence when the complaint in this case did not provide sufficient notice to defendant that the nature of his driving would be at issue in the trial and defendant objected to the introduction of evidence concerning his driving during the trial.
- A finding that defendant has a “flashpoint temper” was not sufficient to support a conclusion that defendant committed an act of domestic violence.
- A finding that plaintiff was “afraid of defendant and what he might do” was not sufficient to support the conclusion that defendant placed plaintiff in fear of imminent serious bodily injury.
- Evidence that defendant hacked plaintiff’s email was not sufficient to support the conclusion that defendant placed plaintiff in fear of continued harassment that caused plaintiff emotional distress when plaintiff offered no evidence of her actual emotional distress.

**Martin v. Martin, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (July 16, 2019).** This opinion after reconsideration supersedes prior opinion filed December 18, 2018. Defendant appeals from DVPO and amended DVPO; DVPO reversed.

Evidence of allegations of domestic violence not alleged in the complaint. The trial court erred when it supported the conclusion that defendant committed an act of domestic violence with findings based on evidence offered by plaintiff over the objection of defendant of acts defendant committed that were not alleged in plaintiff's complaint. The court of appeals held that North Carolina is a notice pleading state, meaning Rule 8(a) of the Rules of Civil Procedure requires a complaint to state a short and plain statement sufficient to give defendant notice of the nature and basis of the claim against him or her such that he or she can answer and prepare for trial. Evidence of acts not specifically alleged in the complaint can be used to support a conclusion of domestic violence if the allegations in the complaint give defendant sufficient notice of the nature and basis of the claims made against him. For example, the court of appeals cited *Jarrett v. Jarrett*, 249 SE2d 269 (2016), wherein the court held that the complaint gave defendant sufficient notice that his aggressive driving on two dates not alleged in the complaint would be at issue in the domestic violence trial where the complaint detailed an act of aggressive driving by defendant on another date.

In this case, the complaint did not include allegations relating to defendant's driving but the trial court made a finding regarding defendant's "road rage" and aggressive driving to support the conclusion that defendant committed an act of domestic violence. Defendant's counsel had objected to plaintiff's testimony about the driving at trial. The court of appeals held that because the complaint did not give defendant sufficient notice that his driving would be at issue, the trial court erred when it allowed the testimony and used the evidence to support the issuance of the DVPO.

Acts of Domestic Violence. The court of appeals agreed with defendant that the trial court erred in making two findings of fact which were not supported by competent evidence: (i) that defendant broke into plaintiff's bedroom and (ii) that defendant threw his keys at plaintiff, when plaintiff actually testified only that defendant unlocked her bedroom door with a key and threw keys on the bed.

In addition, the court of appeals agreed with defendant that the trial court findings did not support the conclusion that defendant committed an act of domestic violence. Specifically, the court held that:

1. the fact that defendant has a "flashpoint temper" is not an act of DV;
2. the fact that "plaintiff was afraid of defendant and what he might do" does not support a conclusion that defendant placed plaintiff in fear of imminent serious bodily injury; and
3. the fact defendant hacked plaintiff's email was not harassment when there was no evidence that plaintiff suffered actual substantial emotional distress as a result of the hacking.

### **DVPO; fear of imminent serious bodily injury; actual fear**

- The test for whether an aggrieved party has been placed in fear of imminent serious bodily injury is subjective; therefore, the trial court must find as fact that the aggrieved party ‘actually feared’ imminent serious bodily injury
- Trial court erred in determining defendant committed domestic violence by placing his ex-spouse and her husband in fear of imminent serious bodily injury where no evidence was introduced that the ex-spouse and her husband actually feared defendant’s threats of violence

**Anderson v. Tredwell, unpublished opinion, \_ N.C. App. \_, 830 S.E.2d 702 (August 6, 2019).**

Trial court granted plaintiff’s request for a DVPO after finding as fact that defendant made threats to kill plaintiff, his ex-spouse, and her husband, and that the parties’ children heard the threats while in defendant’s presence. Based on the findings of fact, the trial court concluded that defendant had placed plaintiff and a member of her family in fear of imminent serious bodily injury and therefore had committed an act of domestic violence.

The court of appeals reversed the trial court on the basis that there was no evidence in the record that plaintiff or her husband actually feared defendant. The only act of DV found by the trial court was that an aggrieved party or his or her family member were placed in fear of imminent serious bodily injury or continued harassment by defendant. The test for this ground is subjective; therefore, the trial court is required to find as fact that the aggrieved party actually feared imminent serious bodily injury before concluding that domestic violence has occurred.

## **Domestic Violence Legislation**

**S.L. 2019-168 (S 493).** “An act to add procedural efficiencies when a defendant is ordered to attend an abuser treatment program, to clarify the specific time that a domestic violence protection order expires on the last day that order is valid, and to provide that subsequent court orders supersede similar provisions in orders issued under the domestic violence laws.”

**Effective December 1, 2019 and applies to orders in effect on or after that date.**

**Abuser treatment program.** Amends GS 50B-3(a2) to provide that if the court orders defendant to attend an abuser treatment program, the defendant must begin the program within 60 days of the entry of the order. At the time the court enters the DVPO, the court must set a date and time for a review hearing for the court to assess whether defendant has complied with the order.

At any time after entry of the order and before the review hearing, the defendant may present to the court a written statement from an abuser treatment program showing defendant has enrolled and begun regular attendance in the program. Upon receipt of the statement, the clerk shall remove the review hearing from the docket and inform both parties that no hearing is required.

**Expiration of DVPO.** Amends GS 50B-3(b) to state that “Protective orders entered pursuant to this Chapter expire at 11:59 P.M. on the indicated expiration date, unless specifically stated otherwise in the order.”

**Relationship of DVPO to other court orders.** GS 50B-7 is amended to provide that “any subsequent court order entered supersedes similar provisions in protective orders issued pursuant to this Chapter.”

**Postseparation Support and Alimony  
Cases Decided Between June 18, 2019 and October 1, 2019**

**Modification; changed circumstances**

- A showing that the person paying support has experienced a substantial increase in income is not sufficient alone to establish a substantial change in circumstances.
- Trial court erred in concluding that husband’s sale of business interests resulted in income to him. Liquidation of an asset, even if the liquidation is in the form of an installment sale where the seller receives the sale price in installments over time, does not result in income to the liquidating spouse unless there is evidence showing the spouse made capital gains on the sale. Only the gain would be income.
- The fact that father stopped making voluntary payments above and beyond the amount required by the consent order was not a substantial change in circumstances absent a showing of a change in the needs of the child or dependent spouse.

**Shirey v. Shirey, \_ N.C. App. \_, \_ S.E.2d \_ (October 1, 2019).** Consent judgment set child support and alimony to be paid by father to mother. After father’s income increased and he sold business interests distributed to him in the property distribution provisions of the consent order, and he ceased making voluntary payments to mother above and beyond the amounts required by the consent order, mother filed a motion to modify requesting that alimony and child support be increased. After concluding that support needed to be modified to enable the child and mother to continue “to maintain their accustomed standard of living”, the trial court ordered father to pay increased amounts for both child support and alimony.

On appeal, the court of appeals held that the trial court erred in modifying support because mother failed to show changed circumstances. According to the court of appeals, an increase in income of a party alone is insufficient to support a conclusion that there has been a substantial change for either child support or alimony modification. In addition, the court held that the trial court erred in finding husband’s sale of his business interests resulted in income to husband where wife did not show husband made a profit on the sale. The liquidation of an asset does not result in income; the asset simply converts to a cash asset. The fact that the cash received in exchange for the asset is paid in installments over time does not change the nature of the funds to income. To show husband earned income from the sale of the business interests, wife would need to show he earned capital gains on the sale.

Finally, the court of appeals held that the fact father stopped making voluntary payments for both the child and mother was not a substantial change without an additional showing of a change in the needs of the child or the mother.

## Equitable Distribution

### Cases Decided Between June 18, 2019 and October 1, 2019

#### **Equitable distribution; distributive award; separate property of spouse**

- The trial court improperly distributed separate property by ordering plaintiff to sell separate property to pay a distributive award.

**Crowell v. Crowell**, \_\_ N.C. \_\_, 831 S.E.2d 248 (August 16, 2019). Appeal from divided opinion of court of appeals upholding the trial court's distributive award in an equitable distribution (ED) case. The Supreme Court reversed the holding the court of appeals and remanded for further proceedings.

Trial court. The trial court found the parties had accumulated a significant amount of debt by the date of separation and determined that an equal distribution was equitable. The court distributed most of the marital debt to husband and ordered wife to pay husband a distributive award in the amount of \$824,294. To pay the distributive award, the trial court directed plaintiff to sell two parcels of her separate property and transfer the proceeds to husband.

Court of appeals. A divided panel of the court of appeals affirmed in part and vacated in part the trial court's equitable distribution judgment and order. The court affirmed the portion of the order requiring plaintiff to sell the separate properties, stating that:

where the trial court was properly considering – not distributing – plaintiff's separate property in distributing the marital estate, specifically considering plaintiff's ability to pay a distributive award to defendant, the trial court did not abuse its discretion in ordering plaintiff to liquidate separate property in order to pay the distributive award.

In a separate opinion concurring in part and dissenting in part, one judge concluded that the trial court did more than merely consider the separate property but improperly ordered a distribution of that property.

Supreme Court. GS 50-20 authorizes trial courts to distribute marital and divisible property between divorcing parties, but separate property must “remain unaffected” by an ED action. The trial court improperly distributed separate property when it ordered plaintiff to liquidate her separate property in order to pay a distributive award. There is no distinction between “considering” and “distributing” a party's separate property where the effect of the resulting order is to divest a party of property rights he or she acquired before marriage.

\*\*In a footnote the Supreme Court distinguished a trial court's authority to enforce an order directing the payment of a distributive award, stating that of course the trial court is free to consider all assets of the party ordered to pay, including her separate property, when determining whether she has the ability to pay the award.

## Equitable Distribution Legislation

### Equitable Distribution: Significant legislative amendments regarding retirement accounts and other forms of deferred compensation

[North Carolina S.L. 2019-172 \(H 469\)](#) made substantial revisions to GS 50-20.1 governing the classification, valuation and distribution of pension, retirement and deferred compensation benefits. The changes apply to distributions made on or after October 1, 2019.

**Types of benefits subject to the provisions in GS 50-20.1.** The legislation changes the title of [GS 50-20.1](#) from “Pension, retirement and *other* deferred compensation benefits to “Pension, retirement and deferred compensation benefits” to clarify that the provisions in the statute apply to all forms of deferred compensation plans rather than only to those deferred compensation benefits that are in the nature of a retirement account. In addition, [GS 50-20.1\(h\)](#) is amended to specify that the statute applies to all vested and nonvested pension, retirement and deferred compensation plans, programs, systems of funds, specifically including but not limited to “uniformed services retirement programs, federal government plans, State government plans, local government plans, Railroad Retirement Act pensions, executive benefit plans, church plans, charitable organization plans, individual retirement accounts within the definitions of Internal Revenue Code sections 408 and 408A, and accounts within the definitions of Internal Revenue Code section 401(k), 403(b), or 457.”

**Classification.** Until this amendment, the statute required that all accounts and benefits subject to [GS 50-20.1](#) be classified by the coverture fraction. The coverture fraction is a simplistic formula that conclusively defines the marital portion of the date of separation value of an account by applying a fraction to the total value of the benefits on the date of separation; the numerator of that fraction being the total time married while earning the pension and the denominator being the total amount of time earning the pension. So for example, if a spouse worked for state government for 5 years before marriage and 5 years during marriage with a total of 10 years of employment by the date of separation, the coverture fraction provides that one half of the value of the government pension on the date of separation is marital and one half is separate.

The legislation amends [GS 50-20.1\(d\)](#) and adds [new section \(d1\)](#) to distinguish the classification methodologies for defined benefit plans from defined contribution plans.

- **Defined benefit plans.** The statute continues to provide that a defined benefit plan will be classified by the coverture fraction.

- A defined benefit plan is a plan wherein the benefits payable to the participant are determined in whole or in part based upon the length of the participant's employment. An example of a defined benefit plan is a government or military pension.
- **Defined contribution plans.** [New section GS 50-20.1\(d1\)](#) requires that a defined contribution plan be classified through tracing rather than by application of the coverture fraction. A defined contribution account is an account wherein the benefit payable to the participant spouse is determined by the contributions contained in an account with readily determinable balance. Examples of defined contribution accounts include 401(k) plans and 403(b) plans.
  - Tracing means classifying an account by establishing through evidence how much of the account balance on the date of separation was the result of marital contributions and growth on marital contributions and how much of the account balance on the date of separation can be traced to separate contributions and growth on separate contributions. If insufficient evidence is presented to allow the court to classify the marital portion of the account by tracing, the court is required to determine the marital portion of the defined contribution plan by application of the coverture fraction.

### Valuation

- **Defined benefit plan.** The legislation changes the requirement that a defined benefit plan be valued as of the date of separation in all cases. [GS 50-20.1\(d\)](#) was amended to specify that if the marital portion of a defined benefit plan (for example, a military or other government pension) is divided equally between the parties and the benefits are distributed by an order that directs the payment of benefits to each party in the future when the plan participant is eligible to receive benefits, begins to receive the benefits, or reaches the earliest retirement age, the court is not required to identify the date of separation value of the pension before classifying it and entering a distribution order.
- **Defined contribution plan.** The statute continues to require that defined contribution plans be valued by the account balance on the date of separation.

### Distribution

**Benefits vested on the date of separation.** The legislation amends [GS 50-20.1\(a\)](#) to allow the court to distribute vested defined contribution accounts:

- as a lump sum from the account (agreement of the parties is no longer required), or
- by ordering the payment of fixed amounts payable over time (also no longer requires agreement of the parties).

Both a vested defined benefit plan and a vested defined contribution plan can be distributed:

- as a prorated portion of the benefits payable at the time the plan participant is eligible to receive the benefits, begins to receive the benefits, or at the participant's earliest retirement age, or
- by awarding a larger portion of other marital assets to the party not receiving the benefits and a smaller portion to the party receiving the benefits, or
- if the parties agree, as a lump sum, or over a period of time in fixed amounts.

**Benefits not vested on the date of separation.** Both a nonvested defined benefit plan and a nonvested defined contribution plan can be distributed:

- as a prorated portion of the benefits payable at the time the plan participant is eligible to receive the benefits, begins to receive the benefits, or at the participant's earliest retirement age, or
- if the parties agree, as a lump sum, or over a period of time in fixed amounts.

**Military Retirement Benefits.** The legislation addresses the application of the “frozen benefit rule” to the division of military retirement benefits. The “frozen benefit rule” was created by an amendment to federal law in 2016. That amendment and the effects of that amendment on the distribution of military benefits is discussed in this blog post: [Equitable Distribution: Change in Federal Law Regarding Military Pensions Part 1.](#)

The legislation addresses the federal law by amending [GS 50-20.1](#) to specify that the fraction included in a military retirement account division order will direct the payment of a percentage of the benefit that is:

“determined using the proportion of time the marriage existed (up to the date of separation of the parties) simultaneously with the total time of the employment which earned the benefit subject to equitable distribution to the total time of employment, *as limited or restricted by the plan, program, system, fund, or statute that earned the benefit subject to equitable distribution.*”

**Deferred Distribution and Survivor Annuities** (deferred distribution is when the plan is distributed by the award of a prorated portion of the benefits payable at the time in the future when the plan participant is eligible to receive the benefits, begins to receive the benefits, or at the participant's earliest retirement age):

The legislation adds [new sections GS 50-20.1\(f1\), \(f2\), \(f3\) and \(f4\)](#) to:

- Require that when deferred distribution is used to distribute marital benefits and the plan permits the use of a “separate interest” approach, there is a rebuttable presumption that the “separate interest” approach will be used. A separate interest approach is a method of dividing the benefits in a way that gives the spouse who is not the plan participant an interest in the plan that allows the nonparticipant spouse to receive benefits in a manner

independent from the participant spouse, or to make elections concerning the receipt of benefits independently of any elections made by the participant spouse.

- Give the court the discretion to award all or a portion of a survivor annuity to the nonparticipant spouse and to allocate the cost of the survivor benefit between the parties when the plan does not permit the “separate interest” approach.
- Require that whenever a plan does not automatically provide preretirement survivor annuity protection for the nonparticipant spouse, the court must order the protection if permitted by the plan; and
- Allow the court to equally allocate between the parties any fees assessed by the plan in processing any domestic relations order.

### **Jurisdiction of the trial court to correct division orders**

The legislation also adds new section [GS 50-20.1\(i\)](#) to allow the court, upon motion of a party, to enter a “subsequent order clarifying or correcting its prior order” when a plan has deemed a division order to be unacceptable to divide the plan benefits.

### **Jurisdiction of the court to enter division order without an ED claim being filed**

The legislation adds new section [GS 50-20.1\(j\)](#) to authorize the filing of a claim, either as a separate civil action or as a motion in the cause in an action brought pursuant to Chapter 50, requesting an order effectuating the distribution of a retirement, pension or deferred compensation account in accordance with a valid written agreement between the parties. The new legislation specifies that the court has the authority to enter a distribution order “effectuating the distribution provided for in the valid written agreement” and specifies that the court can enter the distribution order regardless of whether a claim for ED has been filed or adjudicated.

**Other Legislation**  
**Enacted Between June 18, 2019 and October 1, 2019**

**S.L. 2019-161, S420: An Act to Enact the North Carolina Servicemembers Civil Relief Act and to Clarify that No Member of the North Carolina National Guard Shall be Forced to Use Any Vacation or Other Leave from His or Her Civilian Employment for a Period of Active Service.**

**Effective October 1, 2019 and applies to contracts entered into, renewed or modified after that date.**

This Act adds new Article 4 to Chapter 127B to create the “North Carolina Servicemembers Civil Relief Act.” The NC SCRA extends all rights, benefits and protections of the federal SCRA to any member of the NC National Guard serving on state active duty as well as to any member of the National Guard of another state serving on state active duty who resides in North Carolina. To receive the protections under this Act, the Guard Member must be serving active duty pursuant to order signed by a Governor, for a period of more than 30 consecutive days.

By contrast, the federal SCRA definition of “servicemember” includes a member of the National Guard who is on active duty pursuant to order signed by the President or Secretary of Defense; and the federal SCRA defines “active duty” as “full-time duty in the active military service of the United States.”

**\*\*Extension of federal and state protections to dependents of all servicemembers.** New GS 127B-29 provides that dependents of servicemembers are entitled to the protections regarding contracts that are created for servicemembers in new GS 127B-30 AND entitled to protections provided in Subchapter II of Chapter 50 of Title 50 of the US Code (the federal SCRA). Subchapter II of the federal SCRA includes but is not limited to the following protections:

- Protections against default judgments;
- Stay of civil actions or proceedings, including child custody proceeding;
- Stay of execution of judgments or orders of attachment or garnishment, and
- Tolling of statutes of limitations.

This means that Section 521 of the federal Servicemember’s Civil Relief Act applies to dependents of servicemembers. Dependents are defined as a spouse of a servicemember, a child of a servicemember, or any other person for whom a servicemember has paid more than ½ of the individual’s support for the last 180 days. **Among other things this means a court cannot enter any type of civil order or judgment against a defendant who has not made an appearance in the case without an affidavit by plaintiff indicating whether defendant is in the military OR is a dependent of a person in the military. See form AOC-G-250.**

Stay of court proceedings. GS 127B-31 is amended to state that at any stage of any civil action in which a service member engaged in military service is a party, the court may stay the action on

its own motion and shall stay the proceeding upon motion of the service member unless the court finds the ability of the service member to litigate is not materially affected by his or her military service. This provision applies during the service member's military service (defined in the act) and within 60 days after the service terminates.