Family Law Update
Cases Decided Between
October 4, 2016 and June 6, 2017

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Custody
Cases Decided Between October 4, 2016 and June 6, 2017

Contempt; ambiguous consent order

- Trial court did not err in refusing to hold mother in civil contempt for violating a consent custody order when provision she was alleged to have violated was ambiguous.
- Consent order providing that parties would execute documents necessary to change the last name of their child was ambiguous because it was subject to two reasonable interpretations as to what the last name would be.

Bunch v. Kennedy Bunch, *unpublished opinion*, _ N.C. App. _, 791 S.E.2d 877 (October 4, 2016). Parties entered into a consent custody order regarding the custody of a child who was born before the parties married. Because the child was born when the mother was unmarried, the child was given the mother's last name of Kennedy, with his full name being Brennan Lane Kennedy. In the original consent order resolving custody, the parties agreed that "the minor child's last name would be changed to Bunch [the father's name]". The original order subsequently was amended to state the child's name would be changed to "Brennan Lane Kennedy Bunch". Father alleged mother violated the consent order by attempting to change the child's last name to "Kennedy Bunch." The father argued that the consent order should be interpreted as requiring the last name to be simply "Bunch" with "Kennedy" being a second middle name for the child.

The court of appeals agreed with the trial court that mother could not be found to have willfully violated the court order that was "reasonably susceptible to multiple constructions."

Entry of judgment; trial court not bound by statements made at end of trial

- Trial court did not err by granting primary custody to father after announcing at the end of the trial in open court that mom would have primary custody.
- Custody order is not entered until it is reduced to writing, signed by the court and filed with the clerk of court. Trial judge can change his mind after announcing decision in open court.

Scoggin v. Scoggin, _ N.C. App. _, 791 S.E.2d 524 (October 18, 2016). At the conclusion of the evidence in a custody trial, the trial judge announced from the bench that mother would have primary physical custody of the children and dad would have significant visitation. Within a week, the trial judge contacted the parties to inform them that he had changed his mind and dad would have primary physical custody. The custody order was entered three months later.

Mother agued on appeal that trial court did not have the authority to change the decision after announcing it in open court. The court of appeals disagreed and held that because Rule 58 of the Rules of Civil Procedure no longer allows for the oral entry of judgment in civil cases, the court's decision is not final until the written judgment is filed. The court of appeals acknowledged that appellate opinions issued before the current version of Rule 58 was adopted allowed for a binding rendition and oral entry of judgment in civil cases, but held that this earlier case law has been superseded by the current version of Rule 58.

Contempt; ambiguous order; attorney fees

- Trial court erred in holding mother in contempt for posting statements about father on Facebook when underlying order did not make it clear that Facebook comments were prohibited.
- Trial court erred in ordering mother to pay attorney fees for contempt proceeding where court did not make findings of fact indicating father brought the action in good faith and had insufficient means to defray the cost of the proceeding.

Williams v. Chaney, _ N.C. App. _, 792 S.E.2d 207 (November 15, 2016). Custody order stated that "mother shall not intimidate the child or make any derogatory statements about the child or any of the child's family members." The trial court held mother in contempt after she posted on her Facebook page that child's father was failing to keep her informed about the scheduling and location of child's sporting events. On appeal, mother argued that the language in the custody order was ambiguous and did not indicate she was prohibited from posting comments on Facebook. The court of appeals agreed, holding that if an order is ambiguous, a party's failure to comply cannot be willful and therefore cannot support contempt. The court of appeals did note, however, that mother now knows that such postings are prohibited and can be held in contempt if she posts similar comments in the future.

Mother also argued that the trial court erred in ordering her to pay father's attorney fees incurred for the contempt proceeding and the court of appeals agreed. Attorney fees can be awarded in a contempt proceeding arising out of the violation of a custody order but only if the court makes the findings required by GS 50-13.6. The court must find that the party being awarded fees was acting in good faith and had insufficient means to defray the cost of the contempt proceeding. In this case, the trial court did not make those required findings of fact.

UCCJEA; determination by another state that NC is more convenient forum

- North Carolina had jurisdiction to adjudicate children neglected where state with continuing exclusive jurisdiction decided North Carolina should exercise jurisdiction.
- "Docket entry" by judge in state with continuing exclusive jurisdiction was sufficient to establish that the state with jurisdiction had determined North Carolina was the more convenient forum to exercise custody jurisdiction.

In re: T.R., _ N.C. App. _, 792 S.E.2d 197 (November 15, 2016). Custody order was entered in Illinois in 2011. Mom and children left the state of Illinois but father remained. In 2014, a juvenile petition was filed in North Carolina, alleging the children to be neglected juveniles. The trial court contacted the court in Illinois and the judge in Illinois entered a "docket entry" indicating that it was in the best interest of the children for North Carolina to exercise jurisdiction and that jurisdiction should be "transferred to North Carolina." Following an adjudication of neglect by the North Carolina court, mother appealed and argued that North Carolina did not have subject matter jurisdiction to make the child custody determination pursuant to the UCCJEA.

The court of appeals held that while Illinois had continuing exclusive jurisdiction because father remained in that state, the Illinois court determined that North Carolina was the more convenient forum pursuant to GS 50A-207. The court of appeals rejected mother's argument that the "docket entry" by the Illinois judge was insufficient to constitute a ruling pursuant to this provision in the UCCJEA. According to the court of appeals, the docket entry was an entry of judgment pursuant to the law of Illinois and also held that North Carolina judges do not have the obligation to "undertake collateral review of a facially valid order from a sister state before

exercising jurisdiction" pursuant to the UCCJEA. The trial court in this case acted appropriately when it determined that the docket entry by the Illinois judge was a determination by the state with continuing exclusive jurisdiction that North Carolina was the more convenient forum. ***Cf.*** **In the Matter of T.E.N.**, _N.C. App. _, 798 S.E.2d 792 (April 4, 2017)(where record contained nothing showing that state with continuing exclusive jurisdiction had "transferred jurisdiction" to North Carolina other than petitioner's testimony that the judge in the other state had transferred the case, the district court erred in determining it had subject matter jurisdiction to modify a custody order entered in another state).

Chapter 35A guardianship vs. Chapter 50 custody

- Trial court did not err in dismissing Chapter 50 custody claim filed after petition for Chapter 35A guardianship of the children had been filed before the clerk of court.
- The granting of a guardianship order renders all Chapter 50 custody matters "moot".
- Custody is just one aspect of guardianship. Guardian of the person or a general guardian has the right to physical custody of the child.
- A guardianship order supersedes a Chapter 50 custody order.
- Once clerk appoints a guardian for a child, the clerk retains jurisdiction to address issues relating to the care and custody of the child. At least in the absence of an emergency, district court has no jurisdiction to address custody of the child once the guardian has been appointed.

Corbett v. Lynch, _ N.C. App. _, 795 S.E.2d 564 (December 20, 2016). The biological mother of the two minor children involved in this case died in 2006. Their father later married Ms. Corbett, referred to by the court of appeals as the "stepmother." Tragically, father was killed in 2015. Father's Will designated the children's aunt, Ms. Lynch, and her husband as testamentary guardians of the two children, but stepmother filed a petition for guardianship of the children pursuant to Chapter 35A. In addition, the day after filing the guardianship petition, stepmother filed a Chapter 50 custody action and obtained an ex parte custody order granting her temporary custody of the children. Aunt thereafter filed an application for guardianship as well as an answer and counterclaim for custody in the Chapter 50 proceeding.

The clerk of superior court granted general guardianship to Ms. Lynch and her husband. Following the entry of the guardianship order, the district court dismissed stepmother's custody case. Stepmother appealed the dismissal of the custody case, arguing that the district court erred in determining it did not have jurisdiction to proceed after the clerk entered the guardianship order.

The following blog post [www.civil.sog.unc.edu] was intended to explain the reasoning of the court:

Chapter 35A Guardianship

GS 35A-1221 allows "any person" to file an application with the clerk of superior court requesting the appointment of a guardian of the person or a general guardian for any minor who does not have a natural guardian. The clerk conducts a hearing to decide whether appointment of a guardian is required and if so, considers the child's best interest to determine who the guardian or guardians should be. Once guardianship is ordered, the clerk retains jurisdiction to enforce

compliance with all guardianship provisions, to resolve disputes between guardians, and to remove and replace guardians if necessary. G.S. 35A-1203. In addition, at any time after a guardianship petition is filed, the clerk has authority to enter a temporary, *ex parte* order when "an emergency exists which threatens the physical well-being of the ward or constitutes a risk of substantial injury to the ward's estate." GS 35A-1207.

In *Corbett*, the court of appeals affirmed the trial court's dismissal of stepmother's custody case, holding that "the appointment of a general guardian by the clerk of superior court in the Chapter 35A guardianship proceeding rendered Stepmother's Chapter 50 custody action moot" because an award of general guardianship "necessarily includes physical custody of the minor child." See GS 35A-1241(a)(1)(a general guardian or guardian of the person is entitled to custody of the child).

Further, the court implies without specifically stating that a Chapter 35A general guardian or guardian of the person of a minor child takes on the legal role of a child's parent who has a "constitutionally-protected right to exclusive custody, care and control of [his or her] children." These parental rights include but are not limited to the right to physical custody of the child.

The court of appeals quoted the Supreme Court of Rhode Island to explain the relationship between guardianship and custody:

> "Permanent custody, so called, with its attendant responsibilities, is an incident of guardianship and parents are the natural guardians of their children… Where, as here, a child has been orphaned, the appointment of a guardian supersedes that of a custodian since the latter is contained within the former."

Petition of Loudin, 219 A.2d 915, 917-18 (1966).

What is the effect of a guardianship on an existing Chapter 50 custody order?

The court in *Corbett* held that there was no reason to go forward with the pending custody case because the issue of who should have physical custody of the child had been resolved by the guardianship order making the pending custody case "moot." However, the court also held that a general guardianship or guardianship of the person supersedes any existing permanent custody order. The court stated:

> "our [guardianship] statutes provide for an override of a Chapter 50 custody determination by the appointment of a general guardian or guardian of the person: Chapter 35A allows for an eligible party to obtain guardianship of a minor child with no living parents even if the child's custody has *already been resolved* by the district court in a Chapter 50 proceeding." (emphasis in original)

As support for this conclusion, the court cited G.S. 35A-1221(4) which requires that an applicant for guardianship "include a copy of any … custody order" for the clerk's consideration in making a decision about guardianship. The court reasoned that this provision makes it clear that the legislature intended for guardianship orders to replace any existing custody order.

Does the entry of a guardianship preclude any future custody proceeding pursuant to Chapter 50?

The answer appears to be yes. As previously stated, Chapter 35A provides that once a guardianship is entered, the clerk retains jurisdiction to enforce or modify a guardianship and to resolve all disputes between guardians. In *McKoy v. McKoy*, 202 N.C. App. 509 (2010), the court of appeals held that the parents of a disabled adult child who had been appointed general guardians of the child could not proceed with a GS 50 custody proceeding to resolve their dispute over the allocation of physical custody of the child between the two of them. According to the court in *McKoy*, the clerk retained exclusive jurisdiction to "determine disputes between guardians." In an even more broad statement, the court in *Mckoy* held that, at least in the case of a disabled adult child, the district court has no jurisdiction to determine custody of the child once the clerk has entered a guardianship order.

Extent of authority to require/prohibit conduct

- Trial court erred when it ordered that mom and the children move into the former marital residence as a condition of the custody order awarding mom primary custody.
- A trial court's authority in a custody case is limited to determining "the party or parties to whom custody of the child shall be awarded, whether and to what extent a noncustodial person shall be allowed visitation privileges, and certain other related matters."

Kanellos v. Kanellos, _ N.C. App. _, 795 S.E.2d 225 (December 20, 2016). Before they separated, Stacie and John Kanellos lived with their children in Union County. After separation, Stacie and the children moved to Forsyth County and John moved to Mecklenburg County, but the parties continued to own the marital residence in Union County at the time of the custody trial. The trial court awarded joint legal custody to Stacie and John and awarded primary physical custody to Stacie with John having visitation on alternate weekends. In addition, the trial court determined that it was in the best interest of the children to live in Union County and therefore ordered Stacie and the children to move back to the marital residence. Stacie appealed, arguing that the trial court abused its discretion in ordering her to move. The court of appeals agreed with Stacie, holding that compelling a parent to reside in a specific county and house fell "outside the scope of authority granted to the district court in a child custody action."

The following blog post [www.civil.sog.unc.edu] was intended to explain the reasoning of the court:

Statutory Authority

Acknowledging that GS 50-13.2 vests judges with broad discretion, the appellate court quoted *Appert v. Appert*, 80 N.C. App. 27, 34, 341 S.E.2d 342, 346 (1986), to explain that the discretion is not unlimited:

> [t]he . . . judge's discretion . . . can extend no further than the bounds of the authority vested in the . . . judge. *In proceedings involving the custody . . .of a minor child, the . . . judge is authorized to determine the party or parties to whom custody of the child shall be awarded, whether and to what extent a noncustodial person shall be allowed visitation privileges, . . ., and certain other related matters.*

Kanellos, (emphasis in original).

The court further explained that the trial court's authority to determine "certain other related matters" comes from the provision in G.S. 50-13.2(b) allowing the court to include in custody orders "such terms, including visitation as will best promote the interest and welfare of the child." Such "certain other provisions," therefore, must be supported by findings of fact sufficient to show why the provisions are necessary for the child's welfare.

Court generally must take the parties as they are

To support the conclusion that ordering a parent to live in a certain place exceeded this authority to order "certain other related matters," the court in *Kanellos* explained that courts are required to determine custody based upon the circumstances of the parties that exist at the time of the custody hearing.

> "Our courts may consider *where each parent lives*, along with any other pertinent circumstances, in determining which parent should be awarded primary custody to facilitate the child's best interest. (citations omitted). Put simply, a district court must consider the pros and cons of ordering primary custody with each parent, contemplating the two options as *they exist*, and then choose which one is in the child's best interest. (citations omitted). However, a court cannot order a parent to relocate in order to create a "new and improved" third option, even if the district court believes it would be in the child's best interest."

Kanellos (emphasis in original)

So what is included in "certain other related matters"?

The *Kanellos* opinion does not provide clear guidance about how to determine whether a particular provision is one that can be included in a custody order. The court states that just as a parent cannot be ordered to move, a court also cannot order a parent to refrain from relocating. However, the court acknowledged existing case law approving provisions that:

- Facilitate the ordered custody and visitation plan. For example, the court has approved orders of supervised visitation and orders that specify where the visitation will take place; orders that allocate responsibility for the payment of visitation expenses; and orders allowing a parent to take a child out of the country during visitation.
- Resolve disputes "that directly implicate a child's relationship with each parent or academic and other activities." For example, the court has approved orders barring a parent from using a specific babysitter who had been interfering with child's relationship with other parent, prohibiting home schooling when home schooling interfered with visitation with the other parent, and allocating responsibility for the religious training of a child and prohibiting the other parent from providing religious training that conflicted with that provided by the other parent.

GS 50-13.2 specifically authorizes the court to:

- Protect children and parties who have been victims of domestic violence by including as part of the custody order any of the relief provisions authorized in GS 50B-3(a)(1), (2) or (3).
- Require any party to abstain from consuming alcohol and require a party to submit to a continuous alcohol monitoring system.
- Provide that a child can be taken out of the state and require that a person allowed to take a child out of the state post a bond or other security conditioned upon the return of the child to the state; and
- Provide for visitation by electronic communication and allocate the cost between the parties.

In addition to the case law cited in the *Kanellos* opinion, there also is case law upholding reciprocal provisions ordering both parties to refrain from making negative comments about the other and interfering with the other's relationship with the child. *See e.g. Watkins v. Watkins*, 120 NC App 475 (1995);

However, there also are opinions other than *Kanellos* wherein the appellate court concluded the trial court exceeded its authority. For example:

- In *Martin v. Martin*, 167 NC App 365 (2004), a trial court order prohibiting father from owning or possessing firearms was vacated due to lack of findings indicating that the safety of the children was affected by father's possession or ownership of guns; and
- In *Jones v. Patience*, 121 NC App 434 (1996), the court held that a trial court does not have authority to order the appointment of experts or to order psychological testing or treatment of a parent as part of a permanent custody order, concluding that these provisions are allowed only in temporary orders. *But cf. Maxwell v. Maxwell*, 212 NC App 614 (2011)(upholding provision in permanent custody order that father submit to a mental health evaluation when court concluded that he had committed acts of domestic violence). *See also* GS 50-91(authorizing the appointment of a parenting coordinator as part of any temporary or permanent custody order).

Modification; evidence to establish change in circumstances

Even though the parties always had demonstrated an inability to communicate such that the inability to communicate alone did not constitute changed circumstances, the fact that father's communication problems began causing the child to suffer a high level of anxiety while mother's behavior had improved was sufficient to support the trial court's conclusion that there had been a substantial change in circumstances.

Laprade v. Barry, _ N.C. App. _, _ S.E.2d _ (May 2, 2017). The first custody order between these parties was entered in 2011 when the child was 3 years old. That order was modified in 2012 due to the parties' inability to communicate and concerns over mother's conduct in repeatedly taking the child to the doctor alleging abuse by the father and his girlfriend. In 2014,

mother filed another motion to modify and in 2015, the trial court concluded there had been a substantial change in that the father's inability to communicate with mother and his girlfriend's interference with the child's communication with the mother was causing the child to experience high levels of anxiety. In addition, the court found that mother's behavior had improved in that she no longer was alleging abuse or taking the child to the doctor unnecessarily.

Father appealed, arguing that the problems identified by the court in 2015 existed at the time of the previous order and therefore could not support the conclusion there had been a substantial change in circumstances. The court of appeals disagreed, holding that while the evidence clearly established that the parties had demonstrated a complete inability to communicate about the child from the time they originally separated, the trial court's findings of fact focused on how "father's *present* actions had adversely affected the child and mother's *present* circumstances had improved to the child's benefit." Even though the basic problems existed at the time of the last order, the negative impact of the problems on the child worsened due to the conduct of the father and his girlfriend and due to the age of the child. The court noted that it is "foreseeable" that communication difficulties between parents will affect a child "more and more as she becomes older and is engaged in activities which require parental cooperation and as she is more aware of the conflict between her parents."

In chambers interview of child

- Custody order must be vacated where trial court interviewed minor in chambers without the consent of both parties.

Rowe v. Rowe, *unpublished opinion*, _N.C. App. _, S.E.2d (May 2, 2017). Citing several published appellate opinions, the court of appeals held that a custody order had to vacated and the case remanded to the trial court for a new hearing where the court interviewed a minor in chambers over the objection of plaintiff. Absent consent of both parties, a child must testify in open court.

Child's refusal to visit; civil contempt; attorney fees; appeal of criminal contempt

- Criminal contempt is appealed to superior court rather than the court of appeals
- Trial court erred in finding there was "no evidence" of facts when record showed there was testimony as to those facts. If trial court did not find the testimony credible, trial court should find there was "no credible evidence."
- Trial court erred in entering civil contempt order when respondent had complied with the purge conditions announced by the court at the conclusion of the hearing before the written contempt order was signed.
- Evidence did not support conclusion father was in civil contempt of custody order where son refused to return to mother and father did nothing to keep son from returning to mother and did not refuse or willingly fail to abide by terms of the custody order.
- Attorney fees can be awarded to party who prosecutes civil contempt even though civil contempt order cannot be entered because respondent complies with the purge before the contempt is entered, but only if respondent would have been in contempt if not for the purge.

McKinney (Sutphin) v. McKinney, _ N.C. App. _, _ S.E.2d _ (May 16, 2017). Custody order provided that mom was primary physical custodian and dad had visitation. Teenage son repeatedly left mom's home and traveled to dad's home without permission. Father told child to return to mother but child refused. The trial court held father in criminal contempt for failing to contact mother immediately when son arrived at his home after leaving mom's home without permission. The trial court held that father's failure to inform mother of the child's location was a violation of a provision in the order stating that "the parties shall confer with each other on all important matters pertaining to the health, welfare, education, and upbringing of the child." Father appealed the criminal contempt provision but the court of appeals dismissed the appeal, holding that criminal contempt first must be appealed to the superior court for a trial de novo.

The trial court also made findings of fact that "there was no evidence" that father instructed the child to abide by the custody order and that there was "no evidence" that father secured transportation for the child to return home to the mother. The trial court also found that father's affluent lifestyle "enticed" the child to leave his mother's home in violation of the order. The trial court announced at the end of the contempt hearing that it found father in civil contempt and announced that the purge was the requirement that father return the child to mother. The child returned to mom's home after the hearing but before the contempt order was entered. The trial court later entered the contempt order finding father in civil contempt and ordered him to pay mother's attorney fees incurred in connection with the contempt proceedings.

The court of appeals first held that the trial court erred in entering the civil contempt order when father had complied with the purge condition by the time the contempt order was entered. Because civil contempt is for the purpose of forcing compliance with the purge conditions, a party cannot be in civil contempt if compliance is complete at the time the order is entered. However, the respondent can be ordered to pay attorney fees to the petitioner if compliance occurs after the show cause order is issued. In this case however, the court of appeals held that the trial court erred in concluding there was sufficient evidence to conclude father had been in civil contempt before the child returned to mother. Therefore, the award of attorney fees was improper.

In reviewing the trial court's determination that father was in civil contempt, the court of appeals first held that the trial court erred in finding there was "no evidence" father told child to comply with the custody order or that father provided the child with transportation to return to mother's home because father testified that he had done both. According to the court of appeals, the trial court is free to find that father's testimony was not credible evidence, but finding there was no evidence was error.

In addition, the court held that the facts in this case did not support a finding of civil contempt because while the child refused to comply with the custody order, there was no evidence in the record indicating the father willfully refused to do anything ordered in the custody order. Citing *Hancock v. Hancock*, 122 NC App 518 (1996), the court of appeals stated:

> "In the present case, the district court made no finding that Father refused to allow Max to live with Mother or refused to obey the custody orders. The district court did not find that Father encouraged Max to stay with him, but rather, found that he told

> Max that Max should go home. It is true that the district court found that Father did not punish Max or make life uncomfortable for Max while remaining in Wilmington. And these actions and inactions may have been improper, but otherwise do not rise to the level of contempt. We do not think that the findings that Father provided a high standard of living for Max which was an "enticement" for Max to prefer living with Father is enough to rise to the level of willfulness, absent a finding supported by the evidence that Father provided a high standard of living *for the purpose* of enticing Max to run away from Mother rather than merely for the purpose of providing for or bonding with Max.
>
> Accordingly, we reverse the district court's order awarding attorney's fees incurred in relation to the civil contempt finding. On remand, the district court is free to consider evidence and enter findings regarding whether Father acted willfully in refusing to allow Max to visit with Mother."

Modification; lack of evidence and sufficient findings of fact

- Trial court erred in modifying custody without taking evidence
- Simple findings of fact that dad's move to another state made visitation during the school year not feasible was insufficient to support modification of custody.
- Modification order must conclude there has been a substantial change in circumstances and that custody modification is in the best interest of the children. These conclusions must be based on findings of fact supported by evidence produced during a hearing.

Farmer v. Farmer, _ N.C. App. _, _ S.E.2d _ (June 6, 2017). An order was entered significantly modifying dad's visitation and suspending child support. Mom filed motions pursuant to Rules 52, 59 and 60 seeking to set the order aside based on various reasons. Following a hearing during which the court listened to arguments of counsel and attempted to "mediate" a settlement but no evidence was presented, the court entered an order granting mother's motions in part and denying them in part. In addition, the trial court significantly modified visitation and legal custody. The trial court order made only one finding of fact that father's move to another state made visitation during the school year not feasible.

Mom appealed and the court of appeals vacated the trial court order and remanded the case for a new hearing. The court of appeals held that the trial court erred in modifying custody without taking evidence and without making findings of fact, concluding there had been a substantial change in circumstances and concluding that custody modification was in the best interest of the children. The court of appeals held that the one finding that dad's move made school year visitation impossible was unsupported by any evidence because no evidence was presented during the hearing and even if it had been supported, the finding alone was "too meager" to support custody modification.

Legislation

S 53 AN ACT TO AUTHORIZE LAW ENFORCEMENT OFFICER TO OBTAIN CUSTODY OF A CHILD UPON DETERMINATION BY THE COURT THAT THE CHILD IS IN DANGER. Effective October 1, 2017 and applies to temporary custody orders entered on or after that date.

The legislation amends GS 50-13.3 and GS 50-13.5 to provide that the court has authority to order law enforcement to take custody of a minor child when issuing a temporary custody order

if the court complies with the provisions of GS 50A-311. That statute provides that if a petitioner files a verified request for a pick-up warrant and:

> [i]f the court, upon the testimony of the petitioner or other witness, finds that the child is imminently likely to suffer serious physical harm or be removed from this State, it may issue a warrant to take physical custody of the child.

In addition to requiring actual testimony rather than allowing the court to rely on a verified motion, the statute requires that the warrant actually "recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based."

Any warrant issued also must "provide for the placement of the child pending final relief" and the court is required to schedule a hearing for the day following service of the warrant, unless that date is impossible. If not the next judicial day, the hearing must be held on "the first judicial day possible."

Domestic Violence
Cases Decided Between October 4, 2016 and June 6, 2017

Act of Domestic Violence

- Evidence was insufficient to support conclusion that defendant committed an act of domestic violence.

Hartford v. Hartford, *unpublished opinion*, _ N.C. App. _, 791 S.E.2d 928 (November 1, 2016). Parties entered into a consent order resolving claims for equitable distribution. As part of that consent order, defendant agreed he would not "visit, assault, molest or otherwise interfere with plaintiff, and shall cease stalking or harassing her, and shall not abuse or injure her nor contact her by telephone, written communication or electronic means." Plaintiff subsequently filed a 50B complaint, alleging defendant came to her place of work on two occasions. Plaintiff worked at a bank and defendant had accounts at the bank. There was no evidence that defendant spoke to plaintiff or approached her on either occasion. The trial judge entered the DVPO after concluding defendant had violated the terms of the consent judgment and caused plaintiff fear of continued harassment. The court of appeals reversed, holding that the evidence was not sufficient to support the finding that defendant "placed the plaintiff in fear of continued harassment that rises to such a level as to inflict substantial emotional distress." The court of appeals stated that 50B proceedings cannot be used to enforce provisions in consent judgments and noted that contempt proceedings are available if plaintiff believes defendant has violated the consent order intentionally.

Child Support
Cases Decided Between October 4, 2016 and June 6, 2017

Income; extraordinary expenses

- Trial court did not err in using tax returns to determine income of self-employed parent rather than using evidence of her gross income and business expenses or evidence of her actual monthly expenditures where trial court found tax returns to be the more credible evidence.
- Trial court erred in crediting mother for the payment of extraordinary expenses when there was no evidence in the record to support the trial court's findings of fact as to the amount of the expenses.

Sergeef v. Sergeef, _ N.C. App. _, 792 S.E.2d 192 (November 15, 2016). Mother was self-employed and owned a small business. To prove mother's income, father submitted evidence of the gross income she earned from her business and evidence of her business expenses and asked that the court determine her total gross income for the purpose of setting her child support obligation by subtracting the business expenses from her gross income. In the alternative, he asked that the court set her income based on his evidence of her personal monthly expenditures as reflected in her banking records and her financial affidavit submitted to the court. Mother produced her tax returns that showed an income substantially lower than the amounts alleged by father. The trial court found mother's evidence to be more convincing and set her income in accordance with the tax returns.

On appeal, husband argued that the trial court erred in using the tax returns as evidence of income in light of the evidence he offered. The court of appeals disagreed, holding that "tax returns have long been consistently relied upon by North Carolina courts as constituting competent evidence of a self-employed individual's income," and that it is within the discretion of the trial court to determine the relative weight of a party's evidence. In this case, the court of appeals held that the trial court acted within its discretion when it determined that mother's evidence was more convincing than that of father.

The trial court also determined that mother paid extraordinary expenses each month in the amount of $627 after finding that she paid the child's private school tuition, out of pocket medical and dental expenses, clothing, and cell phone bill. Father argued on appeal that these findings were not supported by evidence and the court of appeals agreed. "After a thorough review of the record and transcript," the court of appeals determined that there was no evidence offered during the trial to support the findings of fact.

Personal Jurisdiction; minimum contacts

- Trial court did not err in denying defendant's motion to dismiss plaintiff's claims for PSS, alimony, DBB, child support and ED based on a lack of personal jurisdiction.
- Defendant had sufficient minimum contacts with North Carolina to support the exercise of personal jurisdiction despite the fact that defendant had not live in NC since 2004.

Anderson v. Anderson, *unpublished opinion,* _ N.C. App. _, _ S.E.2d _ (June 6, 2017). Wife filed action against husband seeking child custody, PSS and alimony, DBB, ED and child support. Husband filed a motion to dismiss for lack of personal jurisdiction, claiming he had not lived in NC since 2004. The trial court denied his motion and the court of appeals affirmed. The court explained as follows:

"A review of defendant's contacts with North Carolina, as found by the trial court, reveals that the court's assertion of personal jurisdiction in this action satisfies due process. The parties were lawfully married on 30 December 1998 in Beaufort. Their daughter, L.G.A., was conceived and born in the state at the Cherry Point Marine Base Hospital when the parties were living in Carteret County. They owned real property in North Carolina during their marriage, from 1999 until 2001 or 2002.After the birth of their daughter, the parties continued to live in the state until 2004.

Defendant returned to North Carolina during most summers for vacation and some holidays from 2004 until 2015. Defendant towed his boat, motor, and trailer to his mother-in-law's home in Beaufort to remain indefinitely. Most recently, in July 2015, defendant abandoned plaintiff and their daughter in Beaufort, opting to move to Virginia alone. Based on his contact with the state, defendant should have reasonably anticipated being haled into court in North Carolina to answer plaintiff's claims arising out of their separation.

The trial court's findings also indicate that its exercise of personal jurisdiction was reasonable and not so inconvenient to be unfair to defendant. Plaintiff is currently residing in North Carolina with L.G.A. and intends to remain in the state. Although defendant is a citizen of Florida currently living in Rhode Island, he suggested in his e-mail to plaintiff that his domestic claim could have been handled in North Carolina: "I did not want to file in RI without discussing it with you first, and wasn't sure if it would be easier to file in NC."

Our state also has a strong interest in resolving the action in the present forum where the parties were married, their daughter was born, and plaintiff resides with their daughter. To the same end, the state's substantive social policies would be best served if the domestic issues underlying the action were resolved in the present forum. We conclude, therefore, that the trial court properly exercised personal jurisdiction over defendant and denied his Rule 12(b)(2) motion to dismiss."

Alimony and Postseparation Support
Cases Decided Between October 4, 2016 and June 6, 2017

Support obligation of sponsors of an immigrant

- Trial court did not err in ordering husband and husband's parents to pay support to Chinese immigrant wife based upon their execution of the Form I-864 Affidavit of Support required for wife to obtain a K-1 Visa which allowed her to live in the United States upon her marriage to husband.
- Immigrant has no duty to mitigate her damages when a sponsor does not provide support as required by the I-864 affidavit.

Zhu v. Deng, _ N.C. App. _, 794 S.E.2d 808 (December 6, 2016). Husband and wife both were born in China. At the time of marriage, husband had become a US citizen but wife had not. Wife applied for a K1 visa to allow her to live in the US upon her marriage to husband and in support of her application, defendant and his parents executed the required I-864 Affidavit of Support promising to provide support for wife in an amount necessary to maintain her at an annual income that is at least 125% of the federal poverty level.

When husband and wife separated, wife filed a complaint seeking support pursuant to the terms of the Affidavit and the trial court ordered both husband and his parents to pay on-going support in the amount provided in the affidavit. The trial court found that wife had very limited English skills and no job skills but concluded that she had mitigated her damages up to the time of trial and had a duty to continue to mitigate her need for support in the future.

Husband and parents appealed, arguing that the contract formed when they executed the Affidavit was unconscionable and therefore unenforceable. Citing cases from other states and federal courts, the court of appeals held that an I-864 Affidavit is an enforceable contract and is not unconscionable. According to the court of appeals, the parents and the husband fully understood the support obligation at the time they executed the Affidavit and they admitted they were not mislead or misinformed. Therefore, even if the contract was one-sided, it could not be set aside as unconscionable when there was no procedural unconscionability. The court also noted that opinions by other courts throughout the country consistently have held that the Affidavits are not unconscionable.

However, the court of appeals held that the trial court erred when it concluded that immigrant wife had an affirmative duty to mitigate her damages by taking steps to provide for her own support. Again looking to court decisions from other state and federal courts, the court of appeals held that courts consistently have decided that sponsors of immigrants are responsible for support even if the immigrant fails to obtain a job or otherwise attempts to support herself.

Cohabitation is a defense to alimony claim; court cannot amend ED judgment

- Trial court acted under a "misapprehension of the law" when it refused to allow defendant to assert cohabitation as a defense to plaintiff's alimony claim.
- Cohabitation is a defense to alimony even if no support is being paid pursuant to a court order at the time of the cohabitation.
- Trial court has no authority to amend an ED judgment.

Orren v. Orren, _ N.C. App. _, _ S.E.2d _ (May 16, 2017). Wife filed a claim for alimony and husband attempted to assert wife's cohabitation as a defense to the claim. The trial court held

that cohabitation is not a defense to alimony and refused to allow the presentation of evidence on cohabitation.

The court of appeals vacated the alimony award and remanded after concluding that the trial court made the decision based on a "misapprehension of the law." Even though GS 50-16.9(b) provides that cohabitation will terminate an award of PSS or alimony, the court of appeals held that the earlier decision in *Williamson v. Williamson*, 142 NC App 702 (2001), broadly held that cohabitation is a defense to an initial alimony claim even if no PSS award was in place to terminate.

As part of the alimony order, the trial court also awarded wife a "distributive award" of $17,000 after concluding that husband received an early retirement incentive package after the entry of the final ED judgment. Concluding that the retirement package contained "benefits that accrued during the time the parties were married and owned on the date of separation" and that the benefits therefore were marital property, the trial court ordered husband to pay a portion of the benefits to wife.

The court of appeals vacated this portion of the trial court order as well, holding that while the court can consider husband's assets when determining alimony, "an alimony order should not (and cannot) be used as a tool to amend an earlier equitable distribution order."

Equitable Distribution
Cases Decided Between October 4, 2016 and June 6, 2017

Corporations; actions filed in superior court while ED pending

- Superior court erred in concluding that the prior pending action doctrine applied to prohibit the superior court from considering wife's claims against husband and marital corporations for breach of fiduciary duty, breach of contract, demand for an accounting, and for *quantum meruit.*
- While the prior pending doctrine did not apply to take jurisdiction from the superior court, principals of judicial economy require that the superior court action be held in abeyance until the equitable distribution action is resolved.

Baldelli v. Baldelli, _ N.C. App. _, 791 S.E.2d 687 (October 4, 2016). Wife filed action in superior court against husband and against several closely held corporations formed and operated during the marriage of the parties. Wife's claims arose out of the operations of the corporations. She alleged breach of contract and breach of fiduciary duty. In addition to damages, she requested an accounting and *quantum meruit*.

At the time wife filed the action in superior court, an equitable distribution action was pending between the parties in district court. The parties contended that the corporations were marital property. Husband filed a motion to dismiss the superior court action and the superior court granted his motion after concluding the superior court had no jurisdiction to proceed based on the prior pending action doctrine.

The court of appeals disagreed and remanded the case to the superior court. The court of appeals explained that in order to determine whether the prior pending action applies to prohibit the exercise of jurisdiction in a case, the court must decide whether the first case filed involves the same claims between the same parties as the second case filed. To determine whether the cases involve the same claims, the court should determine whether it is possible for the party filing the second action to obtain the relief available in the second action if successful in the initial action. In this case, the court of appeals pointed out that the only remedy in equitable distribution is the distribution of marital property. So, in the ED case, wife may be awarded shares of the marital corporation and/or may be awarded a larger share of marital property based on considerations of distribution factors, some of which may be related to the claims raised in the superior court proceeding. Despite this similarity of issues, the court held that wife could not receive damages in the form of a money judgment or an accounting in the district court proceeding as she can in the breach of contract and breach of fiduciary duty actions pending in superior court. For that reason, the prior pending action doctrine did not apply to prohibit the exercise of jurisdiction by the superior court in this case.

However, the court of appeals held that because of the similarity of the issues in the two cases and the chance that the final distribution of marital property would impact wife's potential recovery in the superior court action:

> "we do not believe it is in the interest of judicial economy or clarity for both of these actions to proceed simultaneously. To allow both actions to proceed concurrently would invite conflict between the resolution of interrelated issues in the two actions."

The court therefore held that the superior court action:

> "should be held in abeyance pending the resolution of the district court domestic relations case and the results of the equitable distribution case taken into consideration in the resolution of the superior court case."

**For a similar result and discussion of the prior pending action doctrine, see the *unpublished decision* in Stokes v. Drug Safety Alliance, _N.C. App._, 792 S.E.2d 187 (November 1, 2016)(fraud claim arising out of ED claim must be held in abeyance until ED action is complete).

Property owned by LLC; valuation of LLC; findings to support distributive award

- Husband waived right to object to trial court's classification of assets owned by marital LLC as marital property where he alleged the assets were marital property in a motion filed in the trial court.
- ED order would not be remanded for trial court's failure to specifically determine the date of separation value of the marital LLC distributed to husband where findings of fact regarding the value of all of the assets owned by the LLC on the date of separation "ultimately reflect a reasonable estimate of the value of the parties interest" in the LLC.
- Finding by trial court that defendant was employed and had adequate income and assets from that employment to pay the distributive award was sufficient to show trial court adequately considered defendant's ability to pay before ordering a distributive award where record contained evidence that defendant had liquid assets sufficient to cover the amount ordered.
- Sanctions were appropriate where husband's refusal to participate in the pretrial process caused him to file numerous motions on the eve of trial, resulting in delay and additional expense to plaintiff.

Chafin v. Chafin, _ N.C. App. _, 791 S.E.2d 693 (2016). Parties separated in 2008 and the marital LLC – an auto sales business – was dissolved shortly after separation due to lack of profitability. The assets of the LLC stayed in the possession of husband. ED trial occurred more than five years later, in 2014. Plaintiff contended that both the LLC and the assets of the LLC were marital property. The trial court concluded that there was insufficient evidence to value the LLC as of the date of separation, but accepted wife's evidence of the values of the assets of the LLC and distributed both the LLC and the assets to husband. The trial court also imposed a $10,000 Rule 11 sanction against defendant after concluding that motions filed on the first day of trial were filed to address issues that should have been raised in the pretrial process. Defendant had refused to participate in the pretrial process required by local rule, even after being ordered to do so by the court.

On appeal, husband argued that the trial court erred in distributing the LLC without a value and erred in distributing the assets of the LLC because they were owned by the LLC and therefore were not marital property. The court of appeals affirmed the trial court's distribution of the assets of the LLC based on the fact that husband alleged in a motion filed in the trial court that the assets of the LLC were marital property. According to the court of appeals, "the law does not permit parties to swap horses between courts in order to get a better mount…". The court of appeals also rejected husband's argument that the trial court should not have distributed the LLC when there was no evidence of the date of separation value of the business entity. The court of appeals held that in this case, remand for this issue was inappropriate since the findings of fact regarding the values of the assets of the LLC on the date of separation were sufficient to show

that the court made a "reasonable estimate of the value of the parties' interest" in the business on the date of separation.

The trial court also ordered defendant husband to pay a distributive award of $89,000, payable at the rate of $550 per month until paid in full. Defendant argued on appeal that the trial court erred in failing to consider his ability to pay before ordering the distributive award. The court of appeals disagreed, noting that the record showed defendant had sufficient liquid assets to cover the amount ordered, and the trial court made findings of fact indicating that defendant was employed and able to pay the monthly payments from his employment income.

Finally, the court of appeals upheld the imposition of sanctions against defendant after concluding that the motions filed by defendant at the beginning of trial seeking to set aside the pretrial order or to supplement the pretrial order were filed for the purpose of delaying the ED trial. The court held that the motions should have been filed as part of the pretrial process.

Classification of gift from wife's family; imposition of constructive trust

- Trial court did not err in concluding $150,000 transfer from wife's family to a joint account in the name of husband and wife was a gift to both spouses and therefore marital property.
- Trial court properly imposed constructive trust on funds held by husband's parents because the funds were proceeds from the sale of property purchased with the $150,000 marital property.

Zhu v. Deng, _ N.C. App. _, 794 S.E.2d 808 (December 6, 2016). Husband and wife both were born in China. At the time of marriage, husband had become a US citizen but wife had not. Shortly after their marriage, wife's family in China transferred a total of $150,000 to a joint account the US in the names of both husband and wife. The funds were used to pay the mortgage on the home of husband's parents and to pay part of the purchase price of a tailor shop. Shortly after husband and wife separated, defendant's parents sold the home and the tailor shop. The trial court concluded that the $150,000 was marital property and determined that wife was entitled to half. The court therefore imposed on a constructive trust on the proceeds of the sale of the house and the tailor shop that were held by husband's parents at the time of the ED trial.

On appeal, wife argued that the trial court erred in classifying the $150,000 as marital property. She argued that the money was a gift from her family to her alone and was not intended to be a gift to both. The court of appeals held that because the property was acquired during the marriage, the funds were presumed marital and held that the trial court did not err in concluding wife had failed to rebut the presumption and that the money had been a wedding gift to both spouses. The court of appeals also affirmed the trial court's decision to impose a constructive trust on wife's share of the proceeds from the sale of the house and the tailor shop in order to distribute her share of the marital property. The trial court's finding that husband and wife had supplied marital funds to pay the mortgage in the house and to purchase the tailor shop were sufficient to support imposition of the constructive trust.

Contempt; Rule 60(b)

- Trial court had no jurisdiction to declare an equitable distribution judgment void in a contempt proceeding seeking to enforce that judgement.

Hogue v. Hogue, _ N.C. App. _, 795 S.E.2d 607 (December 20, 2016). Husband and wife separated and filed for ED. An ED judgment was entered and shortly thereafter, the parties reconciled. They lived together for another three years and then separated again. Wife filed a motion for contempt based upon husband's failure to comply with the ED order. The trial court

dismissed the motion for contempt after concluding the ED judgment was voided upon the reconciliation of the parties.

On appeal, wife argued that the ED judgment was not voided by the reconciliation and was still enforceable. The court of appeals did not address that issue but instead held that the trial court had no subject matter jurisdiction to rule that the ED judgment was void within the context of the contempt proceeding. According to the court of appeals, a party seeking to have a judgment declared void must file a Rule 60(b) motion seeking to set aside the order or the trial court must *sua sponte* decide to set the order aside pursuant to Rule 60(b).

Evidence of tax value; rental value of marital property after separation

- While evidence of tax value generally is not competent evidence to support valuation of real property, trial court did not err in using it to support the finding of date of separation value where there was no objection to the introduction of the evidence at trial.
- Parties agreed that trial court erred in calculating fair rental value of marital real property occupied by husband during separation and classifying that rental value as divisible property. Only rental income actually received by husband from the marital property during separation would be divisible property.

Edwards v. Edwards v. Edwards, _ N.C. App. _, 795 S.E.2d 823 (January 17, 2017). Husband's valuation expert testified at trial that certain marital real property had a value of $61,000 at the time of trial and wife introduced county tax records to show a tax value on the date of separation of $193,000. Husband did not object to the introduction of the tax records. The trial court found the date of separation value of the property to be the same as the tax value and husband argued on appeal that this was error.

The court of appeals affirmed the trial court valuation, holding that while long established supreme court precedent provides that tax records are not competent evidence to establish market value of real property, when such evidence is admitted at trial without objection, the trial court is "entitled to be considered for whatever probative value it may have."

The trial court also calculated the fair rental value of marital real property occupied by husband during separation and classified that rental value as divisible property distributed to husband. On appeal, wife did not contest that this was error. The parties and the court of appeals agreed that only rental income actually received from the marital property by the husband during separation minus any expenses paid by husband on the rental property during separation would be divisible property.

Pleading ED; military pension; survivor benefit plan; amendment of ED judgment

- While neither party included allegations in their pleadings referencing equitable distribution or a date of separation, both asked that the court unequally distribute marital property in their favor as part of their prayers for relief. The requests were sufficient to state claims for equitable distribution.
- A claim for equitable distribution can be filed along with a request for divorce from bed and board.
- Parties must be living separate and apart at the time a claim for ED is filed.
- Trial court properly denied husband's request to amend the ED judgment due to changed circumstances. While the court has approved modifications to QDROs to effectuate the terms of original judgment, an ED judgment cannot be modified simply to change the underlying judgment due to a change in circumstances.

Gurganus v. Gurganus, _ N.C. App. _, 796 S.E.2d 811 (February 21, 2017). Equitable distribution judgment entered in 2003 awarded wife a percentage of defendant's military pension to be paid when he begins to receive benefits and ordered that Survivor Benefits be maintained in favor of wife. The "Seifert formula" was applied in the distribution order to designate the percentage of each pension payment received by husband in the future that would be paid to wife. The Seifert formula is the time earning the pension while married over the total time husband earned the pension by serving in the military until the time he begins to receive the benefits. It is referred to as the Seifert formula because it was approved by the North Carolina Supreme Court in the case of *Seifert v. Seifert*, 319 NC 367 (1987).

In 2014, husband filed a motion in the cause seeking a declaration that the "Seifert formula" that was applied under the original judgment to divide his monthly pension payments was improper because it would allow wife to "benefit from his rise in the military ranks and the corresponding increase in retirement benefits that were attained due to his active efforts postseparation." He also asked that the expense of the Survivor Benefit Plan be assigned to wife. In addition, husband argued that his active efforts to advance in the military and wife's attempts to "impede his advancement" constituted a substantial change in circumstances that would support modification of the ED judgment. The trial court granted wife's motion for summary judgment on each of husband's claims, ruling there was no basis in law for granting the requests. Husband appealed.

On appeal, husband first argued that the original ED order was entered without subject matter jurisdiction because neither party properly pled a claim for ED in the original pleadings and because the parties were living together when wife first filed her action for divorce from bed and board and alimony. In her complaint, wife made no factual allegations about marital property and did not state that the parties were living apart – because they were living together at the time she filed her complaint – but she did ask for an unequal distribution of marital property in the prayer for relief section of her complaint. Husband filed an answer after the partied separated. His answer also included a request for an unequal division of marital property in his prayer for relief section. The court of appeals held that both pleadings were sufficient to state a claim for equitable distribution but because wife's claim was filed before the parties separated, it was not sufficient to give the trial court jurisdiction to adjudicate the ED claim. However, husband's claim was sufficient to put the issue before the court because it was filed after the parties began to live separate and apart.

The court of appeals also rejected husband's argument that the ED judgment should be amended because application of the Seifert formula results in "manifest unfairness" because it allows wife to share in the rewards of husband's postseparation efforts. Agreeing with the trial judge that there is no basis in law to amend the ED judgment, the court of appeals noted that the Seifert court considered and rejected that same argument when it approved the formula. Acknowledging that the court allowed an amendment of a QDRO in *White v. White*, 152 NC App 588 (2002), where the military spouse had converted his retirement to disability pay after the entry of the ED judgment, the court of appeals held that the situation in this case was different. While the amendment in White simply effectuated and enforced the terms of the original order, husband in this case simply wants to change the original order due to changes that were completely foreseeable at the time of the entry of the order. In fact, the Seifert formula was adopted for the express purpose of allowing the nonemployee spouse to earn growth on her portion of the pension in the years before receipt by sharing in the growth that occurs to the

pension due to the military member's continued years of service after the ED judgement is entered.

*** Effective December 23, 2016, federal law was amended to address the concerns like those raised by husband in the *Gurganus* case. State courts no longer are allowed to distribute the portion of a military pension that is attributable to time served by the military member following the date of divorce.

The following two blog posts [www,civil.sog.unc.edu] were intended to explain this change to federal law:

Equitable Distribution: Change in Federal Law Regarding Military Pensions Part 1

Before 1981, military pensions were not subject to division by state courts in marital dissolution proceedings. However, Congress enacted the Uniformed Services Former Spouses Protection Act (USFSPA) to provide that, for pay periods after July 25, 1981, "disposable retired pay" of military personal is subject to division by a state court in a divorce proceeding. 10 USC 1408(c)(1). Effective December 23, 2016, Congress has changed the definition of "disposable retired pay" as it relates to property distribution upon divorce in a way that has left family law practitioners and judges across the country struggling to quickly determine how to reconcile existing state law with the new federal definition. In this blog post, I will try to explain the change as it relates to North Carolina equitable distribution law. In my next post, I will discuss some issues and questions arising from the change.

The Change to Federal Law

Before the effective date of this amendment, the USFSPA defined "disposable retired pay" as "the total monthly retired pay to which a member is entitled less [certain specified] amounts."

The 2016 amendment adds that the:

> "monthly retired pay to which a member is entitled shall be—
>
> "(i) the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order, as increased by
> "(ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member's retirement using the adjustment provisions under that section applicable to the member upon retirement.".

National Defense Authorization Act for Fiscal Year 2017, sec. 641; PL 114-328, December 23, 2016, 130 Stat 2000.

Before this amendment, state courts had the authority to order a division of any portion of a service member's disposable retirement pay, even if retirement occurred many years after the property division and the total disposable retired pay reflected years of continued service following the state property division. The new amendment means that state courts now have authority to distribute only that portion of a member's final retirement pay that would have been

paid to the service member had she or he retired on the date of the entry of the property division order plus any cost of living adjustments that occur between the time of the property division and the actual retirement of the service member.

How does this affect North Carolina law?

It appears that this change will not affect either the classification or the valuation of a military pension in a North Carolina equitable distribution proceeding.

G.S. 50-20.1 requires that all pensions be classified using the coverture fraction; the numerator of the fraction represents the number of years of the marriage, up to the date of separation, which occurred simultaneously with the employment that earned the pension, and the denominator represents the total number of years during which the pension accrued up to the date of separation. So for example, if one spouse has been employed by the same company earning a pension for 10 years by the date of separation, and the parties were married for 5 of those years, we know that 5/10ths or one half of the date of separation value of the pension is classified marital property. *See Bishop v. Bishop*, 113 NC App 725 (1994); *Robertson v. Robertson*, 167 NC App 567 (2004). Because classification is determined as of the date of separation and the date of separation always will be before the date of the division order, the federal change to the definition of disposable retired pay will not affect the classification of any pension under North Carolina law.

Similarly, North Carolina law requires that pensions be valued as of the date of separation by assuming that the military service member retired on the date of separation. *Bishop*. So again, because the date of separation always will be before the date of the division order, the change to the federal law will not result in a change in the value of a pension under North Carolina law.

What about distribution?

In *Seifert v. Seifert*, 319 NC 367 (1987), the Supreme Court approved of the use of a very common application of the distribution method authorized by GS 50-20.l(a)(3) and (b)(3). Referred to as "the fixed percentage method" or "deferred distribution," these statutes authorize the court to make an award of pension benefits payable "as a prorated portion of the benefits made payable to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits." The *Seifert* court approved use of a specific fraction to determine the "prorated portion of benefits" to be paid in the future. The fraction is the total time earning the pension while married up to the date of separation over the total time earning the pension up to the time of actual retirement.

This fraction is applied to the total disposable retired pay of a service member, which until December 2016 was defined to mean the total retirement pay of the service member at the time of actual retirement. Service members have argued that application of a fraction such as the one approved in *Seifert* inappropriately allowed the non-service member spouse to share in increases

in retirement benefits earned by the service member spouse after the date of separation. The court in *Seifert* rejected this argument, holding instead that using a fraction that takes into account the total employment time earning the pension makes "deferral of payment … possible without unfairly reducing the value of the award [to the nonemployee spouse]… and [allows] the nonemployee spouse [to] share in any growth in the benefits [earned during the marriage]."

The recent change in the federal definition of disposable retired pay will significantly affect the amount of benefits that will be received by a former spouse of a retired service member if the fraction approved in *Seifert* continues to be used. That is because the fraction will be applied to a smaller number, the amount of retirement pay the service member would have received if he or she retired on the date the distribution order was entered plus cost of living adjustments that accrued between that date and the actual date of retirement.

Consider an example. Wife joins military shortly after marriage. Parties separate after 20 years and court decides pension is 100% marital and husband should receive 50% of the marital portion. Wife stays in military until she retires with 30 years of service. Her disposable retired pay under the old definition (and the amount she actually will receive even with this new definition applicable only for the purpose of property distribution upon divorce) is $3000 per month. Application of the *Seifert* fraction to the $3000 will result in payment to husband of $1020 per month. [20 years/30 years times 50% times $3000 = $1020]

However, application of the fraction to the new definition of disposable retired pay means that, assuming for the sake of illustration that the distribution order is entered the same year the parties separate, husband will be awarded a portion of a 20 year retirement benefit plus cost of living adjustments rather than a portion of a 30 year benefit. Let's assume for this example that this amount would be $2200. When wife retires after 30 years, husband will receive $748 per month rather than the $1020 he would have received before the legislative change. [20 years/30 years times 50% times $2200 = $748].

This Raises Some Questions

I think the first legal issue to address is the question of whether application of the *Seifert* fraction in light of this change results in distributions that may be inherently unfair to the non-military spouse. If so, does North Carolina law actually require that we use the *Seifert* fraction or are judges and litigants free to determine the "prorated portion of the benefits made payable to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits" in some other way?

Equitable Distribution: Change to Federal Law Regarding Military Pensions Part 2

In my last blog post, I wrote about a recent change to federal law regarding the portion of a military pension subject to division by a state court in a divorce proceeding. Effective December 23, 2016, the definition of disposable retired pay in the context of a division of a military pension in a marital dissolution proceeding found in 10 USC sec. 1408 was amended to be the amount a

service member would have received had he retired on the date of divorce plus cost of living adjustment accruing between the date of divorce and the date of actual retirement. Before amendment, the definition of disposable retired pay was the total amount a service member receives upon actual retirement, regardless of whether that amount reflected years of service and elevations in rank of the service member following the date of divorce.

The change in the definition of disposable retired pay does not appear to impact the way we classify and value a military pension under North Carolina equitable distribution law, but the change does raise issues regarding how military pensions actually are divided between the parties when the fixed percentage, deferred distribution method of division is used.

Distribution Methods

In *Seifert v. Seifert*, 319 NC 367 (1987), the Supreme Court explained the difference between the immediate offset method of distributing a pension and the fixed percentage, deferred distribution method. In the immediate offset method, the pension is valued and distributed to the service member whose employment earned the pension. The other spouse receives more marital property to offset the value of that spouse's marital interest in the pension that is distributed to the service member spouse. This method is not the most common distribution method because it requires that there be sufficient other marital property to offset the value of the pension. In most cases, the value of a marital pension far exceeds the rest of the marital estate. If the immediate offset method is used to accomplish an equitable distribution, the recent change to the federal law will not affect the process at all.

The fixed percentage, deferred distribution method is far more common. The division of the marital portion of a pension is accomplished by the entry of an order designating the portion of each future retirement check that must be paid to the non-service member former spouse when the service member retires and begins to receive retirement benefits. The *Seifert* court approved of the use of a fraction to determine the portion of each future pension check payable to the non-service member spouse. In that case, the fraction was to be applied to the total retirement pay received by the service member upon retirement, an amount determined by his rank and years of service at the time of retirement. The recent change in federal law means that the fraction set out in our division orders now will be applied to a lesser amount, the amount the service member would be receiving had he or she retired on the date of divorce** plus any cost of living adjustments accruing between the date of divorce and the service member's actual retirement date.

Do we need to modify the *Seifert* fraction?

The fraction used in *Seifert* had a numerator that was the amount of time earning the pension while married up to the date of separation and a denominator that was the total time the service member spent earning the pension up to the time of his retirement.

While the *Seifert* court decided that application of this fraction to award the non-service member a share of the total pension earned by the service member up to the date of retirement was fair because it protected the non-service member's interest in the growth of the marital interest over

time, application of this same fraction to the lesser amount now authorized by federal law will result in a dilution of the non-service member's marital interest. For a discussion of this dilution effect that at least one appellate court concluded is unfair to the non-service member spouse, see *Douglas v. Douglas*, 454 SW3d 591 (Tex. App. 2014). To avoid this dilution, the denominator of the fraction must be the total time earning the benefits that actually being divided rather than the total time earning all the benefits the service member will receive. With the change in the federal law, the benefits actually being divided are only those earned by the service member up to the date of the divorce.

Can we apply the *Seifert* formula this way?

I think so. The court in *Seifert* defines the denominator of the fraction used in that case as "the total period of participation in the plan." I do not think it is inaccurate to interpret this definition to mean the total period of participation in the plan "earning the amount being divided." That certainly is what the court meant considering the facts in *Seifert*, but the amount being divided in that case was the member's full retirement pay. If we define the amount being divided in accordance with the new federal law, the denominator should be the total number of years earning the pension up to the date of the divorce.

Returning to the admittedly over simplistic example from my last post, let's assume we have spouse who served in the military 20 years while married up to the date of separation, 22 years up to the date of divorce and 30 years by the time of actual retirement. Also assume the non-service member is awarded 50% of the marital portion of the pension. The fraction as applied in *Seifert* was 20/30 times 50% times the disposable retired pay received by the service member when he retires. If the disposable retired pay is the service member's full retirement, *Seifert* says that is fair. But if the fraction is applied to the reduced disposable retired pay now required by the federal law, using 30 years as the denominator dilutes the share of the non-service member spouse. To accurately account for the marital interest in the amount actually available for division, the denominator should be 22 years rather than 30.

Other pensions

A change in the fraction may take care of the unfair dilution. However, courts and practitioners also should remember when fashioning distributions that this change in federal law applies only to military pensions. So, if one spouse has a military pension and the other has, for example, a North Carolina state employee pension, the *Siefert* fraction still will be applied to the state employee's full retirement benefits at the time of retirement while the amount of the military pension to be divided will be the reduced disposable retired pay.

Should courts and practitioners somehow adjust the distribution to account for this difference? This is a difficult question to answer because the difference in the two pensions will not be reflected in their valuation within the context of the equitable distribution proceeding. For this reason, we cannot assume that the military pension is somehow less valuable than the state employee's pension. Even if it is less valuable, if we use the correct fraction to designate the portion of the military pension that should be paid to the non-service member spouse, how significant will the difference be between what the military pension would have been before the

federal law change and what it is now, especially when we add in the cost of living adjustments? That certainly is not something to be considered without actual evidence in each individual case.

**I use the term divorce judgement because the Uniformed Services Former Spouses Protection Act, 10 USC 1408, defines the term court order as "a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree judgment." The amendment changing the definition of disposable retired pay fixes the pay at the time of "the court order".

US Supreme Court; military pension; conversion to disability pay

- Trial court erred when it ordered military member to reimburse former spouse for retirement income she lost when he converted his military pension to disability pay years after the entry of an ED order that awarded wife a share of the member's retirement pay.
- Federal law allows the distribution of 'disposable retired pay' only. Disability benefits are excluded from the definition of 'disposable retired pay.'

Howell v. Howell, 581 U.S. _ (May 15, 2017). The following is the official syllabus of the decision:

The Uniformed Services Former Spouses' Protection Act authorizes States to treat veterans' "disposable retired pay" as community property divisible upon divorce, 10 U. S. C. §1408, but expressly excludes from its definition of "disposable retired pay" amounts deducted from that pay "as a result of a waiver . . . required by law in order to receive" disability benefits, §1408(a)(4)(B). The divorce decree of petitioner John Howell and respondent Sandra Howell awarded Sandra 50% of John's future Air Force retirement pay, which she began to receive when John retired the following year. About 13 years later, the Department of Veterans Affairs found that John was partially disabled due to an earlier service-related injury. To receive disability pay, federal law required John to give up an equivalent amount of retirement pay. 38 U. S. C. §5305. By his election, John waived about $250 of his retirement pay, which also reduced the value of Sandra's 50% share. Sandra petitioned the Arizona family court to enforce the original divorce decree and restore the value of her share of John's total retirement pay. The court held that the original divorce decree had given Sandra a vested interest in the prewaiver amount of John's retirement pay and ordered John to ensure that she receive her full 50% without regard for the disability waiver. The Arizona Supreme Court affirmed, holding that federal law did not pre-empt the family court's order.

Held: A state court may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits. This Court's decision in *Mansell* v. *Mansell*, 490 U. S. 581 , determines the outcome here. There, the Court held that federal law completely pre-empts the States from treating waived military retirement pay as divisible community property. *Id.*, at 594–595. The Arizona Supreme Court attempted to distinguish *Mansell* by emphasizing the fact that the veteran's waiver in that case took place before the divorce proceeding while the waiver here took place several years after the divorce. This

temporal difference highlights only that John's military pay at the time it came to Sandra was subject to a future contingency, meaning that the value of Sandra's share of military retirement pay was possibly worth less at the time of the divorce. Nothing in this circumstance makes the Arizona courts' reimbursement award to Sandra any the less an award of the portion of military pay that John waived in order to obtain disability benefits. That the Arizona courts referred to her interest in the waivable portion as having "vested" does not help: State courts cannot "vest" that which they lack the authority to give. Neither can the State avoid *Mansell* by describing the family court order as an order requiring John to "reimburse" or to "indemnify" Sandra, rather than an order dividing property, a semantic difference and nothing more. Regardless of their form, such orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. Family courts remain free to take account of the contingency that some military retirement pay might be waived or take account of reductions in value when calculating or recalculating the need for spousal support. Here, however, the state courts made clear that the original divorce decree divided the whole of John's military pay, and their decisions rested entirely upon the need to restore Sandra's lost portion.

Classification of mixed property; distributive award; interest and term of payment

- Trial court properly classified husband's 1/3rd ownership interest in a business as marital property except for $50,000 of the date of separation value where husband contributed $50,000 of his separate property to start the business.
- Husband had burden to show appreciation of his initial investment during the marriage was separate property; presumption is that any appreciation of separate property during the marriage is active appreciation and therefore marital property. Where husband introduced no evidence at trial to show the appreciation was passive, the entire value of the appreciation was marital property.
- Trial court findings of fact were insufficient to support the distributive award ordered to be paid over a period of 15 years with 8% annual interest.
- Party ordered to pay a distributive award over time with interest must be allowed to satisfy the distributive award at any time to avoid interest ordered by the court.

Porter v. Porter, _N.C. App. _, 798 S.E.2d 400 (March 21, 2017). Husband appealed ED judgment entered by trial court, arguing that trial court erred in classifying his 1/3rd ownership interest in an LLC formed during the marriage and owned on the date of separation and in ordering him to pay a distributive award payable over 15 years subject to an 8% interest rate.

LLC

During the marriage, husband started a business with two business partners. Each partner owned a 1/3rd interest in the business and husband contributed $50,000 of his separate property as his initial investment in the business. The trial court determined that on the date of separation, the LLC had a value of $1.8 million and determined that husband's 1/3rd interest was partially marital and partially separate. The trial court valued the marital component at $566,931.00 and the separate component at $50,000, the amount of husband's initial investment.

On appeal, husband argued that his interest in the LLC on the date of separation was entirely separate property or that at least, a larger portion of the value should have been classified

as separate property due the appreciation of his $50,000 initial investment. The court of appeals disagreed, holding that the all appreciation of separate property during the marriage is presumed to be marital property. That presumption places the burden on the person seeking to show some or all of the appreciation to be separate property to prove that all or part of the appreciation was passive appreciation, not caused by the action of either spouse. In this case, the court of appeals held that husband offered no evidence that the appreciation of his $50,000 investment in the LLC was passive. Instead, all of his evidence established that he worked very hard during the marriage to make the business profitable.

Distributive Award

The trial court held that an equal distribution was equitable and held that husband needed to pay wife a distributive award of $348,050 in order to accomplish the distribution. The court also held, however, that husband did not have the ability to pay the award in one payment and determined that monthly payments over a 6-year period also would be beyond husband's ability to pay. Therefore, the trial court ordered husband to pay 180 monthly payments of $3,326.15 each. Because the award would be paid over a 15-year period, the trial court also ordered husband to pay interest to wife at 8%.

Husband first argued that the court did not adequately support the order of 8% annual interest. The court of appeals held that a trial court has the discretion to order interest to be paid on a distributive award when the court determines interest is equitable. In this case, however, the trial judge announced when rendering judgment in open court that the interest rate would be 3.5%. Husband also argued that the trial court erred in requiring him to pay the award over the full 15 years and to pay the total 8% interest for this period of time without allowing him the option of paying a set amount earlier if he was able to do so to avoid the interest. The court of appeals held that the trial court must set as amount as a total distributive award and allow the payor the option of paying it off early to avoid interest. In this case, the judgment actually required husband to pay a total of much more than the $348,050 identified in the judgment as the appropriate distributive award because the judgment required husband to make payment for a full 15 years with no option to pay the award off early.

The court of appeals remanded the case, instructing the judge to clarify the discrepancy between the interest rate stated during rendition and the interest rate in the judgment, and instructing the judge to specify in the judgment that that the award can be paid in full by defendant in less than 15 years to avoid the interest.

Husband also argued that the court failed to make findings of fact sufficient to show that it considered his ability to pay the distributive award before determining the award was equitable and the court of appeals agreed. According to the court of appeals, in setting a distributive award, the trial court "has to consider the circumstances in that particular case, the current economic conditions, and the ability of the payor to pay a distributive award under GS 50-20(e). The combination of the interest rate and the term of payment will determine the monthly payments, and the trial court must consider whether the payor has the ability to pay those monthly payments." In this case, the judgment contained no findings as to the husband's monthly earnings and expenses to support a finding that he could make the monthly payments ordered by the judgment.

Finally, husband argued that the trial court erred in ordering payments that include a taxable interest component. GS 50-20(b)(3) provides that distributive awards shall not order payments "which are treated as ordinary income under the Internal Revenue Code" and husband argued that the part of the award representing interest would be treated as income and taxed. The court of appeals disagreed, holding that interest was appropriate in this case because the payment schedule was extended beyond a 6-year time period. The IRS will treat total distributive award payments to be made for longer than 6 years as ordinary income if the trial court makes appropriate findings of fact to show the extended period is necessary due to a "legal or business impediment, or some overriding social policy." The court of appeals held that while the record in this case indicated that the extended time was ordered due to the court's conclusion and the agreement of both parties that husband could not pay the award in less time, the trial court did not make specific findings in the judgment to support the extended time period. The appellate court instructed the trial court to make additional findings on remand.

Evidence of value; procedure on remand

- Trial court did not err in finding wife's evidence regarding the value of the marital home was speculative and not credible.
- Trial court also did not err in concluding that evidence did not support a finding that the marital property increased in value between the date of separation and the date of distribution where wife's expert gave an opinion as to the value some 8 months prior to the date the ED judgment was entered.
- Trial court did not err in failing to conduct a hearing before issuing new judgment following remand from the court of appeals.

Lund v. Lund, _N.C. App. _, 798 S.E.2d 424 (March 21, 2017). Following remand from the court of appeals, the trial court entered a new ED judgment correcting errors identified by the appellate court. Wife appealed again, arguing first that the trial court erred in concluding she had not presented credible evidence of the value of the marital home on the date of separation. The trial court explained in the judgment that while wife had testified that "she would like to say the value was between $290,000 and $300,000," the trial court found her testimony to be "speculative" and therefore concluded there was no credible evidence of value. The court of appeals held that the trial court has the discretion to determine whether evidence is credible and the appellate court will not second guess that determination.

Similarly, wife argued that the trial court erred in concluding there was no credible evidence of the date of distribution value of the marital home and therefore no divisible property. The court of appeals held that while wife's expert testified as to the value of the marital residence on a date that was some 8 months before the entry of the ED judgment, the trial court acted within its discretion when it determined the evidence was not credible evidence of value on the date of distribution.

Finally, wife argued that the trial court was required to hold a hearing to allow the parties to present argument and additional evidence when the case was remanded by the court of appeals. The appellate court disagreed, holding that the trial court followed the mandate issued on the earlier appeal and acted properly by correcting the errors based upon evidence in the existing record.

Setting aside divorce to allow ED claim to be filed; ordering sale of marital property; classification of timber rights

- Trial court did not err in setting aside divorce judgment pursuant to Rule 60(b)(6) to allow wife to file a claim for equitable distribution.
- Trial court erred in ordering that marital home be sold rather than ordering that it be distributed to one party or the other.
- An agreement entitling husband to a portion of the value of timber to be harvested in the future was too speculative to be classified as marital property.

Miller v. Miller, _ N.C. App. _, _ S.E.2d_ (April 18, 2017).

Setting Aside Divorce Pursuant to Rule 60(b)

Wife initiated this proceeding by filing a complaint for divorce from bed and board and for equitable distribution while the parties still lived together. However, after the divorce from bed and board was granted, the parties separated and consented to a "Consent Order to Add Supplemental Pleading" providing that the parties consent to "republish the second claim for relief set out in the Complaint." The second claim in the Complaint was wife's claim for equitable distribution.

Both parties engaged in extensive discovery regarding equitable distribution and husband requested an interim distribution. During discovery, husband filed a separate action for divorce and a divorce judgment was granted. When the ED case came on for trial, the trial court granted husband's motion to amend his pleadings to request an unequal division in his favor. Before trial began, however, husband filed a motion to dismiss the ED claim, arguing the court lack subject matter jurisdiction to hear it because wife filed the claim before the parties began to live separate and apart.

Wife objected, arguing that she ED was properly pled when the parties agreed to "republish" the claim after they began to live apart. In addition, she also filed a Rule 60(b) motion in the divorce case, asking that the court set aside the divorce judgment to allow her to plead equitable distribution.

At the hearing, the trial court stated it was going to deny husband's motion to dismiss and grant wife's motion to set aside the divorce judgment. Before the judgment was entered, husband remarried. He then filed a motion requesting the court to consider his remarriage as a reason not to set aside the divorce but the trial judge refused and entered the order setting aside the divorce. Wife filed an ED claim. The ED claim was tried and husband appealed.

The court of appeals held that Rule 60(b) is a "grand reservoir of equitable power to do justice in a particular case" and stated that if there ever was an appropriate time for a trial court to use that power, "this [case] is it." Husband had engaged in the discovery process, had consented to the "republishing" of wife's original ED claim, and had asked the court for affirmative relief in the form of an interim distribution and an unequal division. In addition, the appellate court held that the trial court acted appropriately in setting aside the divorce even though husband had remarried as husband clearly knew the motion was to be granted at the time he remarried.

Order to Sell Real Property

The trial court classified the marital home and another parcel of real property as marital property and made a finding in the judgment that the parties had stipulated to the date of separation value of each. The court also made a finding that neither party wanted either property in the distribution so the trial court ordered that the properties be sold with the proceeds being divided between the parties.

The court of appeals held that the trial court erred in not listing the values of the properties on the final distribution spreadsheet attached to the ED judgment and erred by ordering that the properties be sold rather than distributed to one of the parties. According to the court of appeals, "the trial court's role is to classify, value and distribute property, not simply order that it be sold." On remand, the trial court was ordered to "value and distribute each parcel of real property to a party," and the court stated that "the party who receives distribution of the real property is free to keep it or sell it."

Distribution Factors

The court of appeals also instructed that on remand, the trial court make findings of fact as to each distribution factor raised by the evidence. The record showed that although the trial court instructed that the findings be included in the judgment being drafted by the attorneys, none of the findings actually appeared in the final judgment.

Timber Agreement

The trial court classified as marital property a Timber Agreement between husband and his cousin which provided that husband would be entitled to fifty percent of the proceeds from timbering certain property located in Pennsylvania when the timber was mature, cut and sold. The trial court valued the contract right at $5,000 and distributed it to husband. Husband argued on appeal, and the appellate court agreed, that the timber agreement was too speculative to be classified as marital property. The court held that "the future value of timber, planted during the marriage on marital property but which will not mature until some years in the future is too speculative to be considered a vested property rights for purposes of equitable distribution."

Automobile and Automobile Debt

After the entry of the divorce from bed and board, husband purchased a Suburban which the court found had a value of $49,000 on the date of separation. To purchase the vehicle, Husband incurred a debt secured by the vehicle in the amount of $64,638.82. The trial court classified the vehicle as separate property and the debt as husband's separate debt after concluding it was not incurred for the joint benefit of the parties.

The court of appeals held that even though the Suburban was purchased after the entry of the divorce from bed and board, it was presumed to be marital property because it was incurred before the date of the physical separation of the parties. Because the trial court did not make findings of fact that would support classifying the vehicle as separate property by showing that the property fit into one of the categories of separate property listed in GS 50-20, "the Suburban and its associated debt should have been classified as marital."

Spousal Agreements
Cases Decided Between October 4, 2016 and June 6, 2017

Modification of Separation Agreement; notary

- Where separation agreement stated that it could be modified only in a writing executed with the same formalities as the original agreement, modification signed by the parties but not in front of a notary was invalid.
- Estoppel and ratification cannot be used to enforce a contract that was not valid when executed.

Kelley v. Kelley, _ N.C. App. _, 798 S.E.2d 771 (April 4, 2017). Parties executed a separation agreement that included a provision stating that any modification of the contract must be in writing and executed with the same formalities as the original contract. Years after execution, the parties signed a modification that was not executed in front of a notary as is required by GS 52-10.1. When wife sought to enforce the amendment, husband filed for summary judgment arguing that the amendment was "*void ab initio*." The trial court disagreed and denied summary judgment. The court of appeals allowed the interlocutory appeal after concluding that the denial of husband's defense to the enforcement proceeding affected a substantial right. The court of appeals then concluded that the modification was void, both because the underlying contract specified than any amendment had to be executed as required by GS 52-10.1 and because that statute provides that any separation agreement must be executed in front of a notary. Any separation agreement or modification of a separation agreement not executed in front of a notary is invalid.

The court of appeals also rejected wife's contention that husband should be estopped from arguing the invalidity of the amendment because the parties performed under the amended contract for a number of years, thereby ratifying the invalid amendment. The court of appeals held that because the amendment was void from the time of execution, estoppel and ratification do not apply to allow enforcement of the agreement.