


Family Law Case Update

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Custody



Kolczak v. Johnson


“For the want of a nail the shoe was lost.
For the want of a shoe the horse was lost.
For the want of a horse the rider was lost.
For the want of a rider the battle was lost.
For the want of a battle the kingdom was lost,
And all for the want of a horseshoe-nail.”

Benjamin Franklin, Poor Richard’s Almanack (1758)



Missing “Magic Words”

- “Purge”
 - To support civil contempt
- “Substantial change in circumstances affecting the welfare of the children”
 - To support modification
- “Insufficient means to defray the expenses of the suit”
 - To support award of attorney fees



Kolczak

- Willful violations by mom that supported contempt
 - failing to inform father of certain events as required by the custody order,
 - failing to give father the right of first refusal when she needed child care for the child as specified in the custody order,
 - allowing her husband to be present when the children were at her home when order provided that children were to have no contact with the husband, and
 - scheduling the children for camps during times that interfered with father's custodial time with the children.

Kolczak

- Contempt reversed for lack of a purge condition
- No remand because
 - "...in this case, the contempt is primarily based upon communication and visitation provisions of the orders, not child support. It is not apparent from the order how an appropriate civil contempt purge condition could 'coerce the defendant to comply with a court order' as opposed to punishing her for a past violation"
 - "this situation may be better suited for criminal contempt."

Conversion of temporary orders

- *Eddington v. Lamb*
 - Father filed complaint for custody 11/12/13
 - Consent order for "temporary custody" 6/25/14
 - Father requested hearing on permanent custody 4/2/15
 - Parties attend mediation 8/17/15
 - Custody hearing calendared for 2/3/16, continued at request of dad for additional time to prepare and review discovery
 - Hearing conducted 8/29/16
 - "Temporary" order in effect 26 months when hearing began
- Temporary or permanent order?

Eddington

- A temporary order may become permanent by operation of time
- When neither party sets the matter for hearing within a reasonable time
- Whether matter is set within a reasonable time must be determined on case-by-case basis
- *"The relevant time period starts when a temporary order is entered and ends when a party requests the matter be set for hearing, not when hearing is held."*

Eddington

- “the reasonableness of the delay depends in part on whether the case [was] dormant before the request to set the matter for hearing was made.”
- Because father made request for hearing on permanent custody nine months after entry of temporary order and because “*litigation continued*”, temporary order remained temporary.

Eddington: splitting legal custody

- Deviation from “pure joint legal custody” must be supported by findings establishing why the deviation is in the best interest of the child
 - Need “causal link” between parental disagreement/issue and welfare of the child
 - See *MacLagan v. Klein*, 123 NC App 557 (1996)(evidence of emotional distress to child resulting from disagreement over religious training supported order allowing dad to make decisions regarding religion)

Eddington: splitting legal custody

- Parents’ disagreement over ADHD treatment did not justify giving mom final authority over all health care decisions
 - But “may support” giving mom final decision on ADHD treatment
- Parents’ disagreement over after school care did not justify giving mom final authority over all education decisions
 - But “may support” giving dad final say on after school care

Modification

- Impact of circumstances on child that manifest after entry of previous custody order can support conclusion of substantial change even if circumstances existed when last custody order was entered.
 - *Shell v. Shell*, NC App (August 21, 2018)(mom’s sobriety, volatile relationship between parents, dad’s disabilities)
 - *Laprade v. Barry*, 800 SE2d 112 (2017)(volatile relationship between parents)
 - *Spoon v. Spoon*, 233 NC App 38 (2014)(relocation)

Rule 702: Expert testimony

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

Daubert standard

- Proposed testimony must be based on scientific, technical or other specialized knowledge that will assist trier of fact (*relevancy*);
- Witness must qualify as an expert by skill, knowledge, experience, training or education, and
- Testimony must meet 3-prong *reliability* test:
 - Be based upon sufficient facts or data,
 - Be the product of reliable principles and methods, and
 - Witness must have applied the principles and methods reliably

Sneed v. Sneed

- Mom's argument that testimony and report of custody evaluator was neither relevant or reliable as required by Rule 702 was "meritless"
 - Evaluator explained her process of gathering information
 - Parties consented to the appointment of a "forensic custody evaluator"
 - Mom failed to show an abuse of discretion

Quevedo-Woolf v. Overholser and Carter

- Child 1 year old: Florida order entered giving grandmother "temporary" custody of child pursuant to Florida statute that provides parent is entitled to return of custody when parent asks for return of custody unless parent shown to be unfit
- Child 3 years old: grandmother and child move to NC; mom moves to West Va.
- Child 7 years old: mom files action in NC asking that custody be returned to her

Quevedo-Woolf v. Overholser and Carter

- Subject matter jurisdiction
 - NC had jurisdiction to consider modification of Florida order because Florida did not have continuing exclusive jurisdiction and NC was child's home state

- Choice of law
 - Once NC acquires subject matter jurisdiction to modify order from another state, NC law applies to determine whether order can be modified

Quevedo-Woolf v. Overholser and Carter

- Waiver of parent's constitutional right to exclusive care, custody and control of child by parent's conduct inconsistent with her protected status as a parent:
 - Requires clear, cogent and convincing evidence
 - Cannot be established by simply showing voluntary relinquishment of custody to a non-parent
 - Mom's act of relinquishing custody to grandmother in Florida temporary order is "presumed to be an act of parental responsibility."

Quevedo-Woolf v. Overholser and Carter

- Conclusion that mom waived her constitutional rights supported by findings that she:
 - Allowed grandmother to act as a parent to the child without creating the expectation that the relationship between the non-parent and the child would not be permanent, and
 - Failed to "take on even minimal acts of parental love and responsibility" for a period of years after entry of the Florida order

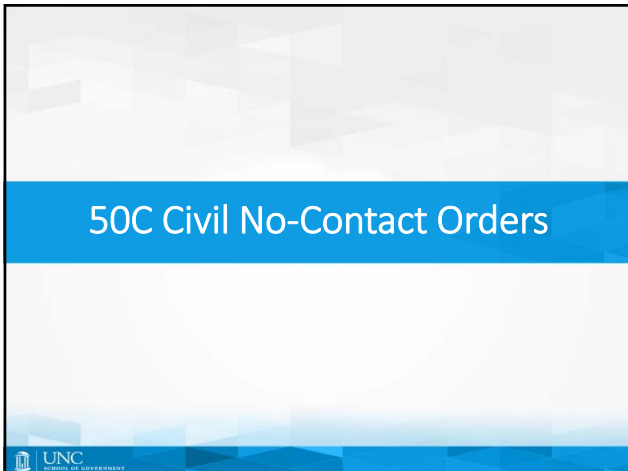
Rule 59 motion for new trial

- Only the trial judge can hear/consider motion made pursuant to Rule 59.
- Rule 59 motion granted by another judge is void, even if trial judge recused himself before the motion for a new trial was filed.
 - *Quevedo-Woolf v. Overholser and Carter*



Attorney fees

- *Mitman v. Shipley, unpublished*
 - GS 50B-3(10) authorizes the court to award attorney fees to either party as part of a DVPO
 - Request must be in complaint or in written motion
 - Rule 6 of Rules of Civil Procedure requires 5 days notice for written motions
 - Fee award must be supported with findings regarding reasonableness of the amount awarded



Firearms

- *Russell v. Wofford*
 - Chapter 50C does not authorize court to order defendant to surrender weapons
 - Chapter 50C does not authorize court to order defendant not to purchase or possess weapons while civil no-contact order in effect
 - "Catch-all" provision in GS 50C-5(b)(7) does not give court "unfettered discretion" to order any relief deemed necessary by the court

Equitable Distribution

Berens v. Barends

- Funds in **529 Education Savings Plan** are owned by the parent(s) rather than the children.
- Therefore, 529 plans are marital property if acquired by either or both spouses during the marriage and owned on the date of separation unless funded with separate funds.

Blair v. Blair

- Husband and father formed partnership before date of marriage
 - Evidence showed each owned 50% interest when formed and on date of ED trial
- Partnership increased significantly in value during the marriage
 - Evidence shows date of marriage value and date of separation value
- Husband received income from partnership after the date of separation and before ED trial

Classification of partnership?

- Mixed separate and marital
 - Separate to extent value acquired before marriage
 - Passive appreciation during the marriage also is separate
 - Active appreciation during the marriage is marital
 - All appreciation during the marriage is presumed active
- Trial court does not need to identify value of marital and separate “with mathematical certainty”
 - Only need to “reasonably approximate values” based on evidence

Classification of income from partnership after DOS?

- Husband's separate property to the extent income is compensation for his work following separation
- Divisible property to the extent the income is a "dividend" (return on investment) from marital component of partnership
 - No presumptions; party claiming divisible property must show income was a dividend
- Parties are bound by classification on income tax returns

Watson v. Watson

- Parties bought house before marriage and held title as joint tenants
- Continued to hold title as joint tenants on date of separation
- Trial court found there was "considerable equity" in the house that was marital property
- Can court distribute the house?

Watson v. Watson

- Parties purchased vehicle during the marriage with marital funds and owned it on the date of separation.
- Paid off \$10,000 loan encumbering the vehicle with marital funds seven years before the parties separated.
- No other evidence in the record about the vehicle
- Can trial court distribute the vehicle?

Watson v. Watson

- "Liquid asset"
 - An asset "readily convertible into cash"
- "Illiquid asset"
 - "[a]n asset that is not readily convertible into cash, usually because of
 - (1) the lack of demand,
 - (2) the absence of an established market, or
 - (3) the substantial cost or time required for liquidation (*such as real property, even when it is desirable*)."
- Equity in a house and a 401K account are not liquid assets

Jurisdiction after appeal

- Trial court loses jurisdiction **until mandate is issued** from the court of appeals to the trial court
 - Filing of opinion does not restore trial court jurisdiction
- Don't sign QDRO after appeal of ED judgment before mandate issues
 - *Henson v. Henson*
- Don't enter a custody order when another custody order for the same child is on appeal until mandate issues
 - *Quevedo-Woolf v. Overholser and Carter*