

Family Law Update

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Child Support

Contempt

- Consider:
 - Plaintiff files motion for civil contempt alleging defendant failed to pay support
 - Defendant doesn't appear at contempt hearing
- What can you do?
- *Tigani v. Tigani*, 805 SE2d 546 (NC App 2017)

Contempt

- Consider
 - Show cause issued based on IV-D attorney's allegation that defendant has not paid support
 - Defendant appears and offers evidence of inability to work
 - You do not find defendant's evidence credible
 - IV-D attorney offers no evidence other than amount of arrears
- What can you do?
- *Alston v. Hodges*, 809 SE2d 317 (NC App 2018)

Unincorporated Agreements

- Consider:
 - Separation agreement provides dad will pay support
 - Dad files complaint, asking court to set guideline support because he lost his job and can't pay amount required by the agreement
 - Mom files counterclaim for breach of contract and for specific performance
 - Mom shows dad has failed to pay amount required by contract
 - Dad shows he lost his job through no fault of his own
- Can you set guideline support?

Pataky v. Pataky, 160 NC App 289 (2003)

- When unincorporated agreement addresses child support, court must presume amount of child support is appropriate for the child[ren].
- Court can set guideline support only if party seeking new order rebuts presumption by showing the contract amount is not sufficient to meet the needs of the child[ren] in light of the circumstances at the time of the court proceeding.

Lasecki v. Lasecki

- “[C]ontrary to [father’s] position, the trial court *was without authority*, absent [mother’s] consent, to modify the separation agreement solely for the purpose of *reducing* his child support obligation. ...Traditionally, the authority of the trial court to order the supporting parent to pay child support in an amount different than established in an unincorporated separation agreement has been recognized as a means of insuring adequate maintenance of the children involved – *not* as a means of lessening the agreed-upon contractual duties of the supporting parent based upon changed circumstances. Stated differently, **the question for the trial court was limited to whether the needs of the children were being adequately met by the amount of child support agreed upon in the unincorporated separation agreement, or whether the amount of child support should be increased in order to meet the children’s needs.**”

Breach of contract

- Amount owing at time of trial
 - Money judgment
 - For total amount owed pursuant to contract
 - Order for periodic payments not authorized (???)
 - Ability to pay is not relevant
 - Money judgment is not enforceable by contempt
- Amounts coming due in the future
 - Order for specific performance allowed when remedy at law is inadequate
 - Order only the amount defendant has the ability to pay
 - Order of specific performance is enforceable by contempt
- Contract is not modified by order of specific performance
 - *Lasecki*

Attorney fees

- Court can order more fees after an appeal to cover attorney fees for the appeal
 - *Alston v. Hodges*, 809 SE2d 317 (2018)
- Court can use court record, prior orders, attorney fee affidavits and argument of counsel to support award
 - *Beasley v. Beasley*, NC App (June 5, 2018)(court not required to take evidence at hearing on request for attorney fees)

Change of Venue

Stokes v. Stokes, 811 SE2d 693 (2018)

Improper venue

- Only upon request of a party
- Must be granted if venue is improper
- Party must ask before or in Answer or before time for response has expired
- Ruling is an interlocutory order that affects a substantial right so can be immediately appealed

Convenience of the parties and/or witnesses

- Only upon request of a party
- Discretionary ruling
- Party cannot ask until after filing of responsive pleading
- Ruling is an interlocutory order that cannot be immediately appealed

Modification

- Trial court cannot modify support order *sua sponte*
- Support/custody can be modified only after **motion is filed** and court concludes there has been a substantial change in circumstances
 - GS 50-13.7
 - *Summerville v. Summerville*, NC App (April 17, 2018)

Income: *Kaiser v. Kaiser*

- Support order is based on actual present income at time support order is entered
- Evidence of past income can be used to support finding of present income if court shows through findings of fact that past income is “reflective of present income”
 - Income from past capital gains and dividends can support finding of present income if trial court finds the income is likely to continue into the future
- “Maintenance” received from third party is actual present income
 - Maintenance is money from third party paid for the benefit of the parent

Child support 'credit'

- "Controlling principle is that credit is appropriate only when an injustice would exist if credit were not given."
 - *Beasley v. Beasley*, NC App (June 5, 2018)
- Credit must be supported by specific findings of fact about why credit is appropriate

Custody

Third party custody

Moriggia v. Castelo, 805 SE2d 378 (2017)

- Conclusion that parent has waived constitutional right to exclusive custody must be supported by findings based on clear, cogent and convincing evidence.
 - Custody order must state that the higher standard was used
- Court can consider conduct of parent before birth of the child in determining whether parent intended to permanently share her exclusive custodial rights with a non-parent

Third Party Custody and Standing

- Is a non-parent required to allege and prove parent's waiver of constitutional rights in order to establish **standing** to file the complaint?
 - If so, what does this mean for consent orders, temporary orders and motions to intervene?
 - See blog ON THE CIVIL SIDE, *Nonparent v. Parent Consent Custody Orders*, May 22, 2015
- *Moriggia*:
 - "[t]he trial court could not even address temporary custody without first determining whether plaintiff had standing to pursue a custody claim."

Jurisdiction Quiz.....

- Consider:
 - Custody order entered in Michigan
 - Mom and kids move to NC; dad moves to South Dakota
 - After 3 months in NC, mom files petition to register Michigan order in NC
 - After 18 months in NC, dad files motion in NC to modify Michigan order.
- Does NC have jurisdiction to modify?

Modification Jurisdiction

- Michigan no longer has continuing exclusive jurisdiction because everyone left Michigan
- NC can modify if NC has jurisdiction to make an initial determination
 - Home state, or
 - No home state and NC has significant connection/substantial evidence
- Is NC the home state?

Brooker v. Strege, 807 SE2d 597 (2017)

- Jurisdiction is determined at “commencement of a child custody proceeding”
- Filing a petition to register or a petition to enforce is not the “commencement of a child custody proceeding”
- Motion to modify was the “commencement of a child custody proceeding”
- NC was home state at time child custody proceeding was commenced

Temporary Order

- Regardless of how it is labeled, an order is temporary if it:
 - Is entered without prejudice,
 - Sets a clear reconvening date, or
 - Does not resolve all custody issues between the parties
- Compare:
 - *Brown v. Swarn*, 810 SE2d 237 (2018)
 - *Summerville v. Summerville*, NC App (April 17, 2018)
 - *Marsh v. Marsh*, NC App (May 15, 2018)

Temporary converts to final.....

- Even if temporary when entered, order will become a final order if neither party seeks a final order within a reasonable time after entry of the temporary order
 - *LaValley v. LaValley*, 151 NC App 290 (2002)

Temporary converts to final.....

- Whether order converted is determined on a case-by-case basis; passage of time alone is insufficient
 - *LaValley* (22-month order was final)
 - *File v. File*, 195 NC App 562 (2009)(5-month order remained temporary)
 - *Senner v. Senner*, 161 NC App 78 (2003)(20-month order still temporary because parties were negotiating)
 - *Dancy v. Dancy*, 785 SE2d 126 (2016)(2016) (4-year order remained temporary; parties were negotiating visitation)
 - *Marsh v. Marsh*, NC App (May 2018) (26-month order was temporary order; parties involved in litigation)

PSS and Alimony

Income

- *Kabasan v. Kabasan*, 810 SE2d 691 (2018)
 - Investment income that is automatically reinvested rather than paid to a party is actual income
 - Including investment income that is automatically reinvested is not imputing income; finding of bad faith is not required
 - Okay to treat social security paid to child on behalf of father the same as it is treated in child support guidelines
 - Counted as income to father
 - Count child support as an expense of father

Equitable Distribution

Crowell v. Crowell, 809 SE2d 325 (2018)

- Court can consider all separate property in determining how party will pay distributive award
- Court can order party to sell separate property to pay a distributive award
- Personal loans from marital business to husband were marital debt
 - Joint benefit established by findings that proceeds from loans used to finance “extravagant lifestyle” of the parties

Crowell

- Court hearing an ED case can apply provisions of Uniform Fraudulent Transfer Act, GS 39-23.1 *et. seq.*, to void a transfer of property
- A transfer is fraudulent when made to “hinder, delay or defraud a creditor.”
- A creditor is any person with a claim
- “A spouse should be considered a creditor ... for the limited purpose of setting aside conveyances that would otherwise prevent the spouse from receiving a full equitable distribution award.”

Crowell: adding necessary parties

- Cannot classify as marital and distribute property owned by an LLC or other third party without joining the LLC or third party as necessary party and granting ownership of the property to a spouse
- Cannot enter money judgment against third party grantee of fraudulent transfer without joining the third party as a necessary party and giving him an opportunity to be heard

Crowell: adding necessary parties

- LLC that owned property trial court ordered sold to satisfy distributive award was not a necessary party where spouse paying distributive award was sole owner of the LLC
 - Dissent on this issue
- Third party grantee of fraudulent transfer was not a necessary party to action wherein court voided the transfer to the grantee when grantee did not take the property in good faith and for reasonable consideration
 - Dissent on this issue

Military pensions and disability

- Federal law allows state courts to distribute “disposable retired pay” in an ED proceeding
- The definition of “disposable retired pay” includes retirement pay and excludes disability pay
- Federal military disability benefits cannot be distributed by state courts

Disability is income.....

- While court cannot distribute military disability pay, disability pay is income
 - Can consider disability pay as source of payment of distributive award
 - *Lesh v. Lesh*, 809 SE2d 890 (2018)
 - Can consider receipt of disability pay as a distribution factor
 - *Halstead v. Halstead*, 164 NC App 543 (2004)

More on retirement funds.....

- *Watkins v. Watkins*, 228 NC App 548 (2013)
 - A defined contribution plan (for example, a 401K account) that is vested can be classified by “tracing out” marital and separate components
 - Court required to apply “coverture fraction” from GS 50-20.1 only to true ‘deferred compensation’
- *Kabasan v. Kabasan*, 810 SE2d 691 (2018)
 - Trial court has discretion to apply “coverture fraction” to classify defined contribution accounts (**IRA, annuity and Thrift Savings Plan**); at least when there is no evidence to establish whether accounts are vested

ED and Alimony

- ED is to be done “without regard to alimony for either party or support of the children of both parties.”
 - GS 50-20(f)
- ED judge not required to consider that dividing pension in-kind would reduce husband’s alimony obligation to wife
 - *Kabasan*
- Classifying pension payments received by husband as marital property and considering those payments as income to husband when setting alimony was not “double-dipping”
 - *Kabasan*

Remand after appeal

- Even when distribution is affirmed on appeal, court may reconsider distribution on remand when remand instructions require change to the marital estate
 - *Hill v. Hill, unpublished, NC App (May 15, 2018)*
 - Citing *Fox v. Fox, 114 NC App 125 (1994)*(trial court should take evidence on changes in distribution factors up until time of hearing on remand)

Check the filing date.....

- ED judgment vacated on appeal because ED claims were filed before parties began to live separate and apart. *Stanbridge v. Stanbridge, NC App (May 5, 2018)*
 - Full trial conducted in trial court, no objections to jurisdiction
 - No objection to jurisdiction on appeal
 - Court of appeals voided entire proceeding *sua sponte*

Spousal Contracts

Problem??

- Separation Agreement and Property Settlement drafted by wife's lawyer
- Wife executed the agreement
- Agreement sent to husband
- Husband requested minor change and wife agreed through her attorney
- Husband made handwritten change on contract, initialed the change and executed the agreement
- *Raymond v. Raymond*, 811 SE2d 168 (2018)

Claim for rescission??

- Wife filed complaint for ED and alimony
- Complaint acknowledged separation agreement and property settlement executed by the parties
- Complaint states that contract was "unconscionable" and was executed when she "was on medication that affected her memory and reasoning"
- Prayer for relief requested ED and alimony
- *Holton v. Holton*, NC App (March 20, 2018)

Reconciliation

- Reconciliation voids separation agreement
- GS 52-10.2 states standard for reconciliation:
 - "Resumption of marital relations" shall be defined as voluntary renewal of the husband and wife relationship, as shown by the totality of the circumstances. Isolated incidents of sexual intercourse between the parties shall not constitute resumption of marital relations."
- When evidence is conflicting, "the issue of the parties' mutual intent is an essential element" in determining whether they reconciled
 - *Johnson v. Johnson*, NC App (June 5, 2018)