Family Law Update
Cases Decided Between
October 3, 2017 and June 5, 2018

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Child Support
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Personal jurisdiction; minimum contacts

- In the “unusual situation” where married couple moved frequently throughout the marriage due to husband’s work and never established a domicile in any other state or country, defendant husband had sufficient minimum contacts with NC to support the exercise of personal jurisdiction over him for child support, alimony and ED despite the fact that husband never resided in NC.

Bradley v. Bradley, _ N.C. App. _, S.E.2d (October 17, 2017). Wife was born and raised in NC but husband was from Virginia. The couple met in Virginia, married in NC, and lived during their four-year marriage in Australia, London, New Jersey and New York. Defendant never resided in NC but visited the state on a number of occasions during the marriage. The parties separated while living in London and after staying for a short period of time with husband’s parents in Virginia, wife and the child of the parties returned to NC. Wife filed an action for custody, child support, alimony and ED in NC. Husband filed a motion to dismiss based on a lack of personal jurisdiction. The trial court denied his motion after concluding he had sufficient contacts under the circumstances to support the exercise of jurisdiction.

The court of appeals affirmed. Recognizing that defendant had very little contact with NC, the court held that under the unusual circumstances where the married couple had not established a place of domicile during the marriage due to frequent moves required by husband’s work assignments, husband’s “actions directed toward North Carolina” along with his visits to the state were sufficient to make the exercise of jurisdiction in this state consistent with Due Process. His actions directed toward NC included:

- The parties married in NC;
- Husband directed that certain mail be delivered to wife’s parents’ house while the couple lived in foreign countries;
- Husband directed that his father-in-law secure a storage unit in NC for marital and separate property of the parties to be stored;
- Husband sent marital and separate property of the parties to that storage unit and paid to maintain the storage unit; and
- Husband “orchestrated events” which led to wife and their child living in the State of NC after the parties separated.

Civil contempt

- Trial court erred in holding defendant in contempt for failure to pay attorney fees ordered by the court where there was no evidence in the record to establish defendant had the ability to pay the fees at the time of the contempt proceeding.
- Defendant did not waive the right to object to the lack of evidence to support the trial court’s conclusion that he had the ability to pay by not showing up for the contempt hearing.

Tigani v. Tigani, _ N.C. App. _, 805 SE2d 546 (October 17, 2017). The trial court ordered Defendant to pay attorney fees but he did not pay. Plaintiff filed a motion requesting defendant be held in civil contempt. Defendant did not appear for the contempt hearing and the trial court concluded he had the ability to pay and held him in civil contempt. On appeal, defendant argued there was insufficient evidence in the record to establish that he had the present ability to pay the attorney fee at the time of the contempt hearing and the court of appeals agreed. The court noted that while the trial court reviewed bank account records of the defendant during the contempt hearing, the records were not introduced into evidence during the hearing and no witness testified. Therefore, there was no evidence in the record at all. The court held that a trial court may not hold a party in civil contempt without evidence in the record establishing the party's present ability to comply with the order. The court of appeals rejected plaintiff's argument that defendant waived any objection to the lack of evidence by not attending the contempt hearing. The court held that a defendant's failure to participate in the hearing does not relieve the court of the need to make findings of fact regarding defendant's present ability to comply with the court order and the purge being imposed before holding a party in contempt. Findings of fact must be supported by evidence in the record.

Unincorporated separation agreement; request for court-ordered support; attorney fees

- Trial court did not err in refusing to set guideline support at the request of father after trial court concluded amount of support provided in unincorporated separation agreement was reasonable.
- Trial court has no authority to "modify" an unincorporated separation agreement.
- A trial court can order child support different from that provided in an unincorporated agreement if the trial court concludes the amount in the agreement does not meet the reasonable needs of the children in light of the circumstances at the time of the hearing.
- The court does not have the authority to enter a child support order in an amount less than that provided in the agreement on the basis that the paying parent does not have the ability to pay the amount provided in the agreement; the court can impose a different child support obligation only if more support is necessary to meet the needs of the children.
- In an action for breach of an unincorporated agreement, the trial court must enter a money judgment for damages proven at trial. The trial court also has the ability to enter an order of specific performance of future payments required by the agreement when the court concludes that the remedy at law (a money judgment) alone is an inadequate remedy.
- An order of specific performance cannot exceed a party's actual ability to pay.
- Where separation agreement provides for the payment of attorney fees by a party breaching the agreement, the trial court did not err in awarding additional fees to mother for fees incurred following a remand of the case from the court of appeals. Fact that court of appeals had affirmed fees awarded up to the point of appeal did not preclude trial court from awarding more fees for additional proceedings required by the remand.
- Trial court did not abuse its discretion by refusing to reopen evidence after conclusion of the hearing to consider change of employment status of father.

Lasecki v. Lasecki, _ N.C. App. _, 809 S.E.2d 296 (2017). Parties entered into a separation agreement providing for father to pay child support and alimony. The agreement was not incorporated. Approximately one year later, father lost his job. He filed a complaint asking the

court to set child support in accordance with the child support guidelines. Mother filed a counterclaim for breach of the contact and requested the remedy of specific performance. The trial court denied husband's request for guideline support after concluding that the amount of support provided in the agreement was reasonable. Concerning mother's counterclaim, the court determined father breached the contract by failing to pay child support and alimony as required by the agreement. The trial court entered a judgment for the arrears accrued until the time of judgment and ordered specific performance of future payments. However, after concluding father did not have the actual ability to pay the full amount due under the contract, the court ordered specific performance of the contract amount of child support but specific performance of a reduced amount of alimony. Father appealed.

<u>Guideline Support.</u> Father first argued that the trial court erred by denying his request for an order setting child support in accordance with the child support guidelines. He argued that his evidence that his income had decreased, that the needs of the children had decreased and mother's income had increased since the agreement was signed was sufficient to support a conclusion that the amount of support provided in the agreement was not reasonable. Relying on *Pataky v. Pataky*, 160 NC App 289 (2003), father argued the trial court was required to set support in accordance with the guidelines because the amount of support in the agreement was no longer reasonable in light of the present circumstances.

The court of appeals disagreed and held that when a party seeks a court order for child support when the parties have executed an unincorporated agreement providing for support, the court is required to enter a child support order in the contract amount unless the court determines the contract amount is not sufficient to meet the reasonable needs of the children in light of the circumstances of the parties at the time of the court proceeding. According to the court of appeals, the court does not have the authority to enter a lesser amount of support on the basis that a parent no longer has the ability to pay the agreed amount or when the needs of the children are less than the amount agreed upon. Interpreting *Pataky*, the court of appeals stated:

> "[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." [emphasis in opinion]

<u>Breach of Contract, Money Judgment and Specific performance.</u> Father also argued that the trial court erred in ordering specific performance of the amount of arrears that accrued before the entry of the court order without finding he had the ability to pay. The court of appeals explained that the trial court did not order specific performance of those amounts. Instead, the trial court entered a judgment for the amount of money wife proved father had failed to pay pursuant to the contract. The court stated:

> "[Father] was simply ordered to pay the damages resultant from his breach of contract as an ordinary money judgment. The trial court had no authority to deny [mother] her right to sue for breach of the specific terms of the Separation Agreement, and the trial court had no authority to order damages for [father's] breach in an amount less than called for in the Separation Agreement."

The trial court's order of specific performance was limited to amounts coming due under the terms of the contract in the future. The court of appeals explained that a trial court cannot modify a contract, but the court is not authorized to order specific performance of more than the payor has the actual ability to pay. In this case, the trial court did not modify father's support obligations, but limited the order of specific performance to the amount the trial court found he had the ability to pay.

Attorney fees. The separation agreement provided that attorney fees could be recovered from a party breaching the agreement. The trial court had awarded fees to mother as part of a judgment that was appealed by father. That appeal resulted in a remand but the court of appeals affirmed the initial award of fees. Following remand, the trial court entered an additional fee award to cover amounts incurred by mother in the remand proceeding. Father argued on appeal that the trial court had no authority to order additional fees when the court of appeals had affirmed the earlier order. The court of appeals disagreed, holding that while the initial award of fees was 'law of the case' regarding fees owed up until the time of appeal, the trial court had authority to order additional fees for the remand proceeding.

Entry of judgment; civil contempt; evidence to support findings of fact

- When trial court signed form civil contempt order and filed it with the clerk of court, the contempt order was entered even though the trial court did not check any of the boxes on the form and did not make any findings of fact in the order.
- Notice of appeal after court signed and filed the form order divested trial court of jurisdiction to enter the more detailed order after the filing of the appeal.
- Finding of fact in civil contempt order that defendant has the ability to comply with the purge condition imposed by the court must be supported by evidence in the record.
- Where the only evidence introduced during the contempt hearing was evidence that obligor was disabled and unable to work, trial court erred in finding obligor had the ability to comply with the support order.

Durham DSS *ex. rel.* Alston v. Hodges, _ N.C. App. _, 809 S.E.2d 317 (2018). A show cause was issued to defendant based on an allegation by DSS that defendant had not paid child support in accordance with a support order. At the hearing for civil contempt, defendant offered evidence from physicians that he was unable to work due to medical and other disabilities and that he had no money. DSS presented no evidence other than records showing defendant had not paid support. Nevertheless, the trial court signed a form civil contempt order holding defendant in contempt and ordering that he be incarcerated until he paid $1,000. The order did not contain any findings of fact other than one preprinted finding that defendant had the ability to pay.

After the form order was signed and filed, defendant filed notice of appeal. Several days later, a more detailed contempt order was signed by the court containing more findings of fact.

The court of appeals first held that the second, more detailed contempt order was void *ab initio* because the appeal of the first order divested the trial court of jurisdiction. Despite the fact that the court clearly intended to substitute a more formal order containing more detailed findings of fact for the form order signed on the day of the hearing, the form order was "entered" when the court signed it and filed it.

The court of appeals then reversed the finding of civil contempt after concluding there was no evidence in the record to support the trial court's finding of fact that defendant had the ability to pay. Even though the issuance of a show cause for civil contempt shifts the burden of proof to defendant in the contempt hearing, no order of contempt can be entered unless there is evidence in the record to support all findings necessary to support an order of contempt. In this case, the only evidence introduced was evidence by the defendant indicating he had no ability to pay. Because DSS introduced no evidence to the contrary, the court erred in holding defendant in contempt.

Change of venue; time of filing request; interlocutory appeal

- A party must request a change of venue based on improper venue before or in an Answer or before the time for answering has expired.
- A grant or denial of a request to change venue based on improper venue is an interlocutory order that is immediately appealable.
- A party must request a change of venue based on convenience of the witnesses or the interest of justice after an Answer has been filed. The court should make a discretionary ruling on venue only after the party responds to the allegations in the Complaint and the court has a basis to determine where the contested issues should be tried.
- A grant or denial of a request to change venue based on the convenience of witnesses or the interest of justice is a discretionary interlocutory ruling not subject to immediate appeal.

Stokes v. Stokes, _ N.C. App. _, 811 S.E.2d 693 (February 20, 2018). Mother filed action for ED, custody and child support in Union County. In response, father filed a motion for emergency custody, a motion to change improper venue, and motion to change venue to Pitt County in the interest of justice and for the convenience of witnesses. The trial court concluded both Union and Pitt Counties were proper venue but ordered the matter transferred to Pitt County for the convenience of the witnesses. Mother appealed, arguing father did not file the request for change of venue in a timely manner and arguing that the trial court abused its discretion in transferring venue based on the convenience of the parties.

The court of appeals held that father raised the venue issue at an appropriate time but dismissed mother's appeal of the court's decision to change venue as an inappropriate interlocutory appeal.

Mother argued that the trial court should have denied father's motion to change venue because he did not file an Answer before requesting the change of venue. The court of appeals

acknowledged that a party must request a discretionary decision to change venue after the filing of a responsive pleading because the trial court cannot know what issues need to be tried before the allegations in the complaint have been 'traversed'. However, the court of appeals held that the motions filed by father in this case in response to mother's complaint sufficiently responded to mother's allegations so the court was able to determine where the matter needed to be tried. The court of appeals also held that a motion for a discretionary change of venue can be made at the same time an Answer is filed and may be made in the same written document.

The court of appeals declined to address mother's contention that the trial court abused its discretion in changing venue based on the convenience of witnesses, concluding that wife's appeal of that issue was an inappropriate interlocutory appeal. While a trial court decision on venue based on a determination of whether venue was proper is subject to immediate appeal, a party cannot challenge a discretionary ruling by the trial court until the trial court enters a final judgment in the case.

Effect of separation agreement; attorney fees for frivolous complaint

- Trial court did not err in incorporating a separation agreement into divorce judgment when plaintiff requested that it be incorporated.
- Trial court properly dismissed father's separate complaint for child support where incorporated separation agreement addressed child support.
- Trial court did not err in awarding attorney fees to mother as a sanction after concluding father's complaint was frivolous.

Durham County on behalf of Adams v. Adams, _ N.C. App. _, 812 S.E.2d 884 (March 20, 2018). Parents entered into a separation agreement that provided for custody and contained an agreement that the parties would split all expenses related to the care of the minor child, including day care and medical expenses. Mother provided health insurance coverage for the child. At father's request, the trial court incorporated the separation agreement into the parties' divorce judgment.

Father subsequently applied for child support services through the county child support agency and filed an action against mom for child support. The trial court dismissed the complaint after concluding that an order for child support existed in the divorce case. The trial court also ordered father to pay mother's attorney fees after concluding the child support action was frivolous.

Father appealed and the court of appeals affirmed the trial court. The appellate court first rejected father's claim that the separation agreement should not have been incorporated into the divorce judgment. The court of appeals held that the supreme court has approved incorporation upon consent of the parties and noted that father actually requested that the agreement be incorporated. The court of appeals also rejected father's argument that the trial court erred in dismissing his claim for support, holding that because there was an existing child support order in the divorce case and father alleged no change in circumstances, he had no right to institute a separate action for guideline support.

Finally, the court of appeals upheld the trial court order for attorney fees as an appropriate sanction for plaintiff's frivolous complaint. The conclusion that the complaint was frivolous was supported by findings that the complaint contained erroneous statements regarding the date of marriage of the parties, the date of separation of the parties, and regarding medical insurance coverage for the child, and by findings that father did not read the complaint before it was filed. Additional support for the sanction was the fact that father had no legal basis for his claim for child support because an order already existed in the divorce proceeding+++++++++.

Modification

- Trial court erred in modifying child support *sua sponte* after modifying custody.
- The court cannot modify support unless a party requests modification pursuant to GS 50-13.7 and the Supreme Court decision in *Catawba County v. Loggins* does not change that rule.

Summerville v. Summerville, N.C. App. , _ S.E.2d _ (April 17, 2018). Both parents filed motions to modify custody. The trial court concluded there had been a substantial change of circumstances regarding the child and modified custody. In the modification order, the trial court also ordered the parties to submit income information to each other, to calculate a new guideline support obligation and to pay the new amount of support as determined by the guideline calculation. Neither party had requested a modification of support.

On appeal, father argued the trial court erred in modifying support *sua sponte* and the court of appeals agreed. GS 50-13.7 authorizes the court to modify support when requested by a party and a trial court has no authority to modify on its own motion. According to the court of appeals, the Supreme Court opinion in *Catawba County v. Loggins*, 804 SE2d 474 (2017)(holding that an order modifying support was not void *ab initio* because neither party filed a motion to modify), did not change that rule.

Income; child support credits

- Child support is based on present income at the time of the support hearing.
- Evidence of past income can be used to determine present income if findings show that the income is likely to continue to be received or otherwise is reflective of present income.
- Funds received from father's parents were not income because evidence showed they were a loan to father that father agreed to repay.
- Maintenance received from third parties is income but findings must support conclusion that funds received are for the benefit of the parent rather than a reimbursement for expenses of the third party.
- Capital gains and dividends are income if findings show parent is likely to continue to receive them regularly.
- Because income from past capital gains is a "poor indicator" of current income due to the volatility and unpredictability of the income, the trial court must make additional findings of fact to support use of past capital gain income to establish present income.

- Trial court did not err in refusing to order father to pay a portion of the past and future expense related to mental health therapy for the children.
- Child support credits are appropriate when findings of fact show "an injustice would exist if credit were not given."

Kaiser v. Kaiser, _ N.C. App. _ , _ SE2d _ (May 15, 2018). In setting child support, the trial court calculated mother's current income to include capital gains she received over a three-year period before the child support hearing and to include dividend income she received from investment accounts during the two years preceding the child support hearing. In addition, the trial court included as income to mother amounts paid by her fiancé to her to cover the fiance's share of the rent and utilities for the house in which they resided.

On appeal, mother argued that the trial court order did not contain sufficient findings of fact to support the trial court's determination of her actual present income and the court of appeals agreed. The appellate court held that while support orders must be based on actual present income at the time of the hearing, it is appropriate for the court to use evidence of past income to determine present income if the court can make findings to show the past income is likely to continue or otherwise is an accurate reflection of present income. In this case, the court of appeals held that while mother's capital gains and dividends could be income, the findings of fact failed to show she was likely to continue to receive both in the future. The court noted that "income from past capital gains generally is a poor indicator of current, regular income" because "asset prices are volatile" and the income is "highly variable." If the court relies on capital gains, the order must include findings to show:

> 1) that the party still owns additional capital assets of like kind sufficient to continue generating similar gains, and
>
> 2) that the party reasonably can be expected to continue realizing similar gains given past behavior and current market conditions."

Similarly, while regular dividends are income, the trial court order must include finding to show dividends received in the past are reflective of present income. In this case, at least one account considered by the court as a source of dividend income had been sold by mother before the child support hearing, meaning that account was not generating present income.

Regarding the payments from mother's fiancé, the court of appeals acknowledged that "maintenance" from third parties is income to a parent if findings of fact establish that the payments are maintenance. Maintenance means "financial support that one provides to someone else for that other person's benefit." In this case, the trial court findings indicated that the payments were made to reimburse mother for the fiance's share of the rent and utilities. Payments for the benefit of the fiancé rather than mother are not maintenance of mother and should not be counted as income to her.

Wife also argued on appeal that the trial court erred in failing to include in father's income amounts he received from his parents. The court of appeals rejected her argument, concluding

that the findings of fact by the trial court established the payment from the parents was a loan to father that he agreed to repay. Loans are not income.

Mother also argued that the trial court erred in refusing to order father to pay a portion of past and future expenses incurred for mental health therapy for the children. Mother alleged the therapy was necessary to repair father's relationship with the children, but the trial court concluded the need for therapy was the result of mother's conduct. The court of appeals held that the trial court's findings supported the decision not to order father to pay.

Finally, the court of appeals vacated the trial court's decision to allow father credit on his child support obligation for amounts he paid for mother's car payments before the child support hearing. According to the court of appeals,

> "There are no hard and fast rules when dealing with the issue of child support credits. Instead, the controlling principle is that credit is appropriate only when an injustice would exist if credit were not given."

In this case, the court of appeals ruled that the trial court "would have been well within its sound discretion to credit these payments toward [father's] child support obligation had it made sufficient findings." The appellate court remanded the issue to the trial court for additional findings to support the credit.

Attorney fees; interlocutory appeals; evidentiary support for findings of fact to support fee award

- Interlocutory appeal of an attorney fee award in a family law case is not authorized by GS 50-19.1.
- However, GS 50-19.1 does not limit interlocutory appeals in family law cases to exclude appeals otherwise appropriate even if the appeal is not explicitly authorized by that statute.
- An interlocutory appeal of an order that affects a substantial right is appropriate.
- Where attorney fee order finally resolved all pending issues in the claims regarding child custody, child support and alimony and was an order for plaintiff to pay a substantial amount of money immediately, the order affected a substantial right and could be appealed immediately even though the ED claim between the parties remained pending in the trial court.
- Trial court did not abuse its discretion when it entered an attorney fee award without considering testimony or other new evidence at the attorney fee hearing; trial court has discretion to rely on the court record, prior orders entered in the case, the attorney fee affidavits submitted by the parties and argument of counsel.

Beasley v. Beasley, _ N.C. App. _, _ S.E.2d _ (June 5, 2018). The trial court disposed of the parties' claims for child support, child custody and alimony, and then entered an order of attorney fees. Plaintiff appealed the attorney fee order and defendant argued that the appeal was an inappropriate interlocutory appeal because the ED claim between the parties remained pending in the trial court. The court of appeals first determined that GS 50-19.1, which allows interlocutory appeals in certain listed family law cases, does not authorize interlocutory appeals

of attorney fee awards because attorney fee awards are not specifically listed in that statute. However, the court of appeals held that GS 50-19.1 does not preclude the interlocutory appeal of orders not covered by that statute if the order affects a substantial right. The court of appeals then concluded because the attorney fee award in this case finally disposed of all claims upon which the fee award was based and ordered plaintiff to pay a significant sum of money immediately, it was an order that affected a substantial right. [there is a dissenting opinion on this issue]

On the substantive appeal, plaintiff argued that the trial court erred by entering the attorney fee award without evidence in the record to support the findings of fact made to support the award of fees. The court of appeals disagreed, holding that the trial court acted within its discretion when it based the findings on the "voluminous" court record, the child support, custody and alimony orders entered in the case, the attorney fee affidavits submitted by the parties and argument of counsel at the attorney fee hearing.

Custody
Cases Decided Between October 3, 2017 and June 5, 2018

Third party custody; standard of proof; time limits

- Trial court conclusion that a parent has waived her constitutional right to custody must be supported by clear, cogent and convincing evidence and order must make it clear that this standard was used.
- Trial court erred in failing to consider facts and circumstances prior to the child's birth in determining whether defendant mother waived her constitutional right to custody.
- Where defendant clearly intended to create a family unit and to co-parent the child with plaintiff at the time the child was conceived and born, the trial court erred in concluding that defendant did not waive her constitutional rights because she changed her intention after the birth of the child when the relationship of the parties ended.
- Where plaintiff failed to request additional time during the hearing, plaintiff could not argue on appeal that the trial court erred by limiting the custody hearing to one hour.

Moriggia v. Castelo, _ N.C. App. _, 805 S.E.2d 378 (October 17, 2017). The parties are a lesbian couple who did not marry but lived together in a committed relationship for several years. During their time together, they decided to have a child and decided that defendant would be the birth mother. Following the birth of the child, the parties separated. Plaintiff filed an action for custody but the trial court dismissed the complaint after concluding plaintiff failed to prove defendant waived her constitutional right to exclusive custody of the child. While the trial court concluded defendant intended that she and plaintiff would co-parent the child during the conception and birth of the child, the court found that plaintiff changed her mind following the birth of the child. The trial court concluded that only actions of the parent following the birth of the child could be considered when determining whether she intended to permanently cede a portion of her exclusive parenting rights to plaintiff on a permanent basis.

The court of appeals disagreed and remanded the case to the trial court. First, the court of appeals addressed the fact that the trial court order did not indicate that the trial court used the clear, cogent and convincing standard of proof in determining defendant mother did not waive her constitutional right to custody. A finding that a parent has waived her constitutional rights must be based on clear, cogent and convincing evidence and a trial court's order must state that this higher standard was used.

The court of appeals then held that the trial court was required to consider evidence of plaintiff's intent both before and after the birth of the child and held that the evidence in this case clearly showed defendant intended before and at the time the child was conceived and born that she and plaintiff would co-parent the child. The fact that she changed her mind when the relationship of the parties deteriorated and ended after the birth of the child did not support the trial court's conclusion that the birth mother did not waive her constitutional rights by intentionally creating a family unit with plaintiff that she had intended would be permanent. Once the relationship is created, a parent cannot simply change her mind and end it because her relationship with the other parent ends.

The court also rejected plaintiff's argument on appeal that the trial court erred in limiting the custody hearing to one hour in compliance with the local rules of the district. The court of

appeals held that plaintiff waived any objection to the time limit by failing to request more time at the time of the trial court hearing.

Modification; jurisdiction; changed circumstances

- NC had subject matter jurisdiction to modify Michigan custody order.
- Father could challenge subject matter jurisdiction on appeal even though he was the party who requested modification by the NC court.
- Trial court's earlier dismissal of a motion to enforce the Michigan order did not preclude the trial court from exercising jurisdiction to modify on a later date.
- Mother's filing of a petition to register the Michigan order in NC was not the "commencement of a child-custody proceeding" for the purpose of determining whether NC was the home state of the children when the court was later asked to modify the Michigan order. The petition requesting registration was not a "child-custody proceeding" as that term is defined in the UCCJEA, and the determination of whether NC was the home state of the children properly was made as of the time the motion to modify was filed.
- Trial court's conclusion there had been a substantial change in circumstances affecting the minor children was supported by findings of fact that the parents enrolled the children in different schools and were unable to "work together for the benefit of the children."

Booker v. Strege, _ N.C. App. _ , 807 S.E.2d 597 (November 7, 2017). Original custody order was entered in Michigan. Thereafter, mother and children moved to NC and father moved to South Dakota. After children had lived in NC for about 3 months, mother filed a petition to register and father filed a motion to enforce the Michigan order. The trial court dismissed the request to enforce after concluding there was no controversy between the parties. When the children had lived in NC for approximately 18 months, father filed a motion to modify the Michigan order in NC. The trial court granted the motion to modify but left primary psychical custody of the children with mother. Father appealed, arguing the NC court lacked subject matter jurisdiction to modify the Michigan order.

First, the court of appeals noted that father had the right to argue lack of subject matter jurisdiction on appeal even though he was the party originally requesting that the NC court modify the Michigan order. Because objection to subject matter jurisdiction can be raised at any time and cannot be conferred upon a court by the parties by consent or by waiver, father did not waive his right to raise the issue on appeal by taking a contrary position in the trial court.

Regarding the modification, father first argued that because the trial court had denied his earlier motion to enforce the Michigan order after determining the NC court had no jurisdiction because the matter was not "ripe" for court action, the trial court erred in later determining it did have subject matter jurisdiction to modify. The court of appeals disagreed and held that the court's initial ruling on jurisdiction to enforce was unrelated to the later issue raised by the motion to modify.

Father then argued that the trial court erred in concluding NC was the home state of the children at the time father asked that the Michigan order be modified. He argued that because home state jurisdiction must be determined as of the time of the "commencement of a child-custody proceeding", the date mother filed the petition to register the Michigan order should have been the date the trial court used to determine whether NC was the home state. At the time mother filed that petition, the children had resided in NC for only 3 months. The court of appeals rejected this

argument, pointing to the definition of a "child-custody proceeding" found in GS 50A-102(4) which states that it is

> "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue…..The term does not include …. a proceeding involving … enforcement under Part 3 of this Article."

According to the court of appeals, this definition indicates that a request to register made pursuant to Part 3 of the UCCJEA is not a "commencement of a child-custody proceeding" for the purpose of determining the home state of the children. Instead, in this case, "the first pleading regarding custody and visitation issues" was the father's motion to modify, filed after the children had resided in NC for more than 11 months.

Finally, the court of appeals rejected father's argument that the trial court erred in concluding there had been a substantial change in circumstances. The Michigan order provided that the parents would share joint legal custody of the children and in that order the parents agreed the children would be enrolled in school in NC. However, when mother enrolled the children in NC, father also enrolled them in a school in South Dakota. The trial court concluded that "it [was] no longer appropriate for the two parents to share the decision of where the children shall be enrolled" and found that father's unilateral decision to enroll the children in the South Dakota school established that the parties were no longer able to "work together for the benefit of their children." The court of appeals held that these findings established a substantial change. The court also held that the trial court appropriately supported the conclusion that the change impacted the welfare of the children by finding that the "parents' fighting with one another over important decisions all parents must make for their children" negatively impacted the children or would negatively impact them in the future.

Attorney fees; comparing estates

- Attorney fees issue was remanded to trial court for reconsideration where record indicated trial court was under the mistaken impression that it did not have the legal authority to compare the financial estates of the parties when determining whether the party seeking fees has insufficient means to defray the cost of litigation.
- A trial court is not required to consider the financial estate of the party asked to pay attorney fees, but the trial court is allowed to compare the financial circumstances of the parties if the trial court deems it appropriate to do so.

Schneider v. Schneider, _ N.C. App. _, 807 S.E.2d 165 (November 7, 2017). After concluding what the court of appeals refers to as "a long and contentious" custody case, the trial court ordered mother to pay father $30,000 in attorney fees. Mother appealed.

GS 50-13.6 allows the award of attorney fees to a party when the trial court concludes that the party is acting in good faith and has insufficient means to defray the expense of the litigation. Mother first argued on appeal that the trial court did not make sufficient findings of fact regarding fathers' ability to pay his legal expenses and that the findings of fact made by the court were not supported the evidence. The court of appeals rejected mother's contentions, concluding that the trial courts' findings were sufficiently detailed and that sufficient evidence was introduced during the custody and child support hearing to support all findings made by the trial court in the attorney

fee order. Because the parties did not object to the trial court using evidence from the custody and support trials rather than taking additional evidence at the hearing on attorney fees, mother could not complain on appeal.

However, the court of appeals did agree with mother that the trial court was incorrect in its apparent impression that the law does not allow the court to consider the mother's financial situation in determining whether an award of fees to father was appropriate. Therefore, the court of appeals remanded the matter to the trial court for reconsideration. The court of appeals pointed to the supreme court opinion in Van Every v. McGuire, 348 NC 58 (1998), wherein the court held that a trial court is not required to compare the estates of the parties in determining whether attorney fees should be awarded, but the trial court has the discretion to do so. Because the trial court apparently misunderstood the law, the matter was remanded for reconsideration.

Custody evaluation

- Trial court was not required to accept the findings made in the report of the court appointed custody evaluation expert.
- Trial court findings of fact supported the conclusion that the custody order entered by the trial court was in the best interest of the children.

Berry v. Berry, _ N.C. App. _, 809 S.E.2d 908 (January 16, 2018). Trial court appointed an expert to conduct a child custody evaluation in case involving allegations that father sexually abused the children. Custody evaluation concluded that it was unlikely father abused the children and that mother was interfering with father's relationship with the children and unable to co-parent. The expert recommended that dad have primary custody but trial court awarded joint custody with mom having primary physical custody.

On appeal, dad argued that the trial court erred in granting mother primary physical custody and that certain findings of fact made by the court were not supported by the evidence. In addition, father argued the trial court erred by not adopting the findings of fact and following the recommendation of the court appointed expert. The court of appeals rejected dad's arguments, concluding that the trial court's numerous and detailed findings of fact were supported by the evidence and were sufficient to support the triall court's conclusions and ultimate custody order. The court of appeals held that a trial court is free to give as much weight to an expert's report and opinion as the trial court deems appropropriate. The findings in this case showed that the trial court thoroughly considered the report from the custody evaluation but ultimately came to a different conclusion as to the best interest of the children. The court of appeals explained that the trial court "merely exercised its appropriate role as the ultimate fact finder in weighing the evidence presented to it."

Time for taking appeal; temporary vs. permanent order

- If an order is not served on a party within 3 days of entry, a party has 30 days following service of the order or from receiving actual notice of the order to file a notice of appeal.
- When the record does not reflect that an order was served upon the appellant, the burden is on the appellee to show the appeal was not filed within 30 days of the appellant receiving actual notice of the entry of the order.
- Custody order labeled a temporary order by the trial court was a final order where it did not indicate that it was entered without prejudice, did not set a date for subsequent hearing and

stated that the custody arrangement provided in the order would remain in effect until further orders of this court.

Brown v. Swarn, _ N.C. App. _, 810 S.E.2d 237 (January 16, 2018). Father appealed a custody order that the trial court labeled a temporary order. The notice of appeal was filed 7 months following the entry of the order. Mom moved to dismiss the appeal, arguing that the appeal was not timely and that the order was an interlocutory order not subject to immediate appeal.

The court of appeals held that the appeal was timely because there was no indication in the record that the custody order had been served upon the father and mother failed to show father waited more than 30 days after receiving actual notice of the custody order before filing an appeal. According to the court of appeals, Rule 3 of the Rules of Appellate Procedure gives a party 30 days to file a notice of appeal after entry of an order if the order is served on the appealing party within 3 days following entry. If the order is not served within 3 days, a party has 30 days from service of the order or receipt of actual notice of the entry of the order to file the notice of appeal. In this case, there was no record in the file that father ever was served with the custody order. Therefore, father's 30 days to file began to run when he received actual notice of the order. The court of appeals held that the burden is on the appellee to show the appellant waited too long after receiving actual notice rather than on the appellant to show he did not. Because mother did not show father received actual notice more than 30 days before he filed his appeal, the court concluded the appeal was timely.

The court of appeals also rejected mother's argument that the appeal should be dismissed as an inappropriate interlocutory appeal because the order was a temporary custody order. The court of appeals concluded that the order was a permanent, final resolution of the custody issue even though it was labeled a temporary order. The court of appeals held it was a final order because it did not state that it was entered without prejudice to the parties, did not set a date for a subsequent hearing on custody, and resolved all pending issues by stating that the custody arrangement provided in the order would remain in effect "until further orders of this court."

Change of venue; time of filing request; interlocutory appeal

- A party must request a change of venue based on improper venue before or in an Answer or before the time for answering has expired.
- A grant or denial of a request to change venue based on improper venue is an interlocutory order that is immediately appealable.
- A party must request a change of venue based on convenience of the witnesses or the interest of justice after an Answer has been filed. The court should make a discretionary ruling on venue only after the party responds to the allegations in the Complaint and the court has a basis to determine where the contested issues should be tried.
- A grant or denial of a request to change venue based on the convenience of witnesses or the interest of justice is a discretionary interlocutory ruling not subject to immediate appeal.

Stokes v. Stokes, _ N.C. App. _, 811 S.E.2d 693 (February 20, 2018). Mother filed action for ED, custody and child support in Union County. In response, father filed a motion for emergency custody, a motion to change improper venue, and motion to change venue to Pitt County in the interest of justice and for the convenience of witnesses. The trial court concluded both Union and Pitt Counties were proper venue but ordered the matter transferred to Pitt County for the

convenience of the witnesses. Mother appealed, arguing father did not file the request for change of venue in a timely manner and arguing that the trial court abused its discretion in transferring venue based on the convenience of the parties.

The court of appeals held that father raised the venue issue at an appropriate time but dismissed mother's appeal of the court's decision to change venue as an inappropriate interlocutory appeal.

Mother argued that the trial court should have denied father's motion to change venue because he did not file an Answer before requesting the change of venue. The court of appeals acknowledged that a party must request a discretionary decision to change venue after the filing of a responsive pleading because the trial court cannot know what issues need to be tried before the allegations in the complaint have been *traversed*. However, the court of appeals held that the motions filed by father in this case in response to mother's complaint sufficiently responded to mother's allegations so the court was able to determine where the matter needed to be tried. The court of appeals also held that a motion for a discretionary change of venue can be made at the same time an Answer is filed and may be made in the same written document.

The court of appeals declined to address mother's contention that the trial court abused its discretion in changing venue based on the convenience of witnesses, concluding that wife's appeal of the issue was an inappropriate interlocutory appeal. While a trial court decision on venue based on a determination of whether venue was proper is subject to immediate appeal, a party cannot challenge a discretionary ruling by the trial court until the trial court enters a final judgment in the case.

Temporary v permanent order; modification

- Even though trial court designated custody order as a temporary order, it was a final order.
- Trial court findings of fact established there had been a substantial change in circumstances affecting the welfare of the minor child since the entry of the last custody order.

Summerville v. Summerville, N.C. App. _ , _ S.E.2d _ (April 17, 2018). The parties are the parents of an autistic child. The mother was supportive of the child's therapist but the father repeatedly questioned the therapeutic approach adopted by the therapist and repeatedly refused to follow the recommendations of the therapist despite orders by the court to do so.

Both parents filed motions to modify custody. The trial court concluded that the last order entered was a permanent order even though the trial court called it a temporary order and the court of appeals agreed. The order did not state that it was entered without prejudice, it did not set a reconvening date, and it determined all issues between the parties regarding custody at the time.

The trial court then determined there had been a substantial change affecting the welfare of the child since the entry of that order and modified custody. On appeal, father argued the trial court's findings were insufficient to establish a substantial change but the court of appeals disagreed, concluding the findings were sufficient to support the trial court's conclusion.

The trial court found that:

- the therapist stopped treating the child because of father's refusal to cooperate with the treatment plan and as a result, the child lost an important therapeutic relationship,
- there had been two physical altercations between the child and the father that caused the child significant psychological distress, and
- father refused to follow the child's IEP which resulted in the child being confused and upset by the conflicting messages he received from the school and his father.

The court of appeals held that these findings clearly established that father's actions since the last custody order had a significant impact on the child and supported the change in custody.

Modification; temporary order

- Custody order was a temporary order where it was entered without prejudice even though it stayed in effect for over two years.
- Trial court does not need to find a substantial change in circumstances before modifying a temporary order.

Marsh v. Marsh, N.C. App. _ , _ S.E.2d _ (May 15, 2018). Parents entered into a consent custody order in 2009. In 2014, father filed a motion to modify, alleging a substantial change in circumstances. In September 2014, the trial court entered a custody order designated as a temporary order. In December 1016, father's motion to modify came on for hearing and mother argued that the temporary order had become permanent and could not be modified by the trial court without a finding of a substantial change in circumstances since the entry of that order. The trial court disagreed and entered a new custody order based on the best interest of the child after concluding there had been a substantial change since entry of the original 2009 consent order.

The court of appeals affirmed the trial court after concluding that the temporary order was a temporary order because it was entered without prejudice to either party. Even though the order did not explicitly state that it was entered without prejudice, the court of appeals determined that "it is clear from the plain language of the order that it was entered without the loss of rights, or otherwise prejudicial to the legal rights of either party." To support this conclusion, the court of appeals pointed to several places in the order where the custodial arrangement was referred to as 'temporary.'

The court of appeals concluded that because the order was temporary when entered, the trial court was not required to find a substantial change in circumstances before modifying the temporary order. The court of appeals does not address the separate issue of whether the temporary order converted to a permanent order by remaining in effect for so long, in accordance with the decision in LaValley v. laValley, 151 NC App 290 (2002)(order that is clearly temporary when entered will convert to a final order if neither party requests a hearing on the underlying custody matter within a reasonable period of time after entry of the temporary order). However, the court of appeals does state that "[l]itigation continued between the parties after the entry of the temporary order regarding child custody, indicating the intent of the parties and the trial court regarding the status of the case as on-going." Other appellate cases have held that a temporary order will not convert to a permanent custody order if the temporary order stays in effect for an extended period of time because the parties are actively litigating custody.

Attorney fees; interlocutory appeals; evidentiary support for findings of fact to support fee award

- Interlocutory appeal of an attorney fee award in a family law case is not authorized by GS 50-19.1.
- However, GS 50-19.1 does not limit interlocutory appeals in family law cases to exclude appeals otherwise appropriate even if the appeal is not explicitly authorized by that statute.
- An interlocutory appeal of an order that affects a substantial right is appropriate.
- Where attorney fee order finally resolved all pending issues in the claims regarding child custody, child support and alimony and was an order for plaintiff to pay a substantial amount of money immediately, the order affected a substantial right and could be appealed immediately even though the ED claim between the parties remained pending in the trial court.
- Trial court did not abuse its discretion when it entered an attorney fee award without considering testimony or other new evidence at the attorney fee hearing; trial court has discretion to rely on the court record, prior orders entered in the case, the attorney fee affidavits submitted by the parties and argument of counsel.

Beasley v. Beasley, _ N.C. App. _, _ S.E.2d _ (June 5, 2018). The trial court disposed of the parties' claims for child support, child custody and alimony, and then entered an order of attorney fees. Plaintiff appealed the attorney fee order and defendant argued that the appeal was an inappropriate interlocutory appeal because the ED claim between the parties remained pending in the trial court. The court of appeals first determined that GS 50-19.1, which allows interlocutory appeals in certain listed family law cases, does not authorize interlocutory appeals of attorney fee awards because attorney fee awards are not specifically listed in that statute. However, the court of appeals held that GS 50-19.1 does not preclude the interlocutory appeal of orders not covered by that statute if the order affects a substantial right. The court of appeals then concluded because the attorney fee award in this case finally disposed of all claims upon which the fee award was based and ordered plaintiff to pay a significant sum of money immediately, it was an order that affected a substantial right. [there is a dissenting opinion on this issue]

On the substantive appeal, plaintiff argued that the trial court erred by entering the attorney fee award without evidence in the record to support the findings of fact made to support the award of fees. The court of appeals disagreed, holding that the trial court acted within its discretion when it based the findings on the "voluminous" court record, the child support, custody and alimony orders entered in the case, the attorney fee affidavits submitted by the parties and argument of counsel at the attorney fee hearing.

PSS and Alimony
Cases Decided Between October 3, 2017 and June 5, 2018

Personal jurisdiction; minimum contacts

- In the "unusual situation" where married couple moved frequently throughout the marriage due to husband's work and never established a residence in any other state or country, defendant husband had sufficient minimum contacts with NC to support the exercise of personal jurisdiction over him for child support, alimony and ED despite the fact that husband never resided in NC.

Bradley v. Bradley, _ N.C. App. _, 806 S.E.2d 58 (2017). Wife was born and raised in NC but husband was from Virginia. The couple met in Virginia, married in NC, and lived during their four-year marriage in Australia, London, New Jersey and New York. Defendant never resided in NC but visited the state on a number of occasions during the marriage. The parties separated while living in London and after staying for a short period of time with husband's parents in Virginia, wife and the child of the parties returned to NC. Wife filed an action for custody, child support, alimony and ED in NC. Husband filed a motion to dismiss based on a lack of personal jurisdiction. The trial court denied his motion after concluding he had sufficient contacts under the circumstances to support the exercise of jurisdiction.

The court of appeals affirmed. Recognizing that defendant had very little contact with NC, the court held that under the unusual circumstances where the married couple had not established a place of domicile during the marriage due to frequent moves required by husband's work assignments, husband's "actions directed toward North Carolina" along with his visits to the state were sufficient to make the exercise of jurisdiction in this state consistent with Due Process. His actions directed toward NC included:

- The parties married in NC;
- Husband directed that certain mail be delivered to wife's parents' house while the couple lived in foreign countries;
- Husband directed that his father-in-law secure a storage unit in NC for marital and separate property of the parties to be stored;
- Husband sent marital and separate property of the parties to that storage unit and paid to maintain the storage unit; and
- Husband "orchestrated events" which led to wife and their child living in the State of NC after the parties separated.

Contract for support; specific performance; request to reopen evidence

In considering an order of specific performance, the trial court is not limited to determining ability to pay by determining the party's income at the time of the award. Rather, the court can consider all resources available to the paying party and any expenses of the paying party to determine the extent to which the party is able to comply with the contract.

Order of specific performance for less than amount provided by a contract does not reduce the contractual obligation of the paying party. Rather, it simply limits the amount that the court can enforce by contempt. The trial court has no authority to modify a contract.

Trial court did not abuse its discretion by refusing to reopen evidence to consider change of employment status of father after the conclusion of the hearing.

Lasecki v. Lasecki, _ N.C. App. _, 809 S.E.2d 296 (December 19, 2017). [for child support portions of the opinion, see child support section of this update] Parties entered into a Separation Agreement providing husband would pay child support and $3,600 per month in alimony to wife. When father filed an action seeking the establishment of guideline child support after he lost his job and was unable to pay amounts agreed in the contract, wife counterclaimed for breach of all of the support terms of the contract. The trial court entered a money judgment for amounts of alimony accrued before the trial court order and entered an order of specific performance for future payments. However, after determining husband did not have the ability to pay the entire $3,600 per month, the trial court ordered specific performance in the amount of $2,850 per month.

On appeal, father argued that there was insufficient evidence to support the conclusion that he had the ability to pay that amount. He first argued that the trial court erred in considering evidence other than his actual present income at the time of the hearing, arguing that the court must base the award on the party's actual income at the time the order of specific performance is entered. The court of appeals rejected this contention and held that while an initial award of alimony is based on a party's income at the time the award is made, the trial court can consider any evidence indicating a party's ability to comply with a contract obligation. In this case, the court of appeals held that the trial court did not err in refusing to consider husband's obligation to pay wife's attorney fees when determining his present expenses and did not err in assuming that husband's new wife shared all of his current living expenses. The court of appeals concluded that the trial court finding that husband's income and assets exceeded his reasonable needs by $2,853 was sufficient to support the order of specific performance.

Dependency; determination of income

- Trial court determination that plaintiff was a dependent spouse was not supported by sufficient findings of fact where alimony order did not contain specific findings regarding her expenses. Reference in order to the incorporation of all previous orders in the case was not sufficient.
- Trial court did not abuse its discretion by including child's social security payments in the calculation of defendant's income.
- Trial court did not impute income to defendant when it included as income to him amounts he could be receiving from investment accounts but the receipt of which he was deferring. These amounts were actual income.
- There was no obvious error in the trial court concluding that income of a party for alimony was different than the income the court found for the party in the child support proceeding.

Kabasan v. Kabasan, _ N.C. App. _, 810 S.E.2d 691 (2018). Trial court awarded alimony to plaintiff wife and defendant husband appealed.

Dependency. Court of appeals agreed with husband's contention that the alimony order contained insufficient findings of fact to support the trial court's conclusion that wife was a dependent spouse where the order contained no findings regarding wife's expenses. The trial court statement that it took "Judicial Notice" of and "incorporated by reference" all previous orders entered in the case was not sufficiently specific to show trial court property considered her expenses in determining dependency.

Inclusion of Child's Social Security as Income to Defendant. In determining husband's income to set alimony, the trial court included social security payments received by the child on his behalf. The trial court also considered husband's child support obligation as one of his expenses. On appeal, husband argued the trial court erred in including the social security payments as income to defendant but the court of appeals disagreed. The court held that while it is clear that these payments are included in income for child support, it is "less clear" that the same rule applies to alimony. However, the court concluded that husband failed to show any prejudice resulting to him due to the court's inclusion of the payments in his income since the trial court also considered the child support he paid as an expense.

Deferred income from investments as income. The trial court order concluded that husband was acting in bad faith by deferring receipt of certain investment income and included the deferred amounts in the calculation of his income. On appeal, husband argued that the trial court findings of fact were insufficient to support the conclusion he was acting in bad faith. The court of appeals did not address his contention after concluding that the trial court did not impute income when it included amounts he could be receiving from the investments. Instead, the court of appeals held that amounts of income a party is entitled to receive from investment is actual present income even if the party defers receipt of that income. Because the trial court did not actually impute, there was no reason to review the trial court's findings regarding bad faith.

Income different from the income determined in child support matter. The court of appeals rejected defendant's argument that the trial court erred in determining his actual present income in the alimony case because the amount was different from the amount the court found in the child support case. The court of appeals held simply that defendant presented no legal authority to support a conclusion that the two findings of fact needed to be the same and stated that defendant's argument was "essentially asking us to reweigh the evidence, which we will not do."

Attorney fees; interlocutory appeals; evidentiary support for findings of fact to support fee award

- Interlocutory appeal of an attorney fee award in a family law case is not authorized by GS 50-19.1.
- However, GS 50-19.1 does not limit interlocutory appeals in family law cases to exclude appeals otherwise appropriate even if the appeal is not explicitly authorized by that statute.
- An interlocutory appeal of an order that affects a substantial right is appropriate.
- Where attorney fee order finally resolved all pending issues in the claims regarding child custody, child support and alimony and was an order for plaintiff to pay a substantial amount of money immediately, the order affected a substantial right and could be appealed

immediately even though the ED claim between the parties remained pending in the trial court.

- Trial court did not abuse its discretion when it entered an attorney fee award without considering testimony or other new evidence at the attorney fee hearing; trial court has discretion to rely on the court record, prior orders entered in the case, the attorney fee affidavits submitted by the parties and argument of counsel.

Beasley v. Beasley, _ N.C. App. _, _ S.E.2d _ (June 5, 2018). The trial court disposed of the parties' claims for child support, child custody and alimony, and then entered an order of attorney fees. Plaintiff appealed the attorney fee order and defendant argued that the appeal was an inappropriate interlocutory appeal because the ED claim between the parties remained pending in the trial court. The court of appeals first determined that GS 50-19.1, which allows interlocutory appeals in certain listed family law cases, does not authorize interlocutory appeals of attorney fee awards because attorney fee awards are not specifically listed in that statute. However, the court of appeals held that GS 50-19.1 does not preclude the interlocutory appeal of orders not covered by that statute if the order affects a substantial right. The court of appeals then concluded because the attorney fee award in this case finally disposed of all claims upon which the fee award was based and ordered plaintiff to pay a significant sum of money immediately, it was an order that affected a substantial right. [there is a dissenting opinion on this issue]

On the substantive appeal, plaintiff argued that the trial court erred by entering the attorney fee award without evidence in the record to support the findings of fact made to support the award of fees. The court of appeals disagreed, holding that the trial court acted within its discretion when it based the findings on the "voluminous" court record, the child support, custody and alimony orders entered in the case, the attorney fee affidavits submitted by the parties and argument of counsel at the attorney fee hearing.

Equitable Distribution
Cases Decided Between October 3, 2017 and June 5, 2018

Personal jurisdiction; minimum contacts

- In the "unusual situation" where married couple moved frequently throughout the marriage due to husband's work and never established a residence in any other state or country, defendant husband had sufficient minimum contacts with NC to support the exercise of personal jurisdiction over him for child support, alimony and ED despite the fact that husband never resided in NC.

Bradley v. Bradley, _ N.C. App. _, 806 S.E.2d 58 (October 17, 2017). Wife was born and raised in NC but husband was from Virginia. The couple met in Virginia, married in NC, and lived during their four-year marriage in Australia, London, New Jersey and New York. Defendant never resided in NC but visited the state on a number of occasions during the marriage. The parties separated while living in London and after staying for a short period of time with husband's parents in Virginia, wife and the child of the parties returned to NC. Wife filed an action for custody, child support, alimony and ED in NC. Husband filed a motion to dismiss based on a lack of personal jurisdiction. The trial court denied his motion after concluding he had sufficient contacts under the circumstances to support the exercise of jurisdiction.

The court of appeals affirmed. Recognizing that defendant had very little contact with NC, the court held that under the unusual circumstances where the married couple had not established a place of domicile during the marriage due to frequent moves required by husband's work assignments, husband's "actions directed toward North Carolina" along with his visits to the state were sufficient to make the exercise of jurisdiction in this state consistent with Due Process. His actions directed toward NC included:

- The parties married in NC;
- Husband directed that certain mail be delivered to wife's parents' house while the couple lived in foreign countries;
- Husband directed that his father-in-law secure a storage unit in NC for marital and separate property of the parties to be stored;
- Husband sent marital and separate property of the parties to that storage unit and paid to maintain the storage unit; and
- Husband "orchestrated events" which led to wife and their child living in the State of NC after the parties separated

Distributive awards; avoiding fraudulent transfers; marital debt

- Trial court had the authority to order the sale of separate property to satisfy distributive award.
- Trial court had authority to void deed from wife to her son conveying marital property to him after the date of separation as a fraudulent transfer. However, trial court did not have authority to order son to repay the equity he acquired in the property.

- Evidence that funds received as loans from marital businesses were deposited into the marital checking account and used to support the "extravagant lifestyle" of the parties was sufficient to support the classification of the loans as marital debt.
- While the trial court failed to make a specific finding that an in-kind distribution of property would be impractical before ordering a distributive award, the trial court's order contained sufficient findings of fact to show that an in-kind distribution would have been impractical.

Crowell v. Crowell, _ N.C. App. _, 809 S.E.2d 325 (January 2, 2018). Plaintiff appealed trial court order of equitable distribution.

Sale of separate property. Plaintiff first argued that the trial court erred in ordering plaintiff to sell separate real property to pay a distributive award. Plaintiff argued that because the property ordered sold actually was titled in the name of an LLC of which plaintiff was the sole owner, the trial court had no authority to order the sale unless the LLC was joined as a party to the ED case. The court of appeals rejected the argument, holding that while the trial court cannot distribute property owned by a nonparty but determined to be marital property without joining the owner of the property, no similar restriction applies when the trial court is ordering the sale of separate property to satisfy a distributive award. [note: the trial court judgment made a finding of fact that the property was owned by plaintiff on the date of separation and was plaintiff's separate property]. The trial court clearly had the authority consider all of plaintiff's separate property as a source of payment of the distributive award.

Fraudulent gift/transfer of marital property. After the date of separation, wife transferred title to marital real property to her son without consideration and without telling husband. The trial court determined the transfer was a fraudulent gift/transfer to defraud creditors and voided the deed. In the ED judgment, the court ordered that wife sell the property and distribute the proceeds between the parties, or that the son pay $90,000 representing the amount of equity he gained as a result of the fraudulent transfer. Wife argued that the trial court erred in voiding the deed and in entering a money judgment against the son without making him a party to the ED case. The court of appeals held that the trial court does have the authority to avoid fraudulent transfers within the context of the ED trial but held that the court did not have the authority to enter a money judgment against the son. According to the court of appeals, ED is "not the proper means to hold a third party responsible for a debt owed." [dissent argues that son must be joined as a party before trial court can void a transfer made to him].

Marital debt. Plaintiff argued that the trial court erred in classifying various debts owed to companies owned solely by plaintiff as marital debt because she did not know about the debts when they were incurred. The trial court determined plaintiff's evidence that she did not know about the debts was not credible and determined that the debts were incurred when the parties borrowed money from the companies and deposited the loan proceeds into the marital checking account and used the funds to finance their "extravagant lifestyle". Evidence that the proceeds of each loan were deposited into the marital accounts and used to fund their lifestyle was sufficient to support the trial court's conclusion that the debts were incurred for the joint benefit of the parties.

Distributive award. The trial court ordered that plaintiff pay defendant a distributive award of $824,294. Plaintiff argued on appeal that the trial court erred by failing to state specifically in the ED judgment that the presumption in favor of an in-kind distribution had been rebutted by evidence that an in-kind division would be impractical. The court of appeals held that the numerous findings of fact made by the trial court regarding all distribution factors raised by the evidence established that an in-kind division was impractical, "especially those [findings] regarding the non-liquid character of the parties' assets." Because these findings were "sufficiently specific to allow appellate review," the trial court was not required to make a specific finding that the in-kind distribution was not practical.

Military disability pay

- Federal law does not prohibit a court from considering military disability pay as a source of payment of a distributive award.

Lesh v. Lesh, _ N.C. App. _, 809 S.E.2d 890 (January 16, 2018). The trial court ordered an unequal distribution of marital property and ordered husband to pay wife a distributive award of $31,590 payable in monthly installments of $877.22. The trial court identified husband's military disability pay as a source of payment for the award. Husband argued on appeal that because federal law exempts military disability pay from distribution by state courts in property division proceedings, the trial court erred in considering the disability pay as a source of income.

The court of appeals rejected husband's argument and held that while military disability is the separate property of the veteran and not subject to distribution by a state court, nothing in federal law prohibits state courts from considering the disability pay as income of the receiving spouse.

Blog post about this opinion: On the Civil Side, Jan. 17, 2018

Military Disability Pay: It's not marital property but it is income

In an opinion issued yesterday, the NC Court of Appeals reaffirmed that while military disability pay cannot be distributed by a court in equitable distribution, it is income that can be considered when the trial court is looking for a source of payment for a distributive award. Lesh v. Lesh, NC App (Jan. 16, 2018). In reaching this decision, the court rejected the argument that this rule was changed by the recent decision by the US Supreme Court in *Howell v. Howell*, 137 S. Ct. 1400 (2017), wherein the Court reiterated that federal law prohibits the distribution of military disability in equitable distribution.

Lesh and *Howell* present a good opportunity to review the law regarding military disability pay in domestic relations cases.

Military Disability Pay Cannot be Distributed in ED

The federal Uniformed Services Former Spouses' Protection Act authorizes states to treat veterans' "disposable retired pay" as property divisible upon divorce, 10 U. S. C. §1408, but the definition of disposable retired pay does not include disability benefits. Therefore, federal law

prohibits the distribution of military disability benefits in equitable distribution proceedings. *Mansell v. Mansell*, 490 US 581 (1989). Military disability pay is the separate property of the veteran. *Lesh*; *Hillard v. Hillard,* 223 N.C. App. 20 (2012); *Halstead v. Holstead*, 164 NC App 543 (2004); *Bishop v. Bishop*, 113 NC App 725 (1994).

Retirement Can Be Converted to Disability and There's Not Much A Trial Court Can Do About It

Unless a retired service member qualifies for concurrent pay pursuant to 10 U.S.C. § 1414(a)(1)(most retirees with at least 20 years qualifying service and a service-related disability of at least 50%), a service member cannot receive both disability pay and retirement pay. This means that many service members must waive retirement pay in order to receive disability pay. Many disabled service members decide to "convert" their retirement pay to disability pay when they become eligible to do so because disability pay is not taxed and cannot be distributed in divorce proceedings.

A service member can waive retirement for disability at any point in time after a service member becomes entitled to receive disability pay. If the conversion occurs before a court enters an order for equitable distribution, the court can consider the disability payments as a distributional factor but cannot give dollar-for-dollar "credit" in distribution to make up for any retirement pay lost due to conversion to disability. *Halstead v. Halstead,* 164 N.C. App. 543(2004).

A service member retains the right to convert retirement to disability even after a state court has awarded a portion of the member's retirement pay to the member's former spouse in an equitable distribution judgment. When this conversion occurs, the amount of retirement pay received by the former spouse of the service member generally is reduced. A trial court may not prohibit a service member from converting retirement pay to disability in the future. *Cunningham v. Cunningham,* 171 N.C. App. 550, 558 (2005).

However, North Carolina appellate courts as well as appellate courts in other states have held that federal law does not restrict the ability of a state court to enforce a judgment dividing military retirement pay entered before a service member converted the retirement pay to disability pay. Therefore, amendments to retirement distribution orders made by trial courts to "effectuate" the terms of the original court order have been upheld. In *White v. White,* 152 N.C. App. 588 (2002), the court of appeals held that the trial court had authority to hear wife's motion to amend a qualified domestic relations order (QDRO) to seek an increase in her share of husband's remaining retired pay to offset the amount of retirement waived by the serviceman. And, in *Hillard v. Hillard,* 223 N.C. App. 20, 24 (2012), the court of appeals affirmed the trial court's decision to amend the ED order after the service member waived retired pay to receive disability pay to require the service member to pay wife "the portion of his retirement required by the previous order." According to the court of appeals, this order did not impermissibly distribute disability pay, as the service member could fund payments from source of his choice.

The recent decision by the US Supreme Court in *Howell v. Howell* rejected this reasoning by state courts and effectively overruled both *White* and *Hillard*.

Howell v. Howell

An Arizona trial court awarded Sandra Howell 50% of John Howell's future Air Force retirement pay, which she began to receive when John retired the following year. About 13 years later, John elected to waive about $250 of his retirement pay per month in order to receive that amount in disability pay. This election resulted in a reduction in the value of Sandra's 50% share of his retirement pay. Sandra petitioned the Arizona court to enforce the original divorce decree and restore the value of her share of John's total retirement pay. The state court held that the original divorce decree gave Sandra a vested interest in the pre-waiver 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.

The Supreme Court reversed and held that a state court may not order a veteran to indemnify a divorced spouse for the reduction in the value of the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive disability benefits. The Court held that federal law completely prohibits states courts from treating waived military retirement pay as divisible property because the waived retirement becomes disability pay. The fact that the waiver occurred after entry of the division order and the state court was attempting to "indemnify" or "reimburse" Sandra for the "vested right" she received when the division order was entered did not change the basic nature of the trial court order. According to the Court, a state court cannot "vest [a right in a party] which [that court] lack(s) the authority to give."

The Court explained that since there is nothing a state court can do to prohibit the conversion or to compensate the non-military spouse after a conversion, the contingency of a conversion is something a state court should consider when valuing the retirement account in the property distribution proceeding. In addition, the court suggested that the loss to the non-military spouse resulting from a conversion may be the basis for a reconsideration of alimony.

But Disability Pay is Income

In *Lesh*, the trial court classified husband's military disability pay as separate property but considered the disability pay as a source of income available to husband to pay a distributive award. Husband argued on appeal that this judgment violated *Howell* because it effectively required him to "reimburse" or "indemnify" wife for the retirement she lost when he accepted the disability pay.

The court of appeals disagreed, pointing to another decision by the US Supreme Court. In *Rose v. Rose*, 481 US 619 (1987), the Court explained that the fact that disability pay must be classified as separate property does not mean that it is not income to the receiving party and held that a veteran's disability income could be considered as a source of income from which he could pay his child support obligation. According to the Court, there is nothing in federal law indicating "that a veteran's disability benefits are provided solely for that veteran's support." *See*

also Comstock v. Comstock, 240 NC 304 (2015)(U.S. Trust IRA was separate property due to federal law but was a liquid asset the court could consider as a source of payment of a distributive award); and *Halstead v. Halstead,* 164 N.C. App. 543(2004)(military disability pay is separate property that can be considered as a distribution factor in ED proceeding).

Expert witness; valuation of retirement accounts; valuation of divisible property; rebutting the marital property presumption; consideration of alimony in making division; marital property as income (double-dipping allegation)

- Trial court was not required to disqualify expert witness when her testimony upon cross-examination indicated she might not have applied a valuation methodology correctly. An expert's proper or improper application of a methodology goes to the weight assigned to the testimony rather than to the expert's competence as a witness.
- Trial court did not err in using the coverture fraction to classify and value several defined contribution retirement accounts.
- Trial court did not err in accepting plaintiff's opinion as to the value of a marital condominium on the date of distribution even though the opinion was based on a sale of a comparable condo that occurred six months before the date of trial.
- Marital gift presumption that arises when title to real property is titled as tenants by the entirety is rebutted by the greater weight of the evidence rather than by clear, cogent and convincing evidence.
- Trial court was not required to consider implications for defendant's alimony obligation to plaintiff when determining whether to award plaintiff a portion of defendant's retirement.
- Trial court order did not result in "double-dipping" where pension payments were classified as marital property in ED and counted as income to the receiving spouse to set PSS.

Kabasan v. Kabasan, _ N.C. App. _, 810 S.E.2d 691 (January 16, 2018). The trial court entered an order of equitable distribution and defendant husband appealed.

Expert Witness. Defendant first argued the trial court was required to disqualify wife's expert accountant *sua sponte* when cross-examination of the expert revealed the expert was not familiar with the law relating to the classification of the retirement accounts she was valuing. The court of appeals rejected this argument, holding that once a witness is qualified as an expert, questions about whether the expert used the correct law to support her opinion go to the weight assigned to the opinion rather than to her qualifications as an expert. Similarly, the court rejected defendant's argument that the expert's valuations of certain properties located in Brazil were incompetent based on the expert's application of the currency exchange rate in the valuation methodology. Again, the court of appeals held that even if there were errors in the expert's application of valuation methodologies, those errors would go to the weight assigned to the expert's opinion by the trial court rather than to the competence or qualification of the expert.

Retirement Accounts. Husband argued that the trial court erred when it used the coverture fraction contained in GS 50-20.1 to classify and value several defined contribution retirement accounts, including an annuity, an IRA and a Federal Thrift Savings Plan. Defendant argued that the holding in *Watkins v. Watkins*, 228 NC App 548 (2013), prohibits a trial court from using the

coverture fraction required by GS 50-20.1 to value an account that is not actually 'deferred compensation" as that term was defined in *Watkins*. In *Watkins*, the court held that if an account was 'vested' on the date of separation, meaning the owner had the right to immediately access the funds in the account, the account is not 'deferred compensation' and not subject to the restrictions on classification, valuation and distributions established by GS 50-20.1. The trial court in this case made a finding that the court was unable to determine from the evidence the extent to which the accounts at issue were not vested.

Defendant argued on appeal that because the trial court did not find the funds were 'deferred compensation' as defined by *Watkins*, the trial court erred by using the coverture fraction to classify and value the accounts. The court of appeals disagreed and held that while *Watkins* allows a trial court to use a tracing methodology to classify and value an account that is not "deferred compensation," *Watkins* does not *require* the court to use a tracing methodology and it does not prohibit a trial court from using the coverture fraction contained in GS 50-20.1 when the trial court determines it is appropriate to do so. According to the court of appeals, *Watkins* did not "announce some … mandatory practice restricting the discretion traditionally afforded a trial court."

<u>Value of Condominium</u> The court of appeals also rejected defendant's argument that the trial court erred in accepting plaintiff's opinion as to the date of distribution value of a marital condominium because her opinion was based on the price received for the sale of a comparable condominium that occurred six months before the date of trial. Defendant argued that because the trial court is required to determine the value of divisible property as of the date of distribution, the court cannot use of evidence of the value of the property six months prior to trial. The court of appeals held that the trial court properly supported the valuation with a finding of fact as to the date of trial value of the condo that was based on plaintiff's testimony as to her opinion of the value on that date. The fact that her opinion was based on a comparable sale that took place six months earlier goes to the weight of her opinion rather than to the competence of her opinion.

<u>Rebutting the marital property presumption.</u> The trial court concluded that real property located in Brazil was plaintiff's separate property because it was acquired before the marriage. The trial court rejected husband's argument that wife had made a gift of the property to the marriage when she recorded a certificate in Brazil indicating she had married defendant. The trial court held that the certificate was not the equivalent of a transfer of title to tenancy by the entirety but even if it was, the court concluded wife had rebutted the gift presumption by the greater weight of the evidence. On appeal, husband argued that case law requires that the presumption be rebutted by clear, cogent and convincing evidence. The court of appeals held that while the elevated burden was required by case law, the burden was changed when the General Assembly amended GS 50-20 to provide that the presumption is rebutted by the greater weight of the evidence.

<u>Distribution of retirement account.</u> At the time of separation, defendant received monthly pension payments from his Federal Employees Retirement plan, a plan the trial court classified as marital property. In the final distribution order, the trial court awarded the entire marital value of the pension to husband and the survivor annuity to plaintiff wife. On appeal, husband argued

that the trial court erred by failing to divide the pension "in-kind" by awarding wife a portion of the monthly pension benefit. He argued that the receipt of these payments would have had a favorable effect on his potential liability for alimony.

The court of appeals rejected his argument, pointing to GS 50-20(f) which states that the court must provide for an equitable distribution "without regard to alimony for either party or support of the children of both parties."

"Double-dipping" income in ED and alimony. The court of appeals also rejected defendant's contention that the trial court effectually inappropriately "double-dipped" when it classified pension payments received by defendant during separation as marital property and considered those payments as income to defendant when determining PSS. The court of appeals held that considering the payment in both actions was not an abuse of discretion.

Change of venue; time of filing request; interlocutory appeal

- A party must request a change of venue based on improper venue before or in an Answer or before the time for answering has expired.
- A grant or denial of a request to change venue based on improper venue is an interlocutory order that is immediately appealable.
- A party must request a change of venue based on convenience of the witnesses or the interest of justice after an Answer has been filed. The court should make a discretionary ruling on venue only after the party responds to the allegations in the Complaint and the court has a basis to determine where the contested issues should be tried.
- A grant or denial of a request to change venue based on the convenience of witnesses or the interest of justice is a discretionary interlocutory ruling not subject to immediate appeal.

Stokes v. Stokes, _ N.C. App. _, 811 S.E.2d 693 (February 20, 2018). Mother filed action for ED, custody and child support in Union County. In response, father filed a motion for emergency custody, a motion to change improper venue, and motion to change venue to Pitt County in the interest of justice and for the convenience of witnesses. The trial court concluded both Union and Pitt Counties were proper venue but ordered the matter transferred to Pitt County for the convenience of the witnesses. Mother appealed, arguing father did not file the request for change of venue in a timely manner and arguing that the trial court abused its discretion in transferring venue based on the convenience of the parties.

The court of appeals held that father raised the venue issue at an appropriate time but dismissed mother's appeal of the court's decision to change venue as an inappropriate interlocutory appeal.

Mother argued that the trial court should have denied father's motion to change venue because he did not file an Answer before requesting the change of venue. The court of appeals acknowledged that a party must request a discretionary decision to change venue after the filing of a responsive pleading because the trial court cannot know what issues need to be tried before the allegations in the complaint have been *traversed*. However, the court of appeals held that the

motions filed by father in this case in response to mother's complaint sufficiently responded to mother's allegations so the court was able to determine where the matter needed to be tried. The court of appeals also held that a motion for a discretionary change of venue can be made at the same time an Answer is filed and may be made in the same written document.

The court of appeals declined to address mother's contention that the trial court abused its discretion in changing venue based on the convenience of witnesses, concluding that wife's appeal of that issue was an inappropriate interlocutory appeal. While a trial court decision on venue based on a determination of whether venue was proper is subject to immediate appeal, a party cannot challenge a discretionary ruling by the trial court until the trial court enters a final judgment in the case.

Order following remand from court of appeals

- Trial court had authority to reconsider on remand whether equal division of marital estate was equitable even though the court of appeals affirmed the original equal division where remand instructions necessitated a change in classification of specific marital assets and liabilities and resulted in a change in the valuation of the total marital estate.
- Similarly, the trial court did not err in changing the terms of the required distributive award even though the original distributive award was affirmed on appeal.

Hill v. Hill, *unpublished opinion*, _ N.C. App. _, _ S.E.2d _ (May 15, 2018). ED order entered by the trial court concluded that an equal distribution was equitable and ordered plaintiff to pay a distributive award of $20,968. The court of appeals affirmed the decision that equal was equitable and the distributive award. However, the appellate court remanded the case with instructions that the trial court reconsider the classification and valuation of specific assets and debts. Following a hearing on remand, the trial court made changes to the original classification and valuation of the specific assets and liabilities as required by the mandate. After those changes, the trial court concluded that an equal division was not equitable and ordered defendant to pay a distributive award of $55,690.

On the subsequent appeal, defendant argued that the trial court exceeded the mandate from the appellate court by revisiting the distribution of the estate and the distributive award. The court of appeals disagreed, holding that the "remand instructions necessarily authorized the trial court to take these actions" because following the remand instructions resulted in a change in the valuation and distribution of the total marital estate. As the marital estate was significantly impacted by the new findings and conclusions resulting from the remand, the trial court had authority to make a distribution that was equitable under the new circumstances.

Filing ED claim; subject matter jurisdiction

- GS 50-21(a) provides that an ED claim can be filed only after the parties begin to live separate and apart.
- Trial court had no subject matter jurisdiction to enter ED judgment where both plaintiff's claim for ED and defendant's counterclaim for ED were filed before the parties separated.
- Court of appeals vacated ED judgment even though neither party objected to the trial court entering judgment because subject matter jurisdiction cannot be granted by consent of the parties or by the failure of the parties to object.

Standridge v. Stanbridge, _ N.C. App. _, _ S.E.2d _ (May 15, 2018). Plaintiff filed a claim for ED on April 15, 2015 and defendant counterclaimed for ED on June 15, 2015. The parties separated in September 2015. Defendant's counterclaim stated that the parties continued to reside together in the same house, but neither party requested dismissal of the action. The trial court tried the case and entered an ED judgment. Plaintiff appealed the judgment but did not raise the issue of subject matter jurisdiction. The court of appeals vacated the judgment on appeal because neither party filed a claim for ED after the date of separation. The trial court has no subject matter jurisdiction to enter an ED judgment on a claim filed before the parties begin to live separate and apart.

Spousal Contracts
Cases Decided Between October 3, 2017 and June 5, 2018

Civil contempt for failure to pay attorney fee following breach of contract action

- Trial court erred in holding defendant in contempt for failure to pay attorney fees ordered by the court where there was no evidence in the record to establish defendant had the ability to pay the fees at the time of the contempt proceeding.
- Defendant did not waive the right to object to the lack of evidence to support the trial court's conclusion that he had the ability to pay by not showing up for the contempt hearing.

Tigani v. Tigani, _ N.C. App. _ , 805 SE2d 546 (October 17, 2017). The trial court ordered Defendant to pay attorney fees incurred by plaintiff for an action to enforce the separation agreement between the parties but he did not pay. Plaintiff filed a motion requesting defendant be held in civil contempt. Defendant did not appear for the contempt hearing and the trial court concluded he had the ability to pay and held him in civil contempt. On appeal, defendant argued there was insufficient evidence in the record to establish that he had the present ability to pay the attorney fee at the time of the contempt hearing and the court of appeals agreed. The court noted that while the trial court reviewed bank account records of the defendant during the contempt hearing, the records were not introduced into evidence during the hearing and no witness testified. Therefore, there was no evidence in the record at all. The court held that a trial court may not hold a party in civil contempt without evidence in the record establishing the party's present ability to comply with the order. The court of appeals rejected plaintiff's argument that defendant waived any objection to the lack of evidence by not attending the contempt hearing. The court held that a defendant's failure to participate in the hearing does not relieve the court of the need to make findings of fact regarding defendant's present ability to comply with the court order and the purge being imposed before holding a party in contempt. Findings of fact must be supported by evidence in the record.

Unincorporated separation agreement; request for court-ordered support; attorney fees

- Trial court did not err in refusing to set guideline support at the request of father after trial court concluded amount of support provided in unincorporated separation agreement was reasonable.
- Trial court has no authority to "modify" an unincorporated separation agreement.
- A trial court can order child support different from that provided in an unincorporated agreement if the trial court concludes the amount in the agreement does not meet the reasonable needs of the children in light of the circumstances at the time of the hearing.
- The court does not have the authority to enter a child support order in an amount less than that provided in the agreement on the basis that the paying parent does not have the ability to pay the amount provided in the agreement; the court can impose a different child support obligation only if more support is necessary to meet the needs of the children.
- In an action for breach of an unincorporated agreement, the trial court must enter a money judgment for damages proven at trial. The trial court also has the ability to enter an order of

specific performance of future payments required by the agreement when the court concludes that the remedy at law (a money judgment) alone is an inadequate remedy.

- An order of specific performance cannot exceed a party's actual ability to pay.
- Where separation agreement provides for the payment of attorney fees by a party breaching the agreement, the trial court did not err in awarding additional fees to mother for fees incurred following a remand of the case from the court of appeals. Fact that court of appeals had affirmed fees awarded up to the point of appeal did not preclude trial court from awarding more fees for additional proceedings required by the remand.
- Trial court did not abuse its discretion by refusing to reopen evidence after the conclusion of the hearing to consider change of employment status of father.

Lasecki v. Lasecki, _ N.C. App. _, 809 S.E.2d 296 (2017). Parties entered into a separation agreement providing for father to pay child support and alimony. The agreement was not incorporated. Approximately one year later, father lost his job. He filed a complaint asking the court to set child support in accordance with the child support guidelines. Mother filed a counterclaim for breach of the contact and requested the remedy of specific performance. The trial court denied husband's request for guideline support after concluding that the amount of support provided in the agreement was reasonable. Concerning mother's counterclaim, the court determined father breached the contract by failing to pay child support and alimony as required by the agreement. The trial court entered a judgment for the arrears accrued until the time of judgment and ordered specific performance of future payments. However, after concluding father did not have the actual ability to pay the full amount due under the contract, the court ordered specific performance of the contract amount of child support but specific performance of a reduced amount of alimony. Father appealed.

<u>Guideline Support and Alimony</u> (see discussions in child support and alimony sections of this update)

<u>Breach of Contract, Money Judgment and Specific performance.</u> Father argued that the trial court erred in ordering specific performance of the amount of arrears that accrued before the entry of the court order without finding he had the ability to pay. The court of appeals explained that the trial court did not order specific performance of those amounts. Instead, the trial court entered a judgment for the amount of money wife proved father had failed to pay pursuant to the contract. The court stated:

> "[Father] was simply ordered to pay the damages resultant from his breach of contract as an ordinary money judgment. The trial court had no authority to deny [mother] her right to sue for breach of the specific terms of the Separation Agreement, and the trial court had no authority to order damages for [father's] breach in an amount less than called for in the Separation Agreement."

The trial court's order of specific performance was limited to amounts coming due under the terms of the contract in the future. The court of appeals explained that a trial court cannot modify a contract, but the court is not authorized to order specific performance of more than the payor has the actual ability to pay. In this case, the trial court did not modify father's support obligations, but limited the order of specific performance to the amount the trial court found he had the ability to pay.

Father also argued that there was insufficient evidence to support the conclusion that he had the ability to pay the amount he was ordered to pay. He first argued that the trial court erred in considering evidence other than his actual present income at the time of the hearing, arguing that the award must be based on the party's actual income at the time the award is made. The court of appeals rejected this contention and held that while an initial award of alimony is based on a party's income at the time the award is made, the trial court can consider any evidence indicating a party's ability to comply with a contract obligation. In this case, the court of appeals held that the trial court did not err in refusing to consider husband's obligation to pay wife's attorney fees when determining his present expenses and also did not err in assuming all of husband's expenses were shared equally by his new wife. The court of appeals concluded that the trial court finding that husband's income and assets exceeded his reasonable needs was sufficient to support the order of specific performance.

Attorney fees. The separation agreement provided that attorney fees could be recovered from a party breaching the agreement. The trial court had awarded fees to mother as part of a judgment that was appealed by father. That appeal resulted in a remand but the court of appeals affirmed the initial award of fees. Following remand, the trial court entered an additional fee award to cover amounts incurred by mother in the remand proceeding. Father argued on appeal that the trial court had no authority to order additional fees when the court of appeals had affirmed the earlier order. The court of appeals disagreed, holding that while the initial award of fees was 'law of the case' regarding fees owed up until the time of appeal, the trial court had authority to order additional fees for the remand proceeding.

Execution of agreement

Separation Agreement was not valid where wife signed the agreement, husband thereafter made a change to the agreement before he signed it, and wife did not initial or sign the agreement after husband amended it. Because both spouses never signed and acknowledged the same version of the document, there was no valid contract.

Raymond v. Raymond, _ N.C. App. _, 811 S.E.2d 168 (February 6, 2018). Wife's attorney drafted a separation agreement and property settlement that wife signed. Wife's attorney sent the agreement to husband who requested a change to the document signed by the wife. Wife told husband to make the change on the document and initial his changes. He did so and returned the document to wife. Wife never initialed the change made by husband or signed the version of the agreement returned to her by the husband.

Wife thereafter filed for alimony and equitable distribution and husband claimed the agreement barred both claims. The trial court agreed and granted husband's motion for summary judgment denying wife's claims. The court of appeals reversed, holding that the trial court erred in concluding the parties had properly executed the agreement. Because there was no complete version of the agreement that both parties signed, there was no valid contract. The court of appeals rejected husband's claims that the doctrines of ratification and equitable estoppel should prohibit wife from asserting the invalidity of the contract. The court held that these equitable principles cannot be applied to enforce an invalid contract.

Rescission claim

- Plaintiff stated a claim for rescission of a separation agreement in her complaint for equitable distribution and alimony even though she did not designate rescission as a separate cause of action.
- Statute of limitations for rescission of a contract is three years.

Holton v. Holton, _ N.C. App. _, _ S.E.2d _ (March 20, 2018). Plaintiff filed a complaint seeking equitable distribution and alimony. The complaint acknowledged she and defendant executed a separation agreement wherein she waived ED and alimony but also included allegations that the agreement was "unconscionable" and executed at a time when "she was on medication the affected her memory and reasoning." However, the complaint did not set out a separate claim for rescission of the contract. Defendant's answer alleged the contract as a defense to plaintiff's claims and requested that the complaint be dismissed.

The trial court dismissed the complaint after concluding that plaintiff's "vague allegations" regarding the execution of the agreement did not state a claim for rescission. The trial court also held that at the time of the hearing on defendant's motion to dismiss, the three-year statute of limitations for a rescission claim had passed precluding plaintiff from amending her complaint to allege the claim.

The court of appeals reversed the trial court's dismissal after concluding plaintiff's complaint stated a claim for rescission. According to the court of appeals, Rule 8 of the Rules of Civil Procedure requires only a "short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences … intended to be proved showing the pleader is entitled to relief." Given this standard, the court of appeals held that plaintiff's complaint was sufficient to give defendant notice plaintiff was asking the court to rescind the contract. In addition to the specific statements about the execution of the agreement and the unconscionability of the agreement, the fact that plaintiff acknowledged the contract but still requested ED and alimony notified defendant that she was requesting that the contract be set aside.

Action to set aside separation agreement; consideration; reconciliation; unconscionability

- Separation agreements require consideration. The consideration generally is in the form of mutual promises and benefits.
- Agreement in this case contained adequate consideration because both parties received items of value and benefits through the execution of the agreement, including custody rights, property distribution, and allocated insurance benefits.
- Reconciliation voids a separation agreement.
- GS 52-10.2 provides the standard for reconciliation.
- Reconciliation is a voluntary renewal of the husband and wife relationship, as shown by the totality of the circumstances.
- "When there is conflicting evidence as to whether reconciliation occurred, the issue of the parties' mutual intent is an essential element in deciding whether the parties reconciled."

- Where trial court found that wife returned to the marital residence after execution of the agreement and lived in the home for over one year but only because she had no other place to stay and husband clearly did not intend to resume the marital relationship, the trial court did not err in concluding that the parties did not reconcile.
- Trial court's conclusion there was no procedural unconscionability was supported by findings that wife testified that she understood the agreement at the time she signed it and that she rejected husband's offer to pay for an attorney to represent her in the negotiation.
- While husband received most of the marital property but wife received benefits under the agreement including visitation rights with the minor child, life insurance benefits, and health insurance coverage, and wife testified that she understood the agreement at the time she signed it, the agreement was not substantively unconscionable.

Johnson v. Johnson, _ N.C. App. _, _ S.E.2d _ (June 5, 2018). Defendant wife requested that a separation agreement be set aside because it lacked consideration, the parties reconciled after its execution, and it was procedurally and substantively unconscionable. The trial court denied her request and the court of appeals affirmed.

<u>Consideration</u>. Wife argued that the contract was not enforceable due to a lack of consideration. The court of appeals disagreed, stating that the contract itself defined the consideration as "the promises, undertakings and agreements herein contained" and specifically acknowledged it was supported by "good and valuable consideration." The court held that consideration for separation agreements generally is the "mutual promises entered into between the parties" and held that in this case, the consideration included custody and visitation rights for both parties, distribution of property, and allocation of insurance benefits.

<u>Reconciliation.</u> The court of appeals also rejected wife's claim that the agreement was voided by the reconciliation of the parties. The trial court concluded there was no reconciliation, even though following an initial separation of several weeks, wife returned to the marital residence and lived there from June 2015 until August 14, 2016. The trial court found husband allowed wife to live in the marital residence at the urging of family members because she had no other place to stay and she was facing criminal charges. The trial court also found that the parties did not sleep in the same bedroom and that husband did not intend to resume the marital relationship.

The court of appeals held that whether reconciliation has occurred is determined by applying the standard set out in GS 52-10.2, the showing of a voluntary resumption of the marital relationship. When evidence of reconciliation is conflicting as it was in this case, the trial court is to examine the mutual intent of the parties. The court of appeals held that the trial court findings of fact regarding husband's lack of intent to resume the marital relationship were sufficient to support the conclusion that the parties did not reconcile.

<u>Unconscionability</u>. Wife argued that the agreement was procedurally unconscionable because she signed the agreement under duress and without counsel and was substantively unconscionable because it gave husband too much of the marital property and waived her right to alimony. The trial court made a finding that wife was not under the influence of medication at the time she signed the agreement and that she admitted she understood the terms of the

agreement when she signed it. In addition, the trial court found that the lack of legal counsel does not establish procedural unconscionability. In this case, husband offered to pay for counsel for wife but she refused. The court of appeals held that the findings by the trial court supported the conclusion that there was no procedural unconscionability in this case.

The trial court also concluded the agreement was not substantively unconscionable and the court of appeals held that the trial court findings were sufficient to support that conclusion. To be substantively unconscionable, "the inequality of the bargain must be so manifest as to shock the judgment of a person of common sense, and the terms so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." While the findings showed husband received most of the marital assets, wife received visitation rights with the child, remained the beneficiary of husband's life insurance, received health insurance coverage, and items of personal property. In addition, wife testified that she understood the agreement when she signed it. The court of appeals held that these findings supported the conclusion that the agreement was not substantively unconscionable.

Chapter 50C: Civil No-Contact Orders

Cases Decided Between October 3, 2017 and June 5, 2018

Contempt; entry of order

- Appeal of civil contempt order for violation of a Civil No-Contact Order was dismissed where contempt order was reduced to writing and signed by the trial judge but there was no indication in the record that the order had been filed with the clerk of court.
- An order or judgment is not entered until it is written, signed and filed with the clerk of court.

McKinney v. Duncan, _ N.C. App. _, 808 S.E.2d 509 (December 5, 2017). Defendant attempted to appeal trial court order holding him in civil contempt for the violation of a Civil No-Contact Order. However, the court of appeals dismissed the appeal after concluding that the contempt order was not entered in accordance with Rule 58 of the Rules of Civil Procedure. An order or judgment is not subject to appeal until it is entered, and an order or judgment is not entered until it is reduced to writing, signed by the judge and filed with the clerk of court. In this case, there was no evidence in the record that the clerk had filed the contempt order written and signed by the judge.