Family Law Case Update

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1

2019 Family Law Bench Book

- www.sog.unc.edu/benchbook
  Password: judges

2

Domestic Violence

(Page 28 of Case Summaries)

3

???????

- Complaint for DVPO alleges act of domestic violence by defendant that occurred one week before the complaint was filed.
- During the 10-day hearing, plaintiff ***does not prove*** that the act alleged in the complaint occurred, but plaintiff presents sufficient evidence to convince you defendant committed *a different act* of domestic violence 2 days before the complaint was filed.
- Can you grant the DVPO?

4

??????

- Complaint for DVPO alleges act of domestic violence by defendant that occurred one week before the complaint was filed.
- During the 10-day hearing, plaintiff ***does prove*** that the act alleged in the complaint occurred, but also wants you to consider evidence that defendant committed *a different act* of domestic violence 2 days before the complaint was filed.
- Can you consider that evidence for any reason?

5

Jarrett v. Jarrett, 790 SE2d 883 (2016)

- Plaintiff proved act alleged in complaint but also proved other acts not in complaint
- Trial court granted DVPO, making findings that all acts occurred
- Citing Civil Procedure Rule 8(a), Court of Appeals held:
  - pleading must give sufficient notice of the events or transactions which produced claim to enable defendant to understand the nature of the act alleged, to file a responsive pleading, and to ask for relevant discovery.
- DVPO upheld because defendant never alleged he was unprepared for trial

6

Martin v. Martin, 822 SE2d 756 (2018)

- ***Motion for rehearing granted by Court of Appeals, Feb. 8, 2019
- "Trial court violated the due process rights of Defendant by allowing Plaintiff to present evidence of alleged acts of domestic violence not specifically pleaded in her Complaint."
- "We hold that the admission of testimony of domestic violence not otherwise plead in a complaint for a domestic violence protective order violates a defendant's right to due process."

7

Custody

(Beginning p. 2 of Case Summaries)

8

Enforcement of Orders

GS 50-13.3. Enforcement of order for custody.

"(a) An order providing for the custody of a minor child is enforceable by proceedings for civil contempt, and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A, Contempt, of the General Statutes."

9

Civil or Criminal Contempt?

- Mother is hiding child from father and refusing to turn over custody to father as provided in custody order.
- Mother failed to give father right of first refusal when she needed a sitter for the child in violation of custody order and allowed her new husband to be around the child in violation of the order.
  - *Kolczak v. Johnson*, 817 SE2d 864 (2018)
- Teenage child refuses to return to mother's home when custody order grants mother primary physical custody
  - *McKinney*, 799 SE2d 280 (2017)
  - *Grisson v. Cohen*, 821 SE2d 454 (2018)

10

Grissom v. Cohen

- Father showed he did all he reasonably could do to encourage daughter to return to mother's custody
- Trial court was right not to "force visitation" after concluding that a "forced visitation order" was not in the best interest of the child

11

What is a "forced visitation" order?

- *Grissom*, quoting *Hancock*, 122 NC App 518 (1996):

"Where, as here, the custodial parent does not prevent visitation but takes no action to force visitation when the child refuses to go, the proper method is for the noncustodial parent to ask the court to modify the order to compel visitation. **A trial judge has the power to make an order forcing a child to visit the noncustodial parent.**

In this case, the trial court attempted the functional equivalent of an order of forced visitation by sentencing plaintiff to jail but allowing her to purge herself of contempt by delivering the child over to defendant each and every time he was entitled to visitation. However, the order fails as an attempt at forced visitation."

12

What is a "forced visitation" order?

- *Grissom*, quoting *Hancock*:

"a trial judge could enter an "order of forced visitation" but only if the circumstances are so compelling and only after he has done the following:

> afforded to the parties a hearing in accordance with due process;
>
> created a proper court order based on findings of fact and conclusions of law determined by the judge to justify and support the order; and
>
> made findings that include at a minimum that the drastic action of incarceration of a parent is reasonably necessary for the promotion and protection of the best interest and welfare of the child.

Neither the consent judgment nor the contempt order contains any findings that the incarceration of the plaintiff is reasonably necessary to promote and protect the best interests of the child."

13

Grissom "Forced Visitation Order"

- "[Mom] asked for a mandatory preliminary injunction requiring Father to return Mary to her home and to "exert his parental influence" to make her stay there. She also asked for "judicial assistance" in the form of mandated reunification therapy. If these motions are not requests for "forced visitation" orders, it is hard to imagine what a forced visitation request would include."

14

Denial of visitation to parent

- Based on evidence introduced in custody trial between mom and dad, you find it would be dangerous for child to be left alone with mom.
- Before denying her visitation, or limiting her to supervised visitation, are you required to conclude – based on clear, cogent and convincing evidence – that she has waived her constitutional right to custody by being unfit, neglecting the welfare of the child or otherwise acting inconsistent with her constitutionally protected status?

15

GS 50-13.5(i)

- "In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an **unfit** person to visit the child ***or*** **that such visitation rights are not in the best interest of the child**."

16

Disagreement at Court of Appeals

- Custody between parents does not implicate constitutional rights at issue in third party custody cases
- Best interest of the child controls cases between parents
  - Denial of visitation governed by GS 50-13.5(i)
- Applicable burden of proof is preponderance of the evidence
- *See*:
  - *Respess v. Respess*, 232 NC App 611 (2014)
    - Relying on *Owenby v. Young*, 357 NC 142 (2003)
  - *Huml v. Huml*, 826 SE2d 532 (2019)

17

Disagreement at Court of Appeals

- Denial of visitation is equivalent to a termination of parental rights
- Parents cannot be denied access unless they are unfit or have waived their constitutional right to custody
- Burden of proof is clear, cogent and convincing evidence to support conclusion parent has waived constitutional rights
- *See*:
  - *Moore v. Moore*, 160 NC App 569 (2014)
  - *Routten v. Routten*, 822 SE2d 436 (2018)(appeal to NC pending)

18

Modification

- Substantial change in circumstances
  - *Peeler v. Joseph*, 823 SE2d 155 (Dec. 18, 2018)(p. 6)
    - New problems from previously existing circumstance
  - *Walsh v. Jones*, 824 SE2d 129 (Jan. 15, 2019)(p. 7)
    - Father's improved life affected child
  - *Stern v. Stern*, 826 SE2d 490 (March 19, 2019)(p. 11)
    - Father's significant change in work schedule 2 months after custody order entered supported modification

19

Child Support

(beginning p. 13 of case summaries)

20

Modification??

- Motion to modify filed by father seeking reduction of support obligation
- Date of hearing, he proves substantial change and you set new support amount
- What is the effective date of the new prospective support obligation?

21

Modification

- After concluding there has been a substantial change, modified support amount must be based on actual present income of parents, unless findings support imputing income
- Effective date of new support obligation?
  - It is "well-established" that the new amount is owed from the date the motion is filed
    - *Mason v. Erwin*, 157 NC App 284 (2003)
  - Judge has discretion to determine whether new amount is due from date of filing or from any date thereafter
    - *Mackins v. Mackins*, 114 NC App 538 (1994)

22

Modification

- Determining amount for time between filing of motion and entry of new order…..
  - *Hill v. Hill*, 821 SE2d 210 (2018)(p. 14)
    - motion pending for four years
  - *Simms v. Bolger*, 826 SE2d 522 (2019)(p. 21)
    - motion pending for 5 years

23

Bonus question…….

- In order of modification, can you reduce arrears owed from before the date the motion to modify was filed?

24

GS 50-13.10

"(a) **Each past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, or otherwise modified in any way for any reason, in this State or any other state,** except that a child support obligation may be modified as otherwise provided by law, and a vested past due payment is to that extent subject to divestment, if, but only if, a written motion is filed, and due notice is given to all parties either:

(1) Before the payment is due or

(2) If the moving party is precluded by physical disability, mental incapacity, indigency, misrepresentation of another party, or other compelling reason from filing a motion before the payment is due, then promptly after the moving party is no longer so precluded."

25

Contempt

- *County of Durham ex. rel. Wilson and King v. Burnette*, (NC App, March 29, 2019)(p.15)
  - "The trial court must make sufficient findings of fact [based on evidence in the record] to show that an alleged contemnor has the ability to pay his child support obligation and purge payment for civil contempt after considering his income, assets **and basic subsistence needs**."
  - Trial court cannot assume parent has ability to work based on lack of evidence of an inability to work
    - Ability to work means the alleged contemnor has actual ability to obtain and maintain a wage-paying job.

26

Civil contempt

- *Cumberland County ex. rel. Alabama obo Lee v. Lee* (NC App, May 7, 2019)(p.17)
  - Issuance of show cause shifts burden to obligor to go first at hearing to establish why he should not be held in contempt
  - Shifting burden does not relieve court of obligation to find, based on evidence in the record, that obligor has the actual ability to pay before holding obligor in contempt

27

Enforcement of order during appeal

- *Simms. v. Bolger*, 826 SE2d 467 (2019)(p. 19)
  - Child support order can be enforced by civil contempt while child support order is on appeal
    - GS 50-13.4(f)(9)
  - **Attorney fee awards** are "an enforceable component of" an order for child support and also can be enforced through civil contempt while order is on appeal

28

Divorce and Annulment

(beginning p. 24 of case summaries)

29

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- Can parties obtain a divorce or an annulment by consent judgment?
- Can the court enter a default judgment for alimony?
- Can the court enter a custody order without hearing evidence?

30

GS 50-10(a)

- "(a) Except as provided for in subsection (e) of this section, the material facts in every complaint asking for a divorce or for an annulment shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and ***no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a judge or jury."***

31

Hill v. Durette, 826 SE2d 470 (2019)

- No annulment by summary judgment
  - Trial court or jury must find facts based on actual evidence presented
    - GS 50-10(a)

32

Summary judgment divorce

- Not really a summary judgment
  - (d) The provisions of G.S. 1A-1, Rule 56, shall be applicable to actions for absolute divorce pursuant to G.S. 50-6, for the purpose of determining whether any genuine issue of material fact remains for trial by jury, ***but in the event the court determines that no genuine issue of material fact remains for trial by jury, the court must find the facts as provided herein.*** The court may enter a judgment of absolute divorce pursuant to the procedures set forth in G.S. 1A-1, Rule 56, ***finding all requisite facts from nontestimonial evidence presented by affidavit, verified motion or other verified pleading.***

33

No consent judgments

- GS 50-10(a) prohibits entry of divorce, annulment and divorce from bed and board by consent
  - Judge or jury must find facts
    - *Allred v. Tucci*, 85 NC App 138 (1987)

34

No defaults

- Because of GS 50-10(a), ***all allegations*** in a complaint for divorce or annulment are deemed denied, even if no Answer is filed
  - *Phillips v. Phillips*, 185 NC App 238 (2007)(no default for alimony requested along with Divorce)
  - *Schlagel v. Schlagel*, 253 NC 787 (1961)(no default for alimony requested along with DBB)

35

Custody by default?

- No
  - *Bohannan v. McManaway*, 208 NC App 572 (2011)
    - "[a] court cannot enter a permanent custody order without hearing testimony"
  - *Story v. Story*, 57 NC App 509 (1982)
    - a court cannot enter a permanent custody order without taking evidence and making findings to support conclusion that order is in best interest of child
  - *Cf. Buckingham v. Buckingham*, 134 NC App 82 (1999)
    - Consent custody orders do not require findings of fact, but "the court should review a consent judgment to ensure that it does not contradict statutory, judicial, or public policy."

36

Alimony

(beginning p. 30 of case summaries)

37

Various things…….

- *Hill v. Hill*, 821 SE2d 210 (2018)(p. 30)
  - Okay to hold defendant in contempt for failure to make payments subsequently modified and reduced by the court
- *Rea v. Rea*, 822 SE2d 426 (2018)(p. 31)
  - Illicit sexual behavior can be established by circumstantial evidence; inclination and opportunity
- *Walton v. Walton*, 822 SE2d 780 (2018)(p. 32)
  - Error for court to cut husband's living expenses in half after concluding live-in girlfriend should pay half

38

Equitable Distribution

(beginning p. 37 of case summaries)

39

Marital debt

- *Sluder v. Sluder*, 826 SE2d 242 (2019)(p. 40)
  - Debt incurred after the date of separation to pay off marital debt is marital debt even though it was incurred after the date of separation

40

Military survivor benefits

- *Watson. Watson*, 822 SE2d 733 (2018)(p. 37)
  - Federal law requires that deceased 's current spouse be the beneficiary of the Survivor Benefit Plan unless that spouse consents to another beneficiary or unless the military received a contrary designation ***within one year of the entry of a ED judgment*** by a state court distributing the benefits to a former spouse
  - When no designation is made within one year, state court has no authority to order benefits to be paid in accordance with ED judgment
  - But – trial court could enforce the 'alternative provision' contained in the ED judgment

41

Enforcing ED judgment after death

- District court retains exclusive jurisdiction to enforce an ED judgment
- Enforcement of ED judgment is not a claim against the estate of a deceased party
- ED judgment determines ownership of property as of the date of separation
- ED judgment determines what property can pass into the estate
  - *Watson v. Joyner-Watson*, 823 SE2d 122 (2018)
  - *Smith v. Rogers*, 824 SE2d 155 (2019)

42

Separation Agreements

(beginning p. 43 of case summaries)

43

Specific performance

- A remedy for breach of contract
- Party requesting specific performance must prove:
  - Breach of contract
  - Remedy at law inadequate
  - Defendant has ability to comply with order of specific performance
    - *Jones v. Jones*, 824 SE2d 185 (2019)(p. 41)
    - *Crews v. Crews*, 826 SE2d 194 (2019)(p. 43)
  - He/she did not materially breach the contract
    - *Crews v. Crews*, 826 SE2d 194 (2019)(p. 43)

44

Appeal

- GS 50-19.1 authorizes certain interlocutory appeals:
  - Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for **absolute divorce, divorce from bed and board, the validity of a premarital agreement as defined by G.S. 52B-2(1), child custody, child support, alimony, or equitable distribution** if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action.

45

Bezzek v. Bezzek, 824 SE2d 865 (2019)

- GS 50-19.1 **does not** authorize the interlocutory appeal of a ruling on a request to set aside a separation and/or property settlement agreement

46