

**Family Law Update
Cases Decided Between
October 2, 2018 and June 4, 2019**

**Cheryl Howell
School of Government
UNC Chapel Hill
howell@sog.unc.edu**

Find the full text of these court opinions at www.nccourts.org

Custody
Cases Decided Between October 2, 2018 and June 4, 2019

Civil contempt; child's refusal to visit

- Trial court did not err in denying mother's request to hold father in civil contempt for child's refusal to return to mother's custody.
- Trial court properly allocated the burden of proof during the hearing on civil contempt. Because the trial court had issued a show cause order based upon a finding of probable cause supported by mother's verified motion for contempt, father had the burden to prove that he was not in contempt.
- Trial court findings of fact established that father did all he reasonably could do under the circumstances to encourage the teenage daughter to return to her mother's custody.
- Trial court did not err by failing to enter an order forcing the child to return to the mother where trial court specifically found that such an order would not be in the best interest of the child.

Grissom v. Cohen, _ N.C. App. _, 821 S.E.2d 454 (October 2, 2018). Custody order gave mother primary physical custody of two teenaged children and father visitation. Following a Christmas visitation with father, the children refused to return to mother. Mother filed extensive motions requesting that the trial court hold father in civil and criminal contempt and grant her injunctive relief and other "judicial assistance" based on her allegations that father was "withholding" mother's custodial time and alienating the children from her. Before the trial court addressed her motion, the son turned 18. At the hearing, mother alleged that her 17 year-old daughter refused to return to her custody due to father's refusal to impose consequences on the child for refusing to return to mother and due to his alienating behavior.

The trial court concluded father was not in civil contempt. The trial court found that the teenage daughter suffered from depression, engaged in self-cutting and refused to return to her mother's home. The court further found that father encouraged the daughter to return to her mother or at least to visit with mother, but the child refused. He drove the child to the mother's home "almost daily" but the child refused to stay, and he also encouraged mother to visit the daughter at his home. The trial court concluded father did everything he reasonably could do to encourage the child to comply with the custody order.

On appeal, mother first argued that the trial court misapplied the burden of proof by placing the burden on her to prove father was in contempt. The court of appeals agreed with mother that because the show cause order for civil contempt was issued based upon the trial court's finding of probable cause supported by mother's verified motion requesting the show cause, the burden of proof in the hearing was on father to show he was not in contempt. However, the court of appeals held that the record and the findings of fact in the court order established that father met his burden by showing he did not violate the custody order.

Mother then argued that the trial court erred in finding father did all he could do to force the child to comply with the custody order, pointing out that father allowed the girl to have her cell phone, to spend time with her friends, to travel out of town and to shop and socialize regularly.

The court of appeals rejected mother's argument, holding that the trial court's findings established that the father did all he could do to encourage the child to visit her mother without resorting to actions that would likely be harmful to the daughter. The court of appeals stated "father was dealing with a depressed teenage girl who was self-harming" and "isolating her from friends or locking her in the house would likely exacerbate her condition." The court held that the trial court appropriately considered the welfare of the child when determining whether father complied with the terms of the custody order.

Compliance orders rather than civil contempt

The court of appeals in *Grissom* engages in a lengthy discussion about orders to "force visitation" and indicates that such orders are the more appropriate way to address these difficult situations when children refuse to visit. Rather than immediately considering civil contempt, *Grissom* holds that a trial court has the authority to enter orders directing a parent to take specific actions to encourage a child to comply with a custody order. If a parent refuses to comply with the specific directives, then contempt is available to enforce compliance with the specific directives.

The court of appeals held that mother in *Grissom* properly requested such an order by filing motions along with her request for contempt:

"She asked for a mandatory preliminary injunction requiring father to return [the child] 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."

The court of appeals stressed that an order to encourage visitation must include findings of fact regarding the needs of the child. Based on those findings, the trial court should direct "what action a parent should reasonably take to force visitation, consistent with the best interest of the child." The appellate court also wrote:

"The need to consider the child's best interest is why cases have typically not required a parent to use "physical force" or other extreme measures to make a child visit or stay with a parent. ... A certain amount of physical force would make a child go in any case, regardless of the child's age or circumstances, but it would probably never be in a child's best interest."

The court of appeals affirmed the trial court's refusal to force visitation in this case because the trial court concluded based on the findings of fact regarding the emotional state of the teenage child that forced visitation would not be in her best interest.

Nonparent custody claim; standing; conduct inconsistent with protected status

- Trial court did not err in concluding plaintiff had no standing to bring custody action against defendants, the natural parents of the child.
- Even though plaintiff had a “parent-like relationship” with the child while she lived with mother, that relationship ended when she and mother separated approximately 18 months before plaintiff filed the complaint for custody. Standing must exist at the time the plaintiff initiates the action.
- Trial court did not err in concluding plaintiff failed to allege and prove both parents waived their constitutional right to exclusive custody of the child.
- Appeal of this opinion is presently pending before the NC Supreme Court

Chavez v. Wadlington and Wadlington, _ N.C. App. _, 821 S.E.2d 289 (October 2, 2018).

Plaintiff filed a complaint seeking custody of two children. Defendants are the natural parents of the children. Defendants were married at the time the children were born and remained married at the time plaintiff filed her complaint. Defendants separated after the children were born and plaintiff entered into a “long-tem, committed and exclusive” relationship with defendant mother that lasted approximately 7 years. During that time, plaintiff and mother lived together and raised the children together, at times identifying themselves as the parents of the children. Mother and plaintiff separated and plaintiff’s relationship with the children ended. Approximately 18 months after the relationship ended, plaintiff filed this action seeking custody of the children. The complaint alleged that plaintiff “was centrally involved in the care, upbringing and development” of the children during her relationship with mother and that mother “intended to and did create a permanent parental relationship” between plaintiff and the children.

The trial court granted defendants motion to dismiss the complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of Civil Procedure. The trial court concluded plaintiff did not have standing to seek custody of the children because plaintiff had no relationship with the children at the time plaintiff filed the complaint for custody and because plaintiff failed to allege and prove defendants waived their constitutional right to exclusive custody of the children.

The majority of the panel of the court of appeals affirmed the trial court dismissal, but there was a dissent. The majority held that although plaintiff clearly had a “parent-like” relationship with the children while she lived with mother and the children, that relationship ended when she began living separate and apart from them. According to the majority, the relationship must exist at the time plaintiff files the complaint because standing must exist when the plaintiff files the complaint. Dissenting opinion argues that the relationship established while plaintiff lived with the children was sufficient to grant her standing to seek custody.

The majority of the court of appeals also affirmed the trial court’s conclusion that plaintiff failed to establish that both parents waived their constitutional right to custody by conduct inconsistent with their protected status as parents. The court of appeals held “as a non-parent third party, plaintiff lacks standing to seek custody unless she overcomes the presumption that defendants have the superior right to the care, custody, and control of the children.” In this case, the trial court held that plaintiff failed to allege or prove “either defendant is unfit or has abandoned or neglected the children” and the court of appeals affirmed. Dissent argued plaintiff established

that both parents waived their constitutional rights by creating a parent-like relationship between plaintiff and the children without intending that the relationship be temporary.

Denial of visitation to parent

- Trial court erred by delegating to father the authority to determine mom's right to visitation.
- Trial court erred in denying mother all contact with her children without first concluding she is unfit or has otherwise waived her right to exclusive care, custody and control of her children. There is a dissent on this issue and appeal presently is pending before the NC Supreme Court.
- Trial court erred in limiting mom's contact to telephone contact twice each week. GS 50-13.2(e) allows court to order electronic visitation as a supplement to in person visitation but electronic visitation cannot take the place of in person visitation.

Routten v. Routten, _ N.C. App. _, 822 S.E.2d 436 (November 20, 2018). Trial court granted sole physical custody to father and denied visitation to mother. Custody order allowed father "to permit custodial time between the children and [mother] within his sole discretion" and ordered that mother have two telephone calls per week with the children. The trial court concluded that visitation with mother was not in the best interest of the children as required by GS 50-13.5(i) but did not conclude mother is unfit. Court of appeals reversed and remanded, holding that the trial court cannot deny a parent all contact with her children without first concluding the parent is unfit or has otherwise waived her constitutional right to exclusive care, custody and control of his or her child. Rejecting the holding in *Respass v. Respass*, 232 NC App 611 (2014)(constitutional rights of parents are not implicated in a custody case between two parents), the majority in *Routten* held that unless "the movant established by clear, cogent and convincing evidence that a natural parent's behavior, viewed cumulatively, has been inconsistent with his or her protected status, the 'best interest of the child' test is simply not implicated." There is a dissent on this issue that argues *Respass* is controlling precedent. Appeal is pending now before the NC Supreme Court.

The court of appeals also held that a trial court cannot give one parent control over whether and when the other parent visits with a child. In addition, the court pointed to GS 50-13.2(e) and held that while a court can order electronic visitation between a parent and a child as a supplement to in person visitation, a court cannot limit a parent to electronic visitation only.

****Denial of visitation to parent: Applying *Respass* rather than *Routten***

- The *Routten* decision described immediately above is not controlling precedent according to *In re Civil Penalty*, 324 NC 373 (1989). Instead, the court of appeals is required to follow the holding in *Respass v. Respass*, 232 NC App 611 (2014).
- Findings of fact by trial court were sufficient to support the conclusion that contact with father was not in the best interest of the child.
- Denial of contact with child in a custody order is not the equivalent of a termination of parental rights because a custody order is subject to modification upon a showing of a substantial change in circumstances.

- Trial court is not required to find that a parent is unfit or has acted inconsistent with his constitutionally protected right to exclusive custody of his child before denying that parent contact with his child in a custody dispute between the parents of the child.
- Findings of fact by the trial court supported the trial court conclusion that it was not in the child's best interest for father to have access to information regarding the child from third parties such as school and medical personnel.

Huml v. Huml, _ N.C. App. _, 826 S.E.2d 532 (March 19, 2019). Custody order gave mother primary physical custody of the child and prohibited all contact between father and child. The order further denied father access to information about the child from third parties such as school and medical personnel. The trial court made numerous findings of fact regarding the father's mental health and domestic violence issues and regarding the negative impact of his behaviors on the child to support the conclusion that contact with the father was not in the best interest of the child. The trial court made further findings about the impact of father's behavior on third parties, such as mother's employer and the child's therapists, to support the conclusion that it was not in the child's best interest to allow father access to information regarding the child from third parties such as school personnel and medical care providers.

Father argued on appeal that the trial court erred by denying him all contact with his child without first concluding, based on clear, cogent and convincing evidence, that he is unfit or has acted inconsistent with his constitutionally protected status as a parent. Rejecting the decision in *Routten v. Routten* (Court of Appeals, November 2018) as contrary to established precedent, the majority of this panel of the court of appeals held that in cases between two parents, the court must apply the best interest of the child test to determine custody. The trial court is not required to consider the constitutional rights of parents as the court is required to do in cases brought by non-parent third parties against a parent. [Dissent on this issue] In a case between two parents, a trial court can deny a parent contact with a child based upon a finding that contact is not in the best interest of the child. GS 50-13.5(i).

The majority rejected the argument that this custody order was equivalent to a termination of parental rights. According to the majority, unlike a termination of parental rights, father in this case can request modification of the custody order at any point in time when he can allege a substantial change in circumstances.

Modification; substantial change since entry of previous order

- Substantial evidence supported trial court's conclusion that there had been a substantial change in circumstances since the entry of the previous custody order.
- In determining whether there has been a substantial change in circumstances, a trial court can consider facts existing at the time of the previous custody order if the parties did not disclose the facts to the trial court before it entered the previous custody order.

Peeler v. Joseph, _ N.C. App. _, 823 S.E.2d 155 (December 18, 2018). The trial court entered the initial custody order in May 2013 granting the parents joint legal custody with mom having primary physical custody. The trial court modified the initial custody order in February 2014 after concluding the child was experiencing medical issues and the parties were unable to make joint decisions regarding the child's medical treatment. The second custody order gave the parties joint physical custody with dad having authority to make education decisions for the child and mom having authority to make health care decisions for the child. Dad filed for modification of the second custody order in October 2016, alleging the child suffered from severe food allergies and that mom refused to acknowledge the allergies to the detriment of the child. The

trial court appointed an expert to evaluate the child. Based upon the report of the medical expert, the trial court concluded there had been a substantial change in circumstances and modified custody again to give dad sole legal custody and primary physical custody of the child.

On appeal, mom argued that the trial court erred in concluding there had been a substantial change since the entry of the second custody order because the trial court heard evidence of the child's medical issues during the second custody hearing. The court of appeals rejected mom's argument, holding that the trial court modified the original custody order based upon evidence that the parents could not make joint medical decisions for the child; the trial court did not consider the particular medical condition of the child or make any determination of what the appropriate medical treatment should be. The trial court based the second modification on the fact that the child suffered from severe food allergies that mother refused to acknowledge. The court of appeals held that while the child may have been experiencing problems with allergies at the time of the first modification, the trial court did not use that fact to support the modification. The substantial change supporting the second modification was the diagnosis of the child's condition by the court-appointed expert and the finding by the trial court that mother refused to acknowledge and accept the diagnosis. Dissent on this issue.

Modification; substantial change since entry of previous order

- Trial court made sufficient findings of fact regarding the positive changes in father's life and determined that the changes justified a modification of custody so the trial court did not abuse its discretion when it modified custody.
- The trial court did not err by ordering resumption of visitation with father even though child did not want to resume the relationship.

Walsh v. Jones, _ N.C. App. _, 824 S.E.2d 129 (January 15, 2019). Previous custody order "immediately and permanently suspended and terminated" all visitation and contact between father and child due to father's drug abuse and anger issues. Father went to prison for drug-related offenses after the entry of the custody order. Shortly after his release from prison, father requested modification, alleging that positive changes in his life justified allowing him to resume contact with his child. The trial court found that while in prison father participated in DART, NA, and AA and paid all of his child support. On post-release supervision, his drug tests were negative, he lived with his mother and he felt remorse for his past behavior. The trial court concluded that father's cessation of drug abuse and improvement in the other problem areas in his life were beneficial to the child and constituted a substantial change in circumstances. The court modified custody to allow a gradual resumption of visitation between the father and the children.

On appeal, mother argued that the trial court erred in concluding there had been a substantial change in circumstances affecting the welfare of the children and in concluding that visitation with father was in the best interest of the child. The court of appeals rejected mom's argument, concluding that the trial court findings of fact about the improvements in father's life since his release from prison, and about his love for his children and his desire to be a part of their lives constituted a substantial change in circumstances. The appellate court also held that the trial court finding that the child would benefit from a resumption of her relationship with her father was sufficient to establish that the change in circumstances related to the welfare of the child.

The court of appeals also rejected mom's argument that visitation with father was not in the best interest of the child because the child expressed concern about resuming her relationship with her father. The court of appeals noted that the trial court appropriately ordered a gradual resumption of visitation to address the child's concerns and ordered father to participate in therapy to assist with the transition. The court of appeals also stated that "even if [the child] stated a desire not to resume her relationship with her father, the trial court does not have to accede to her wishes," when the court determines resumption of the relationship is in the best interest of the child.

Death of party after entry of custody order; subject matter jurisdiction

- Custody action between maternal grandparents and mother pending at the time of mother's death did not abate upon her death.
- Trial court had no subject matter jurisdiction to proceed on separate custody action filed by paternal grandfather following mother's death.

Rivera v. Matthews, Matthews and Lee County DSS, _ N.C. App. _, 824 S.E.2d 164 (February 5, 2019). Following the death of father, maternal grandparents filed a custody complaint against the child's mother. A temporary custody order was entered granting maternal grandparents custody of the child. Mother died approximately one year after the court entered the temporary order. Within days of mother's death, paternal grandfather filed this action against the maternal grandparents and Lee County DSS seeking custody of the child. The trial court dismissed paternal grandfather's action after concluding that the previous custody case between maternal grandparents and the mother of the child did not abate upon her death and that grandfather was required to file a motion to intervene in that prior pending action to request custody of the child. Grandfather appealed the dismissal and the court of appeals affirmed the trial court.

Citing *McIntyre v. McIntyre*, 341 NC 629 (1995), the court of appeals held that a custody action between two parents abates upon the death of one parent and custody of the child(ren) reverts to the surviving parent. However, when the pending custody action is between a parent and a non-parent, the death of the parent does not result in the abatement of the action because custody does not automatically revert to a nonparent surviving party. The court of appeals also cited GS 28A-18-1(a) to explain that an action that does not abate survives against the estate of the deceased parent.

The court of appeals then held that because of the prior pending custody case between maternal grandparents and mother (mother's estate), the trial court had no subject matter jurisdiction to proceed on paternal grandfather's action for custody. The court of appeals held that grandfather must seek custody by filing a claim and a motion to intervene in the previously filed custody case.

Attorney fees

- Although the parties eventually settled their custody dispute in a manner more favorable to father than mother initially sought, trial court did not err in determining mother acted in good faith in contesting father's request for joint custody.
- The element of good faith generally is shown by demonstrating that the party seeking fees had a genuine dispute over custody with the other party.
- A party has insufficient means to defray the expense of the suit when he or she is unable to employ adequate counsel in order to proceed as a litigant to meet the other spouse as litigant in the suit.
- Trial court findings that mother's estate was significantly smaller than father's and that there was a large disparity in the income of mother and father were sufficient to support the trial court's conclusion that mother had insufficient means to defray the cost of the litigation.

Conklin v. Conklin, _ N.C. App. _, 825 S.E.2d 678 (March 5, 2019).

The trial court ordered father to pay mother \$45,000 for attorney fees incurred during custody litigation after concluding mother was a party acting in good faith who had insufficient means to defray the cost of the litigation. On appeal, father argued that trial court erred in concluding mother acted in good faith because she resisted his request for joint custody but ended up consenting to an increase in his custodial time. The court of appeals held that mother clearly had a genuine dispute over custody when she defended father's request for joint custody because she wanted to maintain the existing custodial arrangement. The fact that she was willing to compromise to settle the case was not an indication that she was not acting in good faith. The court of appeals also stated that the trial court is in the best position to determine whether a party is acting in good faith because "he or she can detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges."

The court of appeals also held that the trial court's conclusion that mother has insufficient means to defray the cost of the litigation was supported by findings that mother's estate was significantly smaller than father's, that her income was \$40,000 per year while father earned \$30,000 per month, and mother declared bankruptcy while the action was being litigated.

Impact of TPR on grandparent visitation order

- The termination of mother's parental rights had no impact on maternal grandparent's visitation rights awarded to maternal grandparent in a court order entered before the termination of mother's parental rights.
- Trial court erred when it ruled that the termination of parental rights voided the custody order awarding grandparent visitation.

Adams v. Langdon v. Malone (intervenor grandparent), _ N.C. App. _, 826 S.E.2d 236 (March 19, 2019)

Plaintiff father (Adams) filed an action for custody against defendant mother (Langdon) and a temporary order was entered granting custody to father and limiting mother to supervised visitation due to her alleged mental illness and substance abuse. The order provided that maternal grandmother (Malone) would supervise mother's visitation. A second temporary order was entered terminating mother's visitation until she completed substance abuse testing and

assessments. After the second temporary order, maternal grandmother filed a motion to intervene asking for visitation with her grandchild. The trial court granted her motion, concluding that she had standing to intervene pursuant to Rule 24 of the Rules of Civil Procedure and GS 50-13.2(b1) and GS 50-13.5(j) because there was an on-going custody dispute between the parents of the child. The parties entered into a consent judgment granting permanent custody to father, no visitation to mother and visitation to intervenor grandmother. The court subsequently modified that order to allow mother visitation supervised by intervenor but left all other provisions intact.

Five years later, father filed a separate proceeding seeking the termination mother's parental rights and the court terminated mother's parental rights. Thereafter, maternal grandmother intervenor filed a motion for contempt in the custody action alleging father refused to allow grandmother to exercise her visitation time with the child. At the contempt hearing, the trial court determined that "the custody action does not survive the termination of [mother's] parental rights, therefore, the grandparent rights of [Intervenor] do not survive [mother's] rights being terminated and that [intervenor's] grandparent visitation rights are terminated along with the custodial and parental rights of her daughter [defendant mother]."

Grandmother appealed and the court of appeals held that the termination of mother's rights had no impact on grandmother's court ordered visitation rights. The court of appeals held that once the grandparent became a party to the custody action she was a party for all purposes and the TPR did not affect the rights previously granted to her by the trial court. Citing *Sloan v. Sloan*, 164 NC App 190 (2004), the court of appeals held that the grandparent's visitation rights existed independently of mother's parental and custodial rights.

The court acknowledged the result would be different if the grandmother was attempting to *initiate* an action for visitation after the TPR, citing *Fisher v. Gaydon*, 124 N.C. App. 442, 445, 477 S.E.2d 251, 253 (1996)(where grandparent filed action for visitation after mother's rights had been terminated, trial court had no authority to award grandparent visitation because there was no on-going dispute between the parents when grandparent initiated the action). *But see* GS 50-13.2A (court can award visitation to grandparent following a step-parent or relative adoption).

Motion to dismiss motion to modify; changed circumstances

- Where original custody trial was conducted in January but custody order was not entered until the end of March, trial court later considering a request to modify the order was required to consider any substantial change in circumstances occurring since the date of the custody trial rather than the date the custody order was entered.
- Mother's motion to dismiss father's motion to modify was in effect a motion to dismiss pursuant to Rule 12(b)(6), so the trial court was required to accept father's allegations in his motion to modify as true when deciding whether his motion failed to state a claim for modification.
- Where father's motion to modify alleged at least one fact that would justify modification of the custody order, the motion was sufficient to state a claim and the trial court erred in dismissing the motion even though the request for modification was filed only 20 days following the entry of the last custody order.

- Trial court erred by considering information gained through the trial judge’s conversation with the judge who entered the original custody order in deciding whether to dismiss father’s motion to modify.
- A change in father’s work schedule that will allow him more time to care for the child was a change in circumstances that “would directly affect the child”.

Stern v. Stern, _ N.C. App. _, 826 S.E.2d 490 (March 19, 2019). Trial court conducted an initial custody trial in January 2017 but did not enter the custody order until March 2017. The court awarded primary physical custody to mother with visitation to dad. One of the primary factual issues in the trial was the parties’ difficulty in sharing physical custody of the child due to the father’s work schedule that required him to travel frequently and unpredictably. In April 2017, father filed a motion to modify wherein he alleged his working situation changed following the custody trial in January making him more available to care for the child. He also alleged that mother was having difficulty exercising primary custody of the child. Mother filed a motion asking the court to deny father’s request for modification and argued that his motion failed to allege a substantial change in circumstances. Following a hearing on mother’s motion to deny father’s motion to modify, the trial court took the matter under advisement in order to talk with the judge who entered the initial custody order regarding the extent to which father’s work schedule influenced that initial custody decision. After discussing the matter in chambers with the other judge, the trial judge dismissed father’s modification motion.

The court of appeals reversed and remanded, holding that:

- 1) Mother’s motion to deny was in essence a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6).
- 2) In considering a 12(b)(6) motion, a trial court is required to accept all of the factual allegations in the pleading as true.
- 3) Father’s motion to modify alleged at least one fact that would support a conclusion that there had been a substantial change in circumstances. The change in his work schedule that allowed him more time to care for the child was clearly a change that affects the welfare of the child.
- 4) Fact that father filed his motion to modify only 20 days following the entry of the first custody order did not mean there could be no substantial change in circumstances. First, trial court was required to consider changes occurring since the trial court last heard evidence rather than since the time of the entry of the order, and second, the court of appeals held that “major changes in the life of the parents or child may take place very suddenly.” According to the appellate court, the “timing of the change in circumstances does not determine as a matter of law whether it is substantial or whether it has an effect on the welfare of the child.”
- 5) The trial court erred in considering the conversation with the judge who entered the initial order. The court considering the motion to dismiss was required “to rule upon the evidence and arguments presented at the hearing.” The court of appeals also held that the initial custody order made it clear that father’s work schedule was a significant factor in the initial custody schedule ordered by the court.

Denial of motion to modify required findings of fact

- Trial court order denying a motion to modify custody must contain findings of fact based upon substantial evidence in the record.

Stull v. Stull, unpublished, _ N.C. App. _, S.E.2d (May 7, 2019)

Trial court erred in denying father's motion to modify in an order that contained no findings of fact. Citing the NC Supreme Court in *Shipman v. Shipmen*, 357 NC 471 (2003), the court of appeals held that a decision to deny a request to modify requires that the trial court make findings of fact based upon substantial evidence in the record.

**Child Support
Cases Decided Between October 2, 2018 and June 4, 2019**

Procedure on remand; findings to support non-guideline support; attorney fees

- In responding to remand instructions from the court of appeals, the trial court erred by making findings of fact regarding circumstances and events occurring after the appeal of the original child support order when no evidentiary hearing was held to support those findings of fact.
- Statements by counsel in a hearing are not evidence.
- Trial court must base any findings of fact made following remand on the existing record unless the court takes new evidence.
- Trial court must support an order for non-guideline child support with findings of fact as to the needs of the child based upon the accustomed standard of living of that particular child. Amount of support required by the child support guidelines is not evidence of a particular child's actual needs and expenses.
- In an action for support only (rather than for support and custody), trial court can order a parent to pay attorney fees of the other parent only if the trial court finds the parent being ordered to pay fees refused to provide adequate support for the child under the circumstances existing at the time the action was initiated.
- Trial court erred in denying mother's request for attorney fees without making findings of fact regarding father's refusal to pay adequate support and regarding whether mother was an interested party action in good faith with insufficient means to defray the expenses of the suit.

Crews v. Paysour, _ N.C. App. _, 821 S.E.2d 469 (October 2, 2018). Court of appeals remanded a child support order to the trial court instructing that the trial judge had the discretion to determine whether a new evidentiary hearing was required to address the errors identified by the court of appeals. The trial court did not conduct a new evidentiary hearing but made additional findings of fact regarding the payment of support by the parties while the case was on appeal and about the income of the parties at the time of the hearing after remand based only on the statements of counsel during the hearing on remand. On a subsequent appeal, the court of appeals held that the trial court erred in making findings of fact not based on evidence. The appellate court explained that the remand instruction that the trial court had discretion to determine whether to hear additional evidence meant only that the appellate court left it up to the trial judge to determine whether additional evidence was necessary. Additional evidence was necessary to support findings of fact regarding the circumstances occurring after the original appeal. Statements by counsel cannot support findings of fact unless those statements reflect stipulations by the parties.

The income level of the parents in this case exceeded the guideline limit. The court of appeals instructed the trial court to support the new child support order with findings of fact regarding the income and liabilities of the parents and with findings regarding the specific needs of the child based on the accustomed standard of living for this individual child. The trial court cannot rely on the child support guidelines to provide the amount of support necessary to meet the reasonable needs of the child in a non-guideline case.

The court of appeals also ordered that the trial court make additional findings of fact to support the denial of mother's claim for attorney fees. The original order denying her request found only that the parties were "on fairly equal status". The court of appeals held that a trial court must make the findings of fact required by GS 50-13.6 whether the trial court awards fees or denies fees. This was a case for support only, so the trial court must make a finding regarding whether father refused to pay adequate support under the circumstances existing at the time the parent initiated the action and findings regarding whether mother was an interested party acting in good faith with insufficient means to defray the cost of the suit.

Modification; determining amount due between filing of request to modify and the order addressing the request to modify; attorney fees

- Order addressing father's request to modify his support obligations based on his loss of employment was remanded because the appellate court could not determine the basis for the amount the trial court ordered father to pay for the 4-year time period between the filing of father's request for modification and the trial court ruling on that motion.
- Where trial court ordered father to pay the full amount required by original order between the time he filed his motion to modify and the time he obtained new employment, the trial court was required to explain why the court ordered him to pay the full amount even though he had no income during that time.
- To award attorney fees in a support only case (meaning case where custody is not an issue), trial court must conclude parent failed to pay support in an amount adequate under the circumstances existing at the time of the institution of the action or proceeding.
- Trial court order for attorney fees was vacated and remanded where findings indicated that at the time father initiated this support only proceeding by filing a motion to modify, father had no income but continued to pay the full amount of child support required by the existing child support order.
- Trial court cannot set child support "based solely on depletion of the payor's estate absent bad faith or suppression of earning capacity."

Hill v. Hill, _ N.C. App. _, 821 S.E.2d 210 (October 2, 2018). Husband filed motion to modify his child support and alimony obligations after he lost his job but the trial court did not conduct a hearing on husband's motion until over four years later. During most of that four-year period, father remained unemployed. He secured new employment about a year before the hearing.

The trial court modified both the child support and the alimony orders, increasing the amount of child support prospectively from the entry of the new order but reducing the amount of prospective alimony. In determining the arrearages owed by father for the time between the filing of the motion to modify and the entry of the order modifying support, the trial court concluded father should pay the amount of support required by the original order for the time period between the filing of the motion to modify and the date he began working at his new job despite the fact that father was unemployed during that time period. The trial court ordered that he pay the increased support amount from the date of his new employment until the entry of the modification order.

Father argued on appeal that the trial court erred in ordering him to pay the full amount of the original support obligation for the time between the filing of the motion and the time he found a new job. The court of appeals remanded the order to the trial court after concluding that the

findings of fact did not clearly explain the basis for the trial court decision. Father argued that the trial court improperly imputed income to him even though he was unemployed involuntarily and actively sought new employment in good faith. The court of appeals held that the trial court order was ambiguous and unclear about whether the court did in fact impute income, why it did or did not impute income, or whether it based the amount ordered on the trial court's determination of father's actual income, assets and ability to pay.

Father also argued that the trial court erred in considering his estate rather than his income in determining he could pay the child support due under the original support order. The court of appeals agreed, holding that a trial court cannot base a child support order "solely on the depletion of the payor's estate absent bad faith or suppression of earning capacity."

The court of appeals also vacated the trial court order requiring father to pay attorney fees to mother. The appellate court held that because there was no issue regarding custody in this case, it is one for support only. GS 50-13.6 allows fees for support only cases only when the court finds that the person ordered to pay fees was not providing support that was adequate at the time of the institution of the action. In this case, the court of appeals held that the "institution of the action" was father's motion to modify. At the time he filed the motion to modify, father was unemployed but continued to pay the full amount of child support required by the existing order. The court of appeals remanded the issue of attorney fees to the trial court for findings of fact to clarify the basis for the award of fees.

Contempt

- "Trial courts have a responsibility to consider the basic subsistence needs of an alleged contemnor before determining he has the ability to pay child support as ordered and the ability to pay purge payments."
- "Basic subsistence needs normally will include food, shelter, water, and clothing at the very least."
- Trial court must allow a parent his reasonable needs and expenses; "a parent has the ability to pay only to the extent he has funds or assets remaining after those expenses."
- "The trial court must make sufficient findings of fact 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."
- Contempt order vacated where evidence in the record did not support trial court finding of fact that father willfully refused to pay child support or that he had the present ability to pay the purge set by the trial court.
- Trial court cannot assume parent has the ability to work based on a lack of evidence of the inability to work; finding of ability to work must be supported by evidence in the record.
- Ability to work means the ability to maintain a wage-paying job.
- Order imposing a fixed-term of imprisonment is criminal contempt rather than civil contempt.
- Trial court cannot hold a party in both civil and criminal contempt for the same conduct.

County of Durham ex rel. Wilson and King v. Burnette, _ N.C. App. __, S.E.2d (October 16, 2018), affirmed 824 SE2d 397 (NC March 29, 2019). Trial court held father in civil

contempt for failure to pay child support. Plaintiff presented no evidence in the contempt hearing other than the amount of arrears owed by father. Father presented evidence that he had no income and no ability to pay. The trial court order concluded that father acted willfully and had the ability to pay support based on findings that he:

“owns a boat, owns a car, spends money on gas, spends money on food, has medical issues that do not keep him from working, prepares and delivers food, repairs cars for money, pays for car insurance, and receives in-kind income from his sister.”

The court of appeals held that while the evidence in the record supported these specific findings, the evidence and the trial court findings did not support the conclusion father had the ability to pay support or to pay the purge amount set by the trial court. [There was a dissenting opinion on this issue that was rejected by the NC Supreme Court] According to the appellate court, a trial court must “take an inventory” of a parent’s “financial condition” in order to support the conclusion that the parent willfully failed to pay and has the present ability to comply with the purge condition. A trial court “must consider both sides of the equation: income or assets available to pay and reasonable subsistence needs of the [parent]”.

The findings of fact in this case did not establish, for example, how much the boat or the car was worth, whether father needed the car to care for himself, how much money he makes from repairing cars or delivering food, or how much income he receives from his sister. In addition, there was no evidence in the record to establish father’s subsistence needs. According to the court of appeals, “the central deficiency of the trial court’s order is the complete failure to consider defendant’s living expenses.” Without such findings, the trial court cannot hold a parent in contempt for failure to pay support. The court of appeals further explained that the court must allow a parent “legitimate reasonable needs and expenses” [there was a dissenting opinion on this issue that was rejected by the NC Supreme Court] and held that a “defendant has the ability to pay only to the extent that he has funds or assets remaining after those expenses.”

Ability to work. The court of appeals held that the trial court had no evidence to support the finding that father had the ability to work. Plaintiff presented no evidence on his ability to work and father presented evidence from a doctor that father had suffered a work related injury and had recurring pain that significantly restricted his movement. Plaintiff argued on appeal that the trial court simply did not find father’s evidence credible. The court of appeals held that while the trial court is the sole judge of credibility, “the lack of evidence is not evidence.” In other words, even if the trial court did not believe father’s evidence of his inability to work, the trial court erred in finding that he could work without evidence to support that finding.

In addition, the court of appeals held that “the ability to work means more than the ability to perform some personal household tasks; it means the present ability to maintain a wage-paying job.”

Civil vs criminal contempt. The trial court order held father in “direct civil contempt” and ordered that he be imprisoned for 90 days or until he paid a \$2500 purge. In addition, the court ordered that he serve a 90-day consecutive sentence. The court of appeals held while the purge condition was an appropriate remedy for civil contempt, the fixed 90-day term was a punishment

for criminal contempt. The court of appeals held that it was error for the trial court to impose both civil and criminal contempt for the same conduct.

Contempt

- Despite the fact that the alleged contemnor in a civil contempt proceeding initiated by a show cause order has the burden of proof in the civil contempt hearing, a person cannot be held in civil contempt unless evidence in the record shows the person has the present ability to pay the amount ordered by the court.
- A child support order can be enforced by civil contempt even after prospective support has terminated because the child has reached majority if arrears are owed pursuant to the order. GS 50-13.4(c) provides that if arrears are owed at the time a child support order terminates, payments must continue pursuant to the order until the arrears are satisfied.

Cumberland County ex rel. Mitchell v. Manning, _ N.C. App. _, 822 S.E.2d 305

(November 20, 2018). Trial court held mother in civil contempt for failure to pay child support. The contempt order contained findings of fact that mother had the ability to pay the child support she had failed to pay and that she had the present ability to comply with the purge order entered by the trial court.

Mother appealed, arguing that the trial court erred in holding her in civil contempt because 1) the child support order being enforced by the court was no longer in force and effect because the child had reached 18 before the contempt hearing and 2) there was no evidence of mom's ability to pay child support or the purge amount ordered by the court.

The court of appeals rejected mother's first argument, holding that GS 50-13.4(c) provides that if arrears are owed at the time a child support order terminates, payments must continue pursuant to the order until the arrears are satisfied. However, the court of appeals agreed with mother's second argument and vacated the contempt order due to a lack of evidence in the record to support the trial's findings that mother had the ability to pay. The court of appeals noted that there actually was no evidence in the record other than mother's affidavit of indigency filed when she requested appointed counsel. The court of appeals held that even if that affidavit showed some ability to pay, it could not be used to support a finding of present ability to pay because it reflected mother's financial condition two months before the contempt hearing and therefore was not evidence of her present ability to pay. The court of appeals reiterated that a court cannot hold a party in contempt without evidence of the party's present actual ability to pay the amount ordered.

Contempt

- Despite the fact that the alleged contemnor in a civil contempt proceeding initiated by a show cause order has the burden of proof in the civil contempt hearing, a person cannot be held in civil contempt unless evidence in the record shows the person has the present ability to pay the amount ordered by the court.

Cumberland County ex rel. State of Alabama OBO Lee v. Lee, _ N.C. App. _, _ S.E.2d _ (May 7, 2019). Trial court held father in civil contempt for failure to pay child support. The contempt order contained findings of fact that father had the ability to pay the child support he

had failed to pay and that he had the present ability to comply with the purge order entered by the trial court.

Father appealed, arguing that the trial court erred in holding him in civil contempt because there was no evidence in the record of his ability to pay child support or the purge amount ordered by the court.

The court of appeals the agreed with father and vacated the contempt order due to a lack of evidence in the record to support the trial's findings that he had the ability to pay. The court of appeals rejected plaintiff's argument that the order should be upheld because father had the burden to show he did not have the ability to pay but failed to present any evidence at the hearing. Once again, the court of appeals held that the shifting burden of proof that occurs when a show cause order is issued in a civil contempt proceeding does not relieve the court of the responsibility to find the alleged contemnor has the ability to pay based upon actual evidence in the record.

Registration of Order Entered in a Foreign Country

- Trial court did not err when it denied mother's request to set aside order that vacated registration of a support order she obtained from a court in Switzerland.
- UIFSA, codified in Chapter 52C of the General Statutes, allows for the registration and enforcement of a foreign support order and provides grounds for vacating a registration.
- UIFSA allow registration and enforcement of support orders from a country designated a "foreign reciprocating country" by the US Secretaries of State and Health and Human Resources.
- Switzerland is a "foreign reciprocating country" and the US and Switzerland are parties to a child support reciprocity treaty.
- The treaty requires recognition of a support order only if the application for enforcement includes evidence that the respondent appeared in the action during which the order was entered or was given notice and an opportunity to appear.
- GS 52C-6-607(a)(1) provides that a registered support order from a foreign country will be vacated if the party seeking to vacate the registration shows that the issuing tribunal lacked personal jurisdiction over the respondent.
- Registration of order from Switzerland was properly vacated where documentation from the Swiss child support enforcement agency failed to include evidence showing father received notice of the Swiss proceeding to establish paternity and support.

Gyger v. Clement, _ N.C. App. _, 823 S.E.2d 400 (December 18, 2018). A court in Switzerland entered an order establishing the paternity of father and setting his child support obligation. Father did not make an appearance in the Swiss proceeding. The Swiss Central Authority for International Maintenance Matters, on behalf of mother and the children, applied to register and enforce the Swiss support order through the NC Office of Child Support Enforcement. The documentation from Switzerland included a limited power of attorney executed by mother allowing the NC Child Support Enforcement Agency to act on behalf of mother. The NC Child Support Enforcement Agency initiated an action in NC to register and enforce the Swiss order and the clerk of court registered the order. Father filed a timely request to vacate the registration and the trial court vacated the registration pursuant to GS 52C-6-607(a)(1) and 52C-7-706(b)(3) after concluding that the documentation from the Swiss agency

did not include evidence that father received notice of the Swiss proceeding before the order was entered.

Mother thereafter filed a motion pursuant to Rule 60(b) asking that the order vacating the registration be set aside, arguing that the English translation of the original documents regarding the Swiss proceeding was incorrect and arguing that she did not receive appropriate notice of father's request to vacate the registration. The trial court denied her request and the court of appeals affirmed.

The court of appeals explained that UIFSA, Chapter 52C, provides the procedure for the registration and enforcement of support orders entered in foreign countries. The countries covered by UIFSA include those countries "declared under the law of the United States to be a foreign reciprocating country." Federal law allows the US Secretaries of State and Health and Human Resources to declare any foreign country to be a foreign reciprocating country "if the foreign country has established, or undertakes to establish, procedures for the establishment and enforcement of duties of support owed to obligees who are residents of the US." 42 USC section 659(a)(1). The court of appeals also explained that there is a child support reciprocity agreement between the US and Switzerland that declares Switzerland to be a foreign reciprocating country. That treaty provides that support orders are entitled to registration only if documentation from the issuing country includes evidence that the respondent actually appeared in the proceeding wherein the support obligation was established or received notice and had the opportunity to appear. In addition, GS 52C-6-607(a)(1) provides that a registered foreign support order should be vacated when the moving party shows the issuing court did not have personal jurisdiction over respondent. Because the documentation submitted by the Swiss enforcement agency did not establish that father received notice of the Swiss proceeding, the trial court properly vacated the registration of the Swiss support order.

Enforcement of attorney fee award while child support order on appeal

- GS 50-13.4(f)(9) authorizes the trial court to enforce a child support order by civil contempt while the order is on appeal. That statute also authorizes the enforcement of an order for attorney fees granted as part of the child support order.
- While the posting of a bond will stay enforcement of an order for attorney fees while the case is on appeal, the trial court had jurisdiction to hold defendant in contempt for failure to pay the attorney fee award when defendant was granted a stay of the enforcement of the child support order but did not request a stay or post a bond for the attorney fee order.

Simms v. Bolger, _ N.C. App. _, 826 S.E.2d 467 (March 19, 2019). Trial court entered a child support order and included an order that defendant pay attorney fees. Defendant appealed. While the appeal was pending, defendant requested a stay of the enforcement of the order to pay child support and posted a bond. The trial court granted the stay. The trial court thereafter held defendant in civil contempt for failing to pay the attorney fee portion of the child support order.

On appeal, defendant argued the trial court had no jurisdiction to hold him in contempt while the matter was on appeal. The court of appeals held that generally a trial court loses jurisdiction to act after appeal, but GS 50-13.4(f)(9) authorizes the court to enforce an order of child support by civil contempt while the child support order is on appeal. The court of appeals rejected

defendant's argument that this provision does not apply to an award of attorney fees, holding that attorney fee awards are "an enforceable component of" an order for child support pending appeal. The court of appeals also held that a defendant can seek to stop enforcement during appeal by requesting a stay and posting a bond, but defendant in this case requested a stay of enforcement of the child support order but not the order for attorney fees.

Stay of IV-D support action pending appeal of custody

- Trial court erred in "combining" IV-D support action with pending custody case regarding the same child because GS 110-130.1 prohibits "collateral disputes" involving custody and visitation from being considered in a IV-D proceeding to establish support.
- Trial court does not lose jurisdiction to proceed on IV-D proceeding to establish support when a custody order regarding the same child is appealed. GS 50-19.1.
- Trial court did not have jurisdiction to enter a temporary support order while the stay order entered in the support case was on appeal.

Watauga Cty o/b/o McKiernan v. Shell, _ N.C. App. _, _ S.E.2d _ (March 19, 2019). A custody order was entered in Watauga County. While that custody order was on appeal, a IV-D proceeding to establish child support regarding the same child was filed in Avery County. The trial court in Avery County transferred venue of the IV-D case to Watauga County and ordered that it be "combined with" the custody case. The trial court in Watauga County concluded that the court had no jurisdiction to enter a support order while the custody issue was on appeal and entered an order staying the support issue. The child support enforcement agency appealed the stay order. While that appeal was pending, the custody appeal was resolved and the trial court entered a temporary child support order.

The court of appeals first held that the trial court erred by "combining" the IV-D action and the custody action because GS 110-130.1 prohibits the consideration of custody and visitation disputes in proceedings initiated for child support by a child support enforcement agency. The court of appeals also held that the trial court erred when it concluded that the appeal of the custody order deprived the court of jurisdiction to proceed with the establishment of child support. The court cited GS 50-19.1 and held that the statute allows the appeal of a final order for custody while a support claim is pending and further provides that the appeal of the final custody order "does not drive the trial court of jurisdiction over any other claims pending in the same action."

Modification; determination of income; consideration of non-recurring payments; amount owed for time motion to modify is pending; attorney fees

- Trial court findings of fact were sufficient to support the conclusion there had been a substantial change in circumstances sufficient to support modification. While a court cannot base the conclusion on an increase in a parent's income alone, there were other findings in this case regarding the needs of the child and the change in the income received by both parents sufficient to support the conclusion there had been a substantial change in circumstances.

- Trial court did not err in ordering father to pay a lump sum support payment from the funds he received in settlement of his Workers Compensation claims. The child support guidelines define income to include non-recurring lump sum payments.
- Father's Workers Compensation settlement proceeds were properly considered as his 'current income' even though he received the funds in 2011 and the trial court set support in 2017.
- The trial court did not err by refusing father's request to deviate from the Guidelines based on his argument that the lump sum award would exceed the reasonable needs of the child. The trial court made findings about the income of the parties and the reasonable needs of the child but decided not to deviate. A trial court is "not required to deviate from the Guidelines no matter how compelling the reasons to do so."
- Trial court has the authority to order both a one-time lump sum payment of support and an on-going monthly support payment.
- Trial court did not err by failing to consider the impact of the court's lump sum payment order on father's recurring monthly income where father did not present evidence of the impact.
- Trial court did not have authority to order father to deposit the lump sum support payment into a bank account in the name of the mother and the child, with mother named as custodian of the account because the account was a savings account to be used to provide funds to the child upon turning 18. Child support is to provide support to children not yet emancipated.
- Trial court erred in determining arrears owed for time between filing of the motion to modify and the entry of the order based on father's income for each of the 5 years the motion to modify was pending. Trial court must base prospective support on actual present income at the time the court enters the order unless the court explains the reasons the court decided to use "historical" income.
- The trial court made sufficient findings to support the reasonableness of the attorney fee award.

Simms v. Bolger, _ N.C. App. _, 826 S.E.2d 522 (March 19, 2019). Both mother and father filed motions to modify support in 2011 but the trial court did not enter an order modifying support until 2017. The trial court found that since the entry of the original support order, father received two lump sum settlement awards from a Workers Compensation claim, his monthly Workers Compensation payments ceased after his receipt of the settlements, the child's reasonable expenses increased, and the amount of disability benefit received by mom for the child on behalf of father's disability increased. After concluding there had been a substantial change in circumstances, the trial court entered a new monthly support amount and ordered father to pay a portion of the lump sum settlements into an account in the name of mother and child. The trial court also determined father owed arrears for the time between the filing of mother's motion to modify and entry of the new order. The trial court determined the amount of arrears owed using father's income in each of the 5 years the motion remained pending.

Father appealed and the court of appeals held:

- 1) The trial court findings of fact regarding changes in father's income and in the needs of the child were sufficient to show a substantial change. The court of appeals rejected father's argument that the trial court based its conclusion only on the fact that his income

had increased. The court of appeals held that the findings regarding the changes in the reasonable needs of the child as well as the change in the amount mother received from father's disability payments established that there had been changes other than father's increased income.

- 2) The trial court had the authority to order father to pay a portion of his Workers Compensation settlement as a lump sum payment of child support. The Child Support Guidelines define income to include one-time non-recurring payments and authorize the trial court to order a parent to pay a percentage of the lump sum as support.
- 3) The trial court properly considered the lump sum payments received by father as part of his "current income" even though he received the settlements in 2011 and the trial court entered the support order in 2017. According to the court of appeals, the Guidelines allow non-recurring payments to be considered as income and the fact that he received only one payment over five years earlier "underscores the correctness of the trial court's findings that these disbursements to [father] constituted *non-recurring* income to him."
- 4) The trial court denied father's request to deviate from the Guidelines based on his argument that the amount of the lump sum payment far exceeded the reasonable needs of the child. According to the court of appeals, a trial court has complete discretion to deny a parent's request to deviate from the Guidelines. As long as the trial court makes findings regarding the incomes of the parents and the reasonable needs of the child, the trial court "is not required to deviate from the Guidelines no matter how compelling the reasons to do so."
- 5) Trial court determined father's recurring income based on the amount he received in interest and dividends from the investment account containing his lump sum Workers Compensation settlement. Because the trial court ordered him to pay a significant portion of the funds in that account (19%) as child support, father argued the trial court was required to recalculate his monthly recurring income to reflect the reduction in his investment account. The court of appeals rejected this argument, holding that father failed to present evidence of the actual impact and stating that any change in his income resulting from the order may be grounds for another modification in the future.
- 6) The court of appeals agreed with father's contention that the trial court did not have the authority to order that he deposit the lump sum payment into a Custodial Account in the name of both mother and child with mother being the custodian. Because money left in the account would be paid to the child upon reaching 18, the court of appeals held that it was more of a savings account for the child than present support. Child support is intended to provide for the needs of a child before the child becomes emancipated.
- 7) The court of appeals also agreed with father's argument that the trial court erred when it set the amount of support he owed for the time between the filing of the motions to modify and the entry of the new support order based on his income in each of the 5 years that the motions were pending. The court of appeals reasoned that a prospective support obligation must be based on actual present income at the time the support order is entered. A court can look at historical income to determine prospective support under certain circumstances, such as when a party has a history of fluctuating income, but the court must make findings to explain why it is using past income to set current support. In

this case, the trial court made no “findings providing a rational for using [father’s] income for each individual year rather than using his current income to calculate child support owed back to the time of filing of [mother’s] motion” to modify.

- 8) Finally, the court of appeals rejected father’s argument that the trial court award of approximately \$40,000 in attorney fees to mother was an abuse of discretion. The court of appeals held that the trial court made sufficient findings of fact to support the conclusion that the amount awarded was reasonable.

**Divorce and Annulment
Cases Decided Between October 2, 2018 and June 4, 2019**

Annulment; summary judgment prohibited

- Trial court erred in entering summary judgment declaring marriage invalid.
- Like absolute divorce, a trial court can grant an annulment only after conducting a trial and making findings of fact based on actual evidence. GS 50-10.
- Trial court did not conduct a bench trial where the court admitted no evidence and clearly indicated it was granting summary judgment.

Hill v. Durette, _ N.C. App. _, 826 S.E.2d 470 (March 19, 2019). The trial court granted plaintiff’s request for an annulment. Both parties agreed that a person ordained by the Universal Life Church performed the ceremony and the trial court ruled that the marriage was *void ab initio* because the Universal Life Church is not an actual religious denomination.

After concluding that the trial court entered the annulment by summary judgment, the court of appeals vacated the order, citing GS 50-10(a). That statute states:

“(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.”

On the Civil Side blog post:

Default and Summary Judgment in ‘Divorce’ Cases

In a recent opinion, the court of appeals held that a trial court has no authority to annul a marriage by summary judgment. [Hill v. Durette, \(N.C. App, March 19, 2019\)](#). This case reminds us that while the Rules of Civil Procedure apply to domestic relations cases generally, there are significant limitations on the use of rules that relieve the court of the obligation to make findings of fact based on evidence presented to the court before entering certain types of domestic orders.

***Hill v. Durette* and Annulment**

The trial court in [Hill](#) granted plaintiff’s request for an annulment. Both parties agreed that a person ordained by the Universal Life Church performed the ceremony and the trial court ruled that the marriage was *void ab initio* because the Universal Life Church is not an actual religious denomination.

After concluding the trial court entered the annulment by summary judgment, the court of appeals vacated the order, citing [GS 50-10\(a\)](#). That statute states:

“(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.”

The court in [Hill](#) references *Hawkins ex. rel Thompson v. Hawkins*, 192 NC App 248 (2008), wherein the court of appeals held that [GS 50-10\(a\)](#) also prohibits annulment by default judgment. The court in *Hawkins* explained:

“A marriage may not be annulled by a default judgment. ...[S]ee N.C. Gen.Stat. § 50–10(a) (2005); Although most of the cases which have arisen under this statute have dealt with an absolute divorce instead of annulment, the plain language of the statute says that its prohibition against default applies to *every complaint* asking for a divorce or *for an annulment*.”

Absolute Divorce

The *Hawkins* case cites *Adair v. Adair*, 62 N.C. App. 493 (1983), wherein the court, citing [GS 50-10\(a\)](#), stated:

“In North Carolina a plaintiff cannot obtain judgment by default in a divorce proceeding. A divorce will be granted only after the facts establishing a statutory ground for divorce have been pleaded and actually proved.”

As with annulment, in addition to prohibiting divorce by default, this statute also prohibits a trial court judge from granting an absolute divorce by summary judgment because the statute requires that facts be “found by a judge or jury”. However, [GS 50-10\(d\)](#) provides:

“(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.”

This procedure closely resembles a summary judgment in that the parties do not need to testify in open court on the record, but a trial judge still must find facts supporting the entry of the divorce judgment based on ‘nontestimonial’ evidence.

In addition, [GS 50-10\(e\)](#) allows entry of absolute divorce by the clerk of court in limited circumstances. This part of the statute is much less clear about whether the clerk must find facts based on some type of evidence and to date there have been no appellate opinions on point. It provides:

“(e) The clerk of superior court, upon request of the plaintiff, may enter judgment in cases in which the plaintiff’s only claim against the defendant is for absolute divorce, or absolute divorce and the resumption of a former name, and the defendant has been defaulted for failure to appear,

the defendant has answered admitting the allegations of the complaint, or the defendant has filed a waiver of the right to answer, and the defendant is not an infant or incompetent person.”

Divorce from Bed and Board

In *Allred v. Tucci*, 85 NC App 138 (1987), the court of appeals held that [GS 50-10\(a\)](#) prohibits the entry of a divorce from bed and board by consent of the parties because the court must make findings of fact based on evidence to support the divorce from bed and board. The court in that case ruled that a consent order stating that one party had committed indignities and granting a divorce from bed and board was void *ab initio* because the trial court did not make the findings of fact required for entry of the order. *See also Schlagel v. Schlagel*, 253 NC 787 (1971)(statute prohibiting default and consent orders in divorce cases applies to divorce from bed and board).

The court of appeals also has held that [GS 50-10\(a\)](#) prohibits the court from finding facts upon which to support a divorce from bed and board by default pursuant to Rule 8 of the Rules of Civil Procedure. That Rule provides that “[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.” In *Skamarak v. Skamarak*, 81 NC App 125 (1986), husband argued that wife admitted she committed indignities by default when she failed to respond to his counterclaim alleging indignities and seeking a divorce from bed and board. The court of appeals disagreed, citing [GS 50-10\(a\)](#) and holding that all facts “*in every complaint for divorce*” are deemed denied whether a responsive pleading is filed or not.

Alimony

The court of appeals has interpreted this “*all material facts in every complaint asking for divorce*” language broadly, holding that all facts in every complaint asking for a divorce are deemed denied, even if those facts relate to an alimony claim rather than the divorce request.

In *Phillips v. Phillips*, 185 NC App 238 (2007), plaintiff wife filed a complaint seeking divorce, PSS and alimony. Whether additional claims were included is not clear from the opinion. After entry of a divorce judgment and a PSS consent order, the trial court ordered husband to pay alimony. On appeal, husband argued that the wife has stipulated to marital misconduct by failing to file a reply to his counterclaim wherein he alleged she committed marital misconduct.

The court of appeals acknowledged Rule 8 and acknowledged that allegations in a counterclaim generally are deemed admitted when no reply is filed, but stated:

“[D]efendant overlooks N.C.G.S. § 50–10(a), which states “the material facts in every complaint asking for a *divorce* ... shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not.”

Because every material fact in every complaint for divorce is deemed denied, wife did not admit the allegations relating to marital misconduct by failing to file the required responsive pleading. *See also Schlagel v. Schlagel*, 253 NC 787 (1961)(no alimony without divorce by default judgment because alimony claim was dependent upon wife’s claim for divorce from bed and board and GS 50-10 required that all material facts be found by a judge or jury).

What about custody?

Although not based on [GS 50-10](#), the court of appeals also has held that a trial court cannot enter a custody order by default. In *Bohannan v. McManaway*, 208 NC App 572 (2011), the trial judge signed a custody order submitted by plaintiff's attorney when defendant failed to appear for the custody trial. The court of appeals vacated the order, holding that "[a] court cannot enter a permanent custody order without hearing testimony" even when a defendant fails to answer or appear for trial. *See also Story v. Story*, 57 NC App 509 (1982)(trial court cannot enter permanent custody order without hearing evidence and making finding of fact to support conclusion that the order is in the best interest of the child). *But cf. Buckingham v. Buckingham*, 134 NC App 82 (1999)(a consent order for custody does not need findings of fact or conclusions of law but "the court should review a consent judgment to ensure that it does not contradict statutory, judicial, or public policy").

**Domestic Violence
Cases Decided Between October 2, 2018 and June 4, 2019**

DVPO; evidence of other acts of DV

****Court of Appeals has granted a request to rehear this case****

- Trial court violated defendant's due process rights when it allowed wife to present evidence of acts of domestic violence not included in the complaint requesting the DVPO.
- Trial court erred when it made findings of fact about acts by defendant that plaintiff did not allege in her complaint for the DVPO.

Martin v. Martin, _ N.C. App. _, 822 S.E.2d 756 (December 18, 2018); *Petition for rehearing granted, February 8, 2019.** Trial court entered a DVPO against defendant. During the trial, plaintiff testified regarding the acts of domestic violence alleged in the complaint but also testified about acts that occurred after she filed the complaint for the DVPO. The trial court made findings of fact in the DVPO that the acts not alleged in the complaint had occurred. The court of appeals vacated the order, holding that because defendant had no notice of the acts not alleged in the complaint, the trial court violated his right to due process when it allowed the introduction of evidence about acts not alleged in the complaint.

G.S. 14-277.3A; felony stalking; First Amendment; as-applied challenge; content-based restriction; social media

- Felony stalking convictions based on defendant's social media posts were content-based restrictions on free speech.
- Content-based restrictions must pass strict scrutiny test to be constitutional.
- While state may have a compelling interest in preventing the escalation of stalking behavior into more dangerous behavior, the application of the statutes to defendant's conduct was not the least restrictive way of meeting this state interest.
- Stalking statutes are unconstitutional as applied in defendant's felony convictions.

State v. Shackelford, _ N.C. App. _, 825 S.E.2d 689 (March 19, 2019). Defendant was convicted of four counts of felony stalking for posting comments on social media about a woman he met once at church and then began contacting by email. On appeal, defendant challenged the application of G.S. 14-277.3A to him, arguing that his constitutional right to free speech was violated. That statute defines the crime of stalking, in part, as willfully engaging in a course of conduct that would cause a reasonable person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

The First Amendment protects free speech, and content-based restrictions are presumptively unconstitutional unless the government proves they are narrowly tailored to serve a compelling state interest. The Court disagreed with the State's argument that defendant's social media posts were excluded from First Amendment protection as being "speech that is integral to criminal conduct," since the speech was not punished incident to criminal conduct but was itself considered the crime. Next, the Court evaluated whether the application of the statute to defendant's social

media posts represented a content-based or content-neutral restriction, and determined it was the former, since the nature of the harm caused by the speech could only be gauged by reference to its content. Content-based restrictions must pass a strict scrutiny test, whereby the State must show that the restriction “serves a compelling governmental interest, and that the law is narrowly tailored to effectuate that interest.” *State v. Bishop*, 368 N.C. 869, 876 (2016). Here, the application of G.S. 14-277.3A to the online posts at issue fails strict scrutiny because even if the statute serves a compelling State interest of preventing the escalation of stalking into more dangerous behavior, it is not the least restrictive means of meeting that goal. The complaining witness had already obtained a no-contact order, the enforcement of which would have been a less restrictive way of preventing defendant from engaging in a crime against her. The Court vacated all four convictions.

One judge wrote a concurring opinion to clarify the scope of the exception regarding speech integral to criminal conduct. The concurrence noted that the exception has not been well defined, making its application difficult in the content of stalking crimes, “where the lines between speech and non-speech are often blurred.” The speech “must be proximately linked to a criminal act and cannot serve as the basis for the criminal act itself.” A public posting that is not directed at a single person retains its expressive value, unlike a targeted, unwanted communication such as a telephone call or an email, and cannot constitute “conduct” as the basis for the criminal act.

**Postseparation Support and Alimony
Cases Decided Between October 2, 2018 and June 4, 2019**

Modification; determining amount due between filing of request to modify and the order addressing the request to modify; depletion of estate

- Court of Appeals remanded the trial court order addressing father's request to modify his support obligations because the appellate court could not determine the basis for the amount the trial court ordered father to pay for the 4-year period between the filing of father's request for modification and the trial court's ruling on that motion.
- A supporting spouse generally is not required to deplete his estate to pay alimony.
- A supporting spouse can be required to deplete his estate when the estate of the dependent spouse is insufficient to meet her reasonable needs and the estate of the supporting spouse is insufficient to meet his needs and pay alimony, if the trial court determines depletion of his estate would be fair under the circumstances.
- Supporting spouse can be in civil contempt for failing to comply with alimony order while motion to modify is pending even though the trial court eventually modifies that support order and reduces the amount owed.

Hill v. Hill, _ N.C. App. _, 821 S.E.2d 210 (October 2, 2018). Husband filed motion to modify his child support and alimony obligations after he lost his job but the trial court did not conduct a hearing on husband's motion until over four years later. During most of that four-year period, father remained unemployed. He secured new employment about a year before the hearing.

The trial court modified the alimony order, decreasing the amount of prospective support and applying the decreased obligation back to the time of the filing of his motion to modify. Husband argued that the trial court erred in ordering him to pay arrearages from the time of the filing of his motion to modify to the time of the entry of the modified order. The court of appeals remanded the modification order to the trial court after concluding that the findings of fact did not clearly explain the basis for the trial court decision. Father argued that the trial court improperly imputed income to him even though he was unemployed involuntarily and actively sought new employment in good faith. The court of appeals held that the trial court order was ambiguous and unclear about whether the court did in fact impute income, why it did or did not impute income, or whether the trial court based the amount ordered on the trial court's determination of father's actual income, assets and ability to pay.

Father also argued that the trial court erred in setting an arrears amount that required him to deplete his estate in order to comply with the order. The court of appeals held that a trial court generally cannot require a supporting spouse to deplete his estate to pay support. However, a court can enter an order that will result in the depletion of the estate of the supporting spouse when the dependent spouse cannot meet her reasonable needs, the supporting spouse cannot meet his reasonable needs and pay support from his income, and the trial court determines that an order requiring depletion is fair under the circumstances. The trial court determines whether such an order is fair by considering the relative estates of the parties and the relative reasonable needs

of the parties. “Important factors” include “the difference between the estates, the rate at which each party would need to deplete his or her estate, the prospects for either party to improve his or her earnings in the future, and the term of the payment of alimony.”

The court of appeals instructed the trial court to supply additional findings of fact to support the order if depletion of husband’s estate would be required after remand.

Finally, husband argued that the trial court erred in holding him in contempt for failure to pay alimony as required by the existing alimony order after he filed his motion to modify his alimony obligation. Because the trial court modified the obligation to lower the amount he was required to pay prospectively and applied that lower obligation back to the filing of the motion to determine the arrears, father argued that the order being enforced by contempt was no longer “in force” when the trial court held him in civil contempt as required by GS 5A-21. The court of appeals rejected his argument, holding that the alimony order still was “in force” as required for civil contempt because he continued to be obligated to pay prospective support. The ultimate purpose of the order – support of the dependent spouse – still could be served by forcing his compliance with the original order.

Poof of illicit sexual behavior; indignities; consideration of assets;

- A party can prove illicit sexual behavior or indignities that result from that behavior by circumstantial evidence. A presumption of adultery arises upon the showing of inclination and opportunity on the part of the offending spouse.
- Evidence was sufficient to support trial court’s conclusion that husband committed illicit sexual behavior and that wife suffered indignities by her knowledge of husband’s affair.
- While GS 50-16.3A(b)(10) requires the court to consider “[t]he relative assets and liabilities of the spouses” in determining the amount and duration of an alimony award, the trial court is not required to place a specific value on every asset and account. Trial court did not err in finding husband had “significant” retirement funds without finding the exact amount in his accounts.
- Trial court properly considered expenses incurred by wife for support of foster children even though she was not legally obligated to support the foster children. The parties had supported foster children throughout their marriage so the expense was part of the accustomed standard of living of the parties.
- Trial court adequately supported the duration of alimony ordered by making detailed findings of fact regarding all of the factors set forth in GS 50-16.3A(b).

Rea v. Rea, _ N.C. App. _, 822 S.E.2d 426 (November 20, 2018). Trial court awarded alimony to wife after concluding husband committed an act of illicit sexual behavior before separation and that wife suffered indignities when she learned of husband’s affair. Husband argued on appeal that evidence was insufficient to support the finding that he committed illicit sexual behavior. The majority of the court of appeals affirmed the trial court, holding that a party can prove illicit sexual behavior through circumstantial evidence showing inclination and opportunity. In this case, wife presented the testimony of a private investigator who saw husband kissing a woman in his car before the date of separation and saw husband’s car overnight in the driveway of the woman’s home after the date of separation. In addition, wife testified that she remembered a night before separation when husband did not come home but she could not

remember the date that happened. A dissent on this issue argued that this evidence was sufficient to show inclination but was insufficient to establish opportunity.

Husband also argued on appeal that the trial court erred in considering his “substantial” retirement savings without finding the exact value of the accounts at the time of the alimony trial. The court of appeals rejected his argument, holding that while the court is required to consider the “relative assets and liabilities of the parties” when determining the amount and duration of alimony, there is no requirement that the trial court place a specific value on every asset and account owned by each party.

Court of appeals also rejected husband’s argument that the trial court should not have included amounts wife spends to support foster children in the calculation of her reasonable expenses because she was not legally obligated to support the children. According to the court of appeals, the issue is not “wife’s obligation to support the children; it is the parties’ accustomed standard of living.” Because the parties supported foster children throughout their marriage, the trial court properly considered this expense to be a reasonable expense of the wife.

Finally, husband argued that the trial court did not make adequate findings of fact to support the order that he pay support for a period of 126 months. The court of appeals rejected his argument, holding that the alimony order contained detailed findings of fact regarding all of the factors required to be considered in determining the amount and duration of alimony set forth in GS 50-16.3A(b). A dissent argues that while there were sufficient findings of fact regarding the factors the trial court must consider when setting alimony, the trial court erred by failing to explain the reason for the duration as required by GS 50-16.3A(c).

Imputing income; determining reasonableness of expenses

- Evidence was sufficient to support trial court’s determination that husband deliberately depressed his income following the separation of the parties in order to avoid paying support by refusing to continue operating his motorcycle repair business.
- Trial court did not err in refusing to impute income to wife where there was no evidence to indicate that her decrease in income was the result of bad faith.
- Trial court erred in reducing husband’s expenses by half after concluding that his live-in girlfriend should contribute by paying half of his monthly expenses related to his residence.
- Trial court erred in reducing other expenses of husband without explaining why the court found the expenses to be unreasonable.

Walton v. Walton, _ N.C. App. _, 822 S.E.2d 780 (December 18, 2018). Trial court ordered husband to pay alimony to wife. On appeal, husband argued that the trial court erred in imputing income to him. He had a motorcycle repair business before separation that he operated out of the marital home but testified to the trial court that he lost the income from that business when the court awarded the marital home to wife in an interim order. The trial court held that he continued to have the ability to operate his business out of the home but failed to do so in order to reduce his income. The court of appeals held that evidence that husband had the ability to operate his business but refused to do so was sufficient to support the trial court’s conclusion that he deliberately depressed his income in bad faith disregard of his obligation to support wife.

Husband also argued that the trial court should have imputed income to wife also because her income decreased when she stopped operating a business making chocolate. The court of appeals held that the trial court properly refused to impute income after finding wife stopped operating her business in order to care for husband after he was injured in an automobile accident. Because she did not reduce her income in bad faith, the trial court could not impute income to her.

However, the court of appeals held that the trial court did err when it concluded that husband's live-in girlfriend should pay half of husband's mortgage, homeowner's insurance, cable, water, groceries and other meals and reduced his claimed expenses related to his home accordingly. The court of appeals held that the trial court improperly imputed income to husband in the amount it determined girlfriend should be paying without first concluding husband was failing to collect these payments from girlfriend in bad faith disregard of his support obligation to wife. In addition, the trial court found that other expenses claimed by husband for his cell phone, vacations, gifts, gas, etc. were unreasonable and cut the amount to one-half the amount husband claimed. The court of appeals held that the trial court has discretion to determine the reasonableness of such personal expenses based on the trial judge's "common experience and every-day experience" but the trial court must explain why it determined the amounts claimed to be unreasonable.

Marital misconduct; pleading lack of provocation; condonation

- Court of appeals declined to consider husband's argument on appeal that wife's claim for alimony based in part on husband's marital misconduct should have been dismissed by the trial court for the failure of wife to specifically allege in her pleading a lack of provocation on her part and her failure to provide sufficient detail as to the nature of the indignities she claimed she suffered. Husband's argument was in the nature of a Rule 12(b)(6) motion to dismiss for failure to state a claim. The court of appeals will not consider an argument that a pleading should have been dismissed pursuant to Rule 12(b)(6) after the matter in the pleading proceeded to final judgment on the merits in the trial court.
- Evidence did not support husband's claim that wife condoned his acts of indignities.
- In order to condone marital misconduct, a spouse must know the misconduct occurred.
- The burden of proof is on the party seeking to prove condonation.
- Even assuming wife condoned husband's illicit sexual behavior, her condonation did not prohibit the trial court from considering husband's other acts of marital misconduct that were not condoned by wife.

Gilmartin v. Gilmartin, _ N.C. App. _, 822 S.E.2d 771 (December 18, 2018), review denied, _ N.C. _, _ SE2d _ (May 9, 2019). Trial court concluded that husband committed acts of marital misconduct and ordered husband to pay alimony to wife. On appeal, husband argued that the trial court should have dismissed wife's alimony claim because she alleged marital misconduct on his part but failed to allege a lack of provocation on her part and failed to specify the nature of the indignities she claimed to have suffered. The court of appeals acknowledged case law that requires a dependent spouse alleging indignities on the part of a supporting spouse to allege that she did nothing to provoke the actions of the supporting spouse and requires that

she describe the nature of the indignities alleged with specificity. The court of appeals refused to consider husband's argument after concluding that it was in the nature of a Rule 12(b)(6) motion to dismiss for failure to state a claim. According to the court of appeals, "an unsuccessful motion to dismiss grounded on an alleged insufficiency of the facts to state a claim for relief" may not be reviewed on appeal after the merits of the claim proceeded to final adjudication in the trial court.

The court of appeals then rejected husband's argument that the trial court erred when it concluded wife did not condone the indignities he committed. In order to prove wife condoned husband's acts of marital misconduct, husband had the burden of proving that wife know of his misconduct and forgave him. Forgiveness is implied when a spouse knows about the other's misconduct but continues the marital relationship.

The uncontested findings of fact in the trial court order established that throughout the marriage husband engaged in the "repeated and addictive use of pornography and use of social media dating sites for dating and flirting with other women." The trial court also found that there had been a pattern throughout the marriage of wife discovering husband's activity, husband apologizing and promising to stop, and then husband continuing the behavior while "deceiving wife into believing he had stopped." The court of appeals held that there was no evidence that wife condoned husband's indignities because when she became aware of his activities, she objected and asked him to stop "but he continued his behavior surreptitiously."

The trial court also found that husband admitted to having two affairs during the marriage. Wife found out about the affairs but continued the marital relationship. Husband argued that because she clearly condoned the affairs, the trial court erred when it concluded he committed marital misconduct. The court of appeals disagreed, holding that even if wife condoned the affairs, she wife did not condone the indignities of his use of pornography and dating sites. Indignities were sufficient to support the trial court's conclusion husband committed marital misconduct.

Calculation of income; reasonable expenses; amount and duration; attorney fees

- Trial court erred when it failed to deduct amounts withheld from husband's pay for mandatory retirement fund contributions.
- Where trial court included medical insurance premiums as a reasonable expense for wife, trial court abused its discretion by failing to also count premiums for medical insurance as a reasonable expense of husband.
- Trial court did not err in using income from husband's business from past years to determine his present income where the trial court concluded that husband's evidence of his present income from the business was unreliable.
- Where husband included some of his personal expenses as business expenses when calculating the income earned by the company, the trial court was not required to consider those same expenses when calculating husband's reasonable expenses
- Alimony order must be remanded where order did not explicitly identify the reasons for the amount and duration of the alimony award.

- While trial court findings of fact established wife was entitled to an award of attorney fees, the order failed to include findings to establish the reasonableness of the fees awarded.

Wise v. Wise, _ N.C. App. _, _ S.E.2d _ (April 2, 2019). Trial court ordered husband to pay child support and alimony. On appeal, husband argued that the trial court erred in calculating his income because the trial court disregarded mandatory deductions from his paycheck for retirement and for medical insurance. The court of appeals agreed with defendant that the trial court should have included the mandatory deduction for retirement. The court of appeals stated “the issue is not whether it was a reasonable need or expense, but whether it was a mandatory deduction from his income.” Because it was mandatory, the trial court should have deducted it when determining husband’s net income.

The court of appeals characterized the premiums for medical insurance as an expense and held that while trial judges have discretion to determine the reasonableness of expenses in alimony case, the trial court in this abused that discretion by considering wife’s insurance premiums as a reasonable expense and disregarding husband’s premium payments.

The court of appeals rejected husband’s argument that the trial court erred by finding that his present income from his business was the same as he had reported in past years on his tax returns. The court of appeals held that while a trial court is required to find present actual income, the court can use evidence of income in past years to determine actual present income when other evidence of present income is “unreliable or otherwise insufficient.” In this case, the trial court made a specific finding that husband’s evidence of his actual income from the business was “not credible”.

The court of appeals also rejected husband’s argument that the trial court should have considered separately the personal expenses that were included as a business expense when calculating his income from his business. Husband argued the trial court erred in not listing those expenses as part of his individual monthly expenses but the court of appeals held that the expenses could not be counted both as a loss to the business to reduce the overall net income from the business and as a separate personal reasonable expense of husband. The court of appeals stated that it was “taking no position on the correct classification of these expenses,” but held that counting them in both places would result in “double dipping”.

The court of appeals agreed with husband’s contention that the trial court erred in failing to explain the reason for the amount and duration of the alimony award as required by GS 50-16.3A. The court rejected wife’s argument that the reasons for the amount and duration were obvious from the findings of fact in the alimony order. For example, the duration of the award was the amount of time the trial court identified as the amount of time it would take wife to reenter the workforce and the amount of alimony was an amount in the range of husband’s excess income and wife’s income shortfall. The court of appeals held that while these findings may in fact be the reason for the amount and duration, the appellate court “does not rely on speculation.” The trial court must explicitly state its reasons for the amount and duration of the alimony award.

Finally, the court of appeals held that while the trial court made sufficient findings of fact to establish wife was entitled to an award of attorney fees, the order contained no findings to establish the reasonableness of the fee awarded. The trial court must include findings to show that the hourly fee awarded was reasonable and customary for the work performed.

**Equitable Distribution
Cases Decided Between October 2, 2018 and June 4, 2019**

Allocation of military survivor benefits; enforcement of ED judgment after death of party

- Trial court erred when it ordered estate of husband to take whatever steps necessary to have wife named sole beneficiary of husband’s military Survivor Benefit Plan where husband failed to elect wife as the sole beneficiary within one year of the entry of the ED judgment requiring him to do so. Federal law provides that the named beneficiary at the time of death is entitled to the SBP benefits and the state court has no authority to order otherwise due to federal preemption.
- Federal law requires that the current spouse of the military member at the time of his death be the beneficiary of the SBP benefits unless the current spouse consents to another beneficiary or unless the military receives a contrary designation within one year of the entry of the ED order distributing the benefits to a former spouse.
- However, wife is entitled to enforce the alternative provision in ED judgment specifying that wife has a right to recover from the estate of husband an amount equal to the present value of the SBP benefits.

Watson v. Watson, _ N.C. App. _, 822 S.E.2d 733 (December 18, 2018). Equitable distribution judgment entered in 1999 distributed a portion of husband’s military retirement benefits to wife. In addition, the order provided that husband would name wife as the sole primary beneficiary of the Survivor Benefit Plan (SBP). The judgment further provided that if husband failed to make wife the beneficiary of the SBP, “an amount equal to the present value of the SBP coverage for the [wife] shall, at the death of [husband], become an obligation of his estate.”

Husband died in 2016. Defendant’s second wife was the sole beneficiary of the SBP because husband never made first wife the beneficiary as required by the ED judgment. In 2017, wife filed a motion in the ED case seeking to hold the personal representative of husband’s estate (his second wife) in contempt for failure to comply with the ED judgment. The trial court entered an order requiring the “Executrix for [husband] ... to take whatever measures necessary to correct the military record and place [wife] as the sole beneficiary of the SBP.”

Estate of husband appealed and the court of appeals reversed the trial court after concluding that federal law preempts the trial court’s authority to order enforcement of the ED provision by awarding the SBP benefits to wife. The court of appeals explained that 10 USC sec. 1448(a) mandates that if a retiree is married at the time of his death, his current spouse must be the beneficiary of the SBP proceeds unless the current spouse agrees to another beneficiary. Federal law allows a former spouse to become the beneficiary by “deemed election” but only if the election is made in writing and received by the military within “one year after the entry of the order directing” the designation. If a military spouse fails to make this designation within the one year, a state court has no authority to order a different designation of benefits. As federal law controls the allocation of military retirement and survivorship benefits, federal law preempts state court authority to order that a person other than the beneficiary receive the funds.

The court of appeals also held however that wife “is entitled to an amount equal to the present value of the SBP coverage, which is an obligation of [husband’s] estate” as provided in the ED judgment.

Enforcement of ED judgment after death of party

- District court had exclusive jurisdiction to enforce terms of a 1999 ED judgment following death of husband.
- ED is not a claim against the estate but rather a proceeding that determines what property goes into the estate.
- Property distributed in ED to the other spouse will not pass into the estate of the deceased spouse, even if the deceased spouse held title or had possession of the property at death.
- A distributive award is treated the same as other marital property; it is owned by the spouse to whom it was awarded, with title vesting on the date of separation. Therefore, the distributive award in this case was property owned by the surviving spouse rather than the decedent. The funds to pay the distributive award are not property of decedent’s estate. Dissent on this issue.

Watson v. Joyner-Watson, _ N.C. App. _, 823 S.E.2d 122 (December 18, 2018). Equitable distribution judgment entered in 1999 distributed a portion of husband’s military retirement benefits to wife. In addition, the order provided that husband would name wife as the sole primary beneficiary of the Survivor Benefit Plan (SBP). The judgment further provided that if husband failed to make wife the beneficiary of the SBP, “an amount equal to the present value of the SBP coverage for the [wife] shall, at the death of [husband], become an obligation of his estate.”

Husband died in 2016. Defendant’s second wife was the sole beneficiary of the SBP because husband never made first wife the beneficiary as required by the ED judgment. In 2017, wife filed a claim against husband’s estate and filed an action in superior court against husband’s second wife alleging breach of contract, quantum meruit, constructive fraud, and constructive trust seeking to recover the value of the SBP benefits pursuant to the terms of the ED judgment. The superior court dismissed wife’s claims after concluding that the superior court had no subject matter jurisdiction because the district court had exclusive jurisdiction to enforce the ED judgment. The court of appeals agreed and held that wife must enforce her rights under the ED judgment in district court.

The majority of the court of appeals held that the opinion in *Painter-Jamieson v. Painter*, 163 NC App 527 (2004), controls the disposition of this case. In *Painter*, the court of appeals held that ED is not a claim against the estate of a deceased spouse but rather is a proceeding wherein it is determined what property is owned by the decedent and available to pass into his estate. Property distributed to the other spouse in the ED matter does not pass into the estate of the defendant, even if decedent holds title at the time of his death. Pointing to GS 50-20(k), the court of appeals held that ED determines ownership of marital property and that ownership vests on the date of the separation of the parties. The court in *Joyner-Watson* also reaffirmed the holding in *Painter* that distributive awards are treated the same as specific items of property. The funds

necessary to pay the award are not property of the estate but rather belong to the spouse to whom the ED court ordered that they be paid.

NOTE: Effective January 1, 2003, GS 50-20(1)(2) now states that “the provisions of Article 19 of Chapter 28A of the General Statutes [decedent’s estates] shall be applicable to a claim for equitable distribution against the estate of the deceased spouse.” Effective October 1, 2009 and applicable to estates of individuals dying on or after that date, GS 28A-19-6(a) now states that a claim for ED is eighth in order of payment priority with regard to other claims against the estate of a person. *See Smith v. Rogers* directly below wherein the court of appeals held that these 2 amendments have no effect on ED judgments entered after their effective dates because the statutes apply only to claims for ED and ED judgments entered before the death of one party.

Enforcement of ED judgment after death of party

- District court had exclusive jurisdiction to enforce terms of a 2012 ED judgment following death of husband so superior court judge property dismissed wife’s action filed in superior court seeking a declaratory judgment regarding her ownership interest in property distributed to her in the ED judgment.
- Enforcement of an ED judgment entered before the death of a spouse is not a claim against the estate of the deceased spouse.
- Property distributed in ED judgment to the other spouse entered before the death of a spouse will not pass into the estate of the deceased spouse, even if the deceased spouse held title or had possession of the property at death.

Smith v. Rogers, _ N.C. App. _, 824 S.E.2d 155 (February 5, 2019). District court entered an equitable distribution judgment in 2012 distributing one-half of the marital interest in an LLC to wife and one-half to husband, and ordering husband to pay wife a distributive award. Three months after entry of the ED judgment and before the parties distributed the interest in the LLC and before husband paid the distributive award, husband died suddenly. His estate paid the distributive award to wife, but the LLC was liquidated and the proceeds were placed in trust pending a decision as to how they should be allocated.

Wife filed this action against the estate of husband and against other owners of the LLC in superior court seeking recovery of the property distributed to her in the ED judgment. Her complaint alleged breach of fiduciary duty and conversion and requested a declaratory judgment that she is entitled to one-half of the proceeds from the liquidation of the LLC. The superior court dismissed her action after concluding that her claims were claims against the estate of the husband that were filed beyond the time limit for filing actions on claims against an estate.

The court of appeals disagreed that wife’s claims were claims against husband’s estate but affirmed the dismissal of wife’s request for a declaratory judgment after concluding that the district court has exclusive jurisdiction over actions to enforce an ED judgment. The court of appeals held that an action to enforce an ED judgment is not a claim against the estate of a deceased spouse so the amendments to the ED statute in 2003 and 2009 (discussed immediately above in summary of *Watson* case) did not apply. Instead, an ED judgment entered before death of a spouse determines property belonging to the decedent at the time of death. Property distributed to the surviving spouse by the ED judgment does not pass into the estate so an action to recover that property is not a claim against the estate. However, the court of appeals held that the district court retains exclusive jurisdiction to enforce the ED judgment, so the trial court property dismissed wife’s superior court action for a declaratory judgment.

The court of appeals also held that wife's tort claims for breach of fiduciary duty and conversion against the personal representative of husband's estate and against the other former owners of the LLC were not claims within the exclusive jurisdiction of the district court because they are not claims seeking enforcement of an ED judgment. However, the court of appeals did not reverse the trial court's dismissal of those claims because it concluded wife failed to address the issue on appeal.

Marital debt; refinance after the date of separation

- Trial court did not err in classifying refinanced mortgage debt as marital debt even though the refinance occurred after the date of separation and the entire debt was in plaintiff husband's name.
- A debt incurred after the date of separation to pay off a marital debt is marital debt.

Sluder v. Sluder, __ N.C. App. __, 826 S.E.2d 242 (March 19, 2019). After the date of separation, the parties refinanced the mortgage on the marital residence. The parties used the proceeds to pay the mortgage debt as well as four other marital debts. The trial court classified the refinanced mortgage as marital debt. On appeal, defendant wife argued that the debt was separate debt because it was incurred after the date of separation and was in plaintiff husband's name alone. The court of appeals rejected that argument and affirmed the trial court. According to the court of appeals, debt incurred by one or both parties after the date of separation to pay off marital debt existing on the date of separation is marital debt.

Stipulations about classification

- Trial court erred in classifying property as marital where parties stipulated in the pretrial order that the property was wife's separate property.
- Trial court cannot set aside a stipulation without giving parties notice and an opportunity to be heard.

Clemons v. Clemons, __ N.C. App. __, __ S.E.2d __ (May 7, 2019). Pretrial order stated that the parties agreed the marital home was wife's separate property valued at \$186,000. Based on evidence of a loan received during the marriage that encumbered the property on the date of separation, the trial court concluded that the home had a marital component. Wife appealed and the court of appeals held that the trial court erred by classifying the property contrary to the stipulation in the pretrial order without going through the process of setting aside the stipulation. While a trial court can set aside a stipulation on its own motion, the court must give the parties a notice and an opportunity to be heard and to consider presenting evidence on the issue that had been covered by the stipulation.

**Spousal Agreements
Cases Decided Between October 2, 2018 and June 4, 2019**

Denial of request to set aside entry of default; order of specific performance; interpretation of contract

- A trial court should set aside an entry of default upon a showing of good cause.
- In considering whether defendant has established good cause, the trial court must consider “(1) was defendant diligent in pursuit of this matter; (2) did plaintiff suffer any harm by virtue of the delay; and (3) would defendant suffer a grave injustice by being unable to defend the action?”
- Trial court did not err when it denied defendant’s request to set aside entry of default where trial court determined defendant did not act diligently in his defense of this matter and determined that defendant would not suffer a grave injustice by not being able to defend the action.
- Trial court order of specific performance was not an inappropriate modification of the contract where it enforced the intent of the parties as expressed in the separation agreement.
- Party seeking specific performance has the burden of proving other party has the ability to comply with the contract.
- Trial court must make findings of fact concerning defendant’s ability to comply before ordering specific performance.
- Trial court findings regarding defendant financial circumstances were sufficient to support the trial court’s determination that defendant had the means and ability to comply with the order of specific performance.

Jones v. Jones, _ N.C. App. __, 824 S.E.2d 185 (February 5, 2019). Plaintiff filed action for breach of a separation agreement and requested an order of specific performance. When defendant failed to file an Answer in a timely manner, the clerk of court entered default. Plaintiff moved for summary judgment but the court denied that request. The trial court also denied defendant’s request to set aside entry of default. The trial court held a hearing on plaintiff’s claim of breach of contract and entered an order of specific performance. On appeal, defendant argued that trial court erred in denying his request to set aside the entry of default and erred in entering the order of specific performance.

Regarding the denial of defendant’s request to set aside entry of default, the court of appeals held that the trial court properly exercised its discretion and applied the good cause standard to determine whether to grant defendant’s request. The good cause standard requires that an entry of default be set aside when defendant shows good cause. In considering whether defendant has established good cause, the trial court must consider “(1) was defendant diligent in pursuit of this matter; (2) did plaintiff suffer any harm by virtue of the delay; and (3) would defendant suffer a grave injustice by being unable to defend the action?” The trial court determined defendant was not diligent in litigating the action and that he admitted he breached the separation agreement. The court of appeals also noted that the trial court allowed defendant to present evidence at the hearing

on the breach of contract and request for specific performance so the entry of default clearly did not cause defendant to suffer an injustice.

Defendant also argued that the default should be set aside because he received no notice that plaintiff planned to request a default. Plaintiff argued no notice is required. The court of appeals did not address the issue.

Regarding specific performance, the court of appeals rejected defendant's argument that the trial court order modified the terms of the separation agreement and held instead that the trial court order properly enforced the intent of the parties as expressed in the agreement. In the contract, defendant agreed to pay alimony to plaintiff in the amount of \$3,750 per month until the mortgage on the marital home was satisfied. At that point, his alimony obligation would be reduced to \$1,444.00 per month. Before the mortgage was satisfied, wife refinanced the loan in order to lower her monthly payments. When the original loan was paid off in the refinance, defendant reduced his alimony payments to \$1444.00 contending that because the original mortgage was satisfied, he no longer owed the higher amount of alimony. The trial court found that defendant breached the contract by reducing his alimony payments before the mortgage on the home was satisfied and ordered husband to continue paying alimony in the amount of \$3,750 until the date the original loan was scheduled to be paid off at the time the agreement was signed. The court of appeals affirmed the trial court, concluding that the parties clearly intended that defendant would pay the higher amount of alimony until wife no longer had to pay mortgage payments on the marital residence. The fact that she refinanced the original loan mortgage did not mean the mortgage was paid in full, as contemplated by the parties at the time the agreement was signed. [Dissent argues that the trial court modified the contract when it ordered defendant to pay the higher amount until the date the original loan was scheduled to be paid off.]

The court of appeals also rejected defendant's argument that the evidence in the record did not support the trial court's finding that he had the ability to pay the amounts required by the order for specific performance. The court of appeals pointed to the trial court's numerous uncontested findings of fact regarding defendant's financial circumstances and held those findings were sufficient to support the trial court's determination that he had the means and ability to comply with the order.

Appeal of order to set aside separation agreement

- A party has no right to an immediate appeal of a trial court's decision to set aside a separation agreement.
- While GS 50-19.1 authorizes the immediate appeal of a number of orders that would be final judgments but for other pending claims filed in the same action, including orders adjudicating "the validity of a premarital agreement," this statute does not authorize the interlocutory appeal of a trial court decision to set aside a separation agreement.

Bezzek v. Bezzek, _ N.C. App. _, 824 S.E.2d 865 (February 19, 2019). Plaintiff filed action for divorce and equitable distribution. Defendant filed an Answer raising a separation agreement as a bar to ED. Plaintiff replied with a claim to set aside the agreement. When trial court granted plaintiff's request to set aside the contract, defendant appealed. The court of appeals dismissed the

appeal as an inappropriate interlocutory appeal. Defendant failed to argue the trial court order affected a substantial right, so the court of appeals did not address that issue. The court of appeals did address GS 50-19.1 which authorizes the appeal of judgments for divorce, divorce from bed and board, custody, child support, alimony, equitable distribution and regarding the validity of a premarital agreement that would be final judgments but for other pending claims in the same action. The court of appeals held that nothing in that statute authorizes an immediate appeal of an order setting aside a separation agreement.

Specific performance

- Finding that husband breached the separation agreement by failing to pay alimony was sufficient to establish that a remedy at law was inadequate.
- Where husband made no argument to trial court that he had no ability to pay in accordance with the agreement, evidence by wife that husband was gainfully employed was sufficient to meet her burden to show he had the ability to comply with the order of specific performance.
- To be actionable, a breach of contract must be a material breach. A breach is material if it “substantially defeats the purpose of the agreement” or is a substantial failure to perform.
- Wife’s failure to return car to husband was not a substantial breach of the separation agreement.

Crews v. Crews, _ N.C. App. _, 826 S.E.2d 194 (March 5, 2019). Trial court held that husband breached the separation agreement between the parties by failing to pay alimony and entered an order of specific performance. On appeal, husband argued that the trial court erred by failing to explicitly conclude in the judgment that plaintiff’s remedy at law was inadequate before ordering specific performance. The court of appeals rejected husband’s argument, concluding that the failure to include “magic words” was not a reason to vacate the trial court order. The court of appeals held that the remedy at law is presumed inadequate when a party has breached an agreement to pay periodic alimony in a separation agreement. [dissent on this issue]

Husband also argued that the trial court erred in failing to make findings of fact that he had the ability to comply with the order of specific performance. The court of appeals held that wife met her burden to show his ability to pay when she testified that he remained gainfully employed in the same business he ran during the marriage and evidence showed that his business was successful and profitable. The court of appeals held this evidence was sufficient where husband made no argument to the trial court that he did not have the ability to pay. [dissent on this issue]

Court of appeals also rejected husband’s argument that wife was not entitled to specific performance because she failed to return a car to husband, breaching a requirement in the contract that items of personal property be returned to husband. The court of appeals held that wife’s failure to return the car was not a substantial breach in this case. The contract did not mention the car specifically; rather it simply required return of personal property. The fact the parties did not mention the car in the contract was sufficient to show return of the car was not a material term of the contract and her failure was not significant enough to defeat the purpose of the agreement

Validity of agreement entered in another state

- Virginia law applied to determine the validity and interpretation of a contract executed in Virginia that contained a Virginia choice of law clause.
- When the contract is valid and enforceable under the law of the state where executed, the contract will be recognized and enforced in NC as long as the enforcement is not contrary to the public policy of NC.
- A provision in a contract providing that the terms of a property settlement agreement survive reconciliation does not violate NC public policy and is enforceable in this state.

Bradshaw v. Bradshaw, _ N.C. App. _, 826 S.E.2d 779 (April 2, 2019). Parties executed a separation agreement and property settlement in Virginia in 1993 but reconciled shortly thereafter. In the agreement, both parties waived their right to ED. The agreement also contained a clause stating that reconciliation would have no impact on the terms of the contract.

The parties moved to NC and separated again in 2013. Wife filed for ED and husband responded with a request for declaratory judgment that the Virginia agreement barred wife's claim for ED. The trial court concluded that the agreement was a separation agreement voided upon reconciliation and held that the reconciliation provision in the contract violated NC public policy.

The court of appeals reversed and remanded. The appellate court disagreed with the trial court conclusion that this agreement was an integrated separation agreement and held that under Virginia law, the contract was both a separation agreement and a property settlement agreement. Because NC law also provides that property settlement agreements survive reconciliation, enforcement of the property settlement provisions of the contract does not violate NC public policy.

Code of Judicial Conduct
Summary of Disciplinary Actions Between October 2, 2018 and June 4, 2019

Public Reprimand for Delay in Entry of Order

In re: Henderson, 812 S.E.2d 826 (N.C. 2018). Supreme Court issued public reprimand of district court judge for the failure of the judge to issue a ruling for more than two years on a motion for attorney fees associated with a party's claims for PSS, custody, sanctions and contempt. Trial judge also failed to respond to attorney inquiries as to the status of the ruling and failed to respond to communications from the Judicial Standards Commission's investigator.

30-day Suspension Without Pay for Delay in Entry of Order

In re: Chapman, 819 S.E.2d 346 (N.C. 2018). Supreme Court suspended district court judge for 30-days without pay for unjustifiably failing to rule on a claim for child support for five years. The delay in entering the order, coupled with the fact that the court file was lost after being in the possession of the judge, violated the Code of Judicial Conduct.