

**Family Law Update  
Cases Decided Between  
October 15, 2019 and May 5, 2020**

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**Custody**  
**Cases Decided Between October 15, 2019 and May 5, 2020**

**Findings required to support best interest determination**

- Trial court custody order must resolve the primary disputes between the parties and explain why awarding primary custody to one parent is in the best interest of the child.
- Where order set out numerous facts relating to the parties and the children but did not actually resolve the issues between the parties or explain why the facts found supported the trial court’s custody award, case was remanded to trial court for further findings of fact to explain how each finding by the court affected the welfare of the children.

**Hinson v. Hinson, \_ N.C. App. \_, 836 S.E.2d 309 (November 5, 2019).** Mother was the primary physical custodial parent in the original custody order. Both parents filed motions to modify the original custody order. While the motions to modify were pending, mother and the children moved to another county. The trial court modified custody to grant joint legal custody and primary physical custody to father and mother appealed.

The court of appeals affirmed the trial court’s conclusion that there had been a substantial change in circumstances because mother had alleged that there had been a substantial change in her motion to modify. The court of appeals held that she could not argue there had been a substantial change at the trial court level and then contest the trial court conclusion that there had been a substantial change at the appellate level.

However, the court of appeals remanded the best interest determination for further findings of fact. According to the court of appeals, the custody order contained numerous findings of fact relating to the parties and the children but did not explain how any of those findings of fact related to the welfare of the children. The court of appeals stated:

“Based upon the trial court’s findings of fact here, the primary issues supporting its conclusions of law were: the schools, doctors, and extracurricular activities the children attended; the disparate work schedules of the parties; and the relative support groups of family and friends each party had in their respective county. The trial court made thirty findings of fact, which touched on all of these issues, but resolved none of them. These findings are not self-executing. ...

[T]he trial court made findings that mother unilaterally withdrew the children from one school and moved them to another but there were no further findings to show whether the move was good or bad for the children. In addition, there were findings that father worked a 24-hour shift every third day and mom worked part-time 16 hours a week but did not indicate whether either fact supported the trial court determination that father should have primary custody. ...

[T]he findings of fact do not explain *why* it is in the best interests of the children for Defendant to be granted primary physical custody.”

**Modification; substantial change effect on children; ‘self-evident effects’; best interest; split custody; contempt**

- Evidence supported trial court conclusion that there had been a substantial change in circumstances affecting the welfare of the children.
- Where the effects of a substantial change on children are self-evident, there is no need for evidence directly linking the change to the effect on the children.
- Trial court did not err in determining it was in the best interest of the children for mother to have primary custody of older child who was experiencing a strained relationship with his father and for father to have primary custody of the younger child who had a good relationship with his father.
- Civil contempt order finding mother to be in civil contempt for violating the original custody order between the parties was supported by the evidence.

**Deanes v. Deanes, \_ N.C. App. \_, 837 S.E.2d 404 (January 7, 2020).** Original custody order between the parties was entered in 2012 when the children were two and six years old. The original order granted only supervised visitation to father due to his problem with alcohol. However, shortly after entry of the order, father began exercising unsupervised visitation and father “enjoyed unsupervised visitation with his children without incident” for years before he filed this motion to modify in 2018. Father remarried and had cared for his wife’s two children without incident. In 2016, mother took the children from father’s house without his knowledge and refused to allow father contact with the children. Father filed motion to modify and trial court found a substantial change in circumstances. The trial court entered a new custody order granting primary physical custody of the older child to mother and primary physical custody of the younger child to dad. Mom appealed but the court of appeals affirmed.

Substantial change affecting the children. Mother argued that there had been no substantial change in circumstances and that there was no evidence linking the changes found by the trial court to the welfare of the children. The court of appeals rejected the argument, holding that when the effects of a change on the children is “self-evident,” direct evidence of impact is not required. The court held:

- The fact that children have grown from toddlers to middle school aged children cannot be the sole reason to modify a custody order, but it is a fact that can be considered in determining whether there has been changed circumstances.
- Father’s remarriage and new child cannot be presumed to be a change that affects the children but the trial court properly considered the bond between the children and the new spouse and baby as a changed circumstance.
- Fact that father no longer exhibited the drinking problem that lead the trial court to allow him only supervised visitation in the original custody order was a substantial change that had a self-evident effect on the children where the trial court found that he had been able to visit with the children without supervision for years since entry of the original order.
- Fact that as a result of her “poor decision making,” mother unilaterally severed all contact between father and the children for over two years and failed to inform father of children’s mental health, medical and dental issues during this time, resulting in the older

child being resistant to seeing his father at all, was a substantial change in circumstances affecting the minor children.

Best interest and split custody. The court of appeals also rejected mother's argument that the trial court abused its discretion when it ordered primary physical custody of the older child to mother and primary physical custody of the younger child to father. The court of appeals held that the strained relationship between the older child and his father and the older child's emotional issues associated with that strain, justified the split custody. In addition, the court appeals held:

- The trial court should consider a parent's ability or inability to cooperate with the other parent in determining best interests.
- The trial court should consider a parent's interference with the other parent's visitation rights when determining best interests.
- The trial court properly considered the relationship between the siblings and protected that relationship by ordering that the children spend every other weekend together.

Contempt. The trial court also found mother to be in civil contempt of court for failing to allow father reasonable telephone communication with the children as provided in the original custody order and for failing to consult with him on major medical, educational, and religious decisions relating to the children. The court of appeals held that the trial court findings of fact supported the adjudication of contempt. Findings included fact that father attempted to call the children 200 times in the two years after mother took them from his home but mother answered his calls only 5 times during that time period. In addition, the trial court made findings that mother failed to inform father about mental health treatment received by the older child and medical and dental treatment received by both children as required by the existing custody order.

#### **Restrictions on parent's visitation and access to school and medical records**

- Before denying a noncustodial parent reasonable visitation rights with a child, the court must find either that the parent is unfit or that visitation is not in the best interest of the child.
- Limiting a parent to supervised visitation is not 'reasonable visitation' and such an order must be supported with findings either that the parent is unfit or that unsupervised visitation is not in the best interest of the child.
- Trial court order allowing mother unsupervised visitation when the child was in her custody for short periods of time but requiring supervision when mother has the child for 5 or more consecutive days was not such 'severe restrictions' as to require the court to make those findings of fact required for orders of supervised visitation only.
- GS 50-13.2(b) provides that parents have equal access to records relating to a child's health, education and welfare unless a court orders otherwise.
- A trial court can prohibit access of a parent to a child's school, medical and other records if the court finds such a limitation is necessary to protect the welfare of the child.

**Paynich v. Vestal, \_ N.C. App. \_, 837 S.E.2d 433 (January 7, 2020).** Mother appealed custody modification order that granted father primary physical custody, awarded her unsupervised visitation for alternate weekends and other days such as birthdays and Mother's Day, and

allowed her visitation for 5 days or more for some holiday visits. The extended visits of 5 days or more were required to be supervised. In addition, the order denied mother access to the child's school, medical and counseling records, and prohibited her from attending school events and from participating in making medical decisions regarding the child. The mother also was prohibited from participating in the child's counseling, unless specifically requested by the child's therapist. Mother appealed. The court of appeals affirmed the visitation provisions and the provisions prohibiting mother from attending school events and from participating in medical decisions or in the child's therapy. However, the court of appeals remanded the provisions denying mother access to school and medical records for further findings of fact.

Restricted visitation. Mother argued that the restrictions on her visitation were so severe that the trial court was required to make the findings required by GS 50-13.5(i) to support the restrictions. That statute provides that a parent has a right to reasonable visitation unless the court finds the parent is unfit or that visitation is not in the best interest of the child. The court of appeals agreed that an order of supervised visitation only requires the court to make these findings, but the court concluded that the limitations on mother's visitation in this case were not so severe as to amount to unreasonable visitation. The trial court therefore was not required to make the GS 50-13.5(i) findings to support the order.

Denial of access to records. The court of appeals agreed with mother's argument that the findings of fact did not support the denial of access to records from school personnel and medical providers. Findings regarding mother's behavior at the child's school supported the trial court's order for her to stay away from the school but there was no evidence indicating school personnel were afraid for their safety or had any other reason to be concerned about providing mother access to records. There was no other finding indicating mother's access to information would have a detrimental impact on the welfare of the child, so the court of appeals remanded this issue to the trial court for further consideration.

### **Relocation and best interests**

- Trial court failed to consider factors required by *Ramirez-Barker* when considering whether children should relocate with mother.
- A parent's fault for the failure of a marriage is not an appropriate consideration in determining whether relocation would be in the best interest of children.

**Tuel v. Tuel, \_ N.C. App. \_\_, \_ S.E.2d \_ (March 17, 2020).** The day after she filed a complaint for custody, mother and children moved to Indiana. The father remained in NC. Three months later, she and father entered into a consent temporary custody order and mother returned to NC with the children, pending resolution of the custody action. Following the custody trial, the trial court granted mother primary physical custody, allowing the children to move to Indiana.

On appeal, father argued that the trial court erred by failing to address factors identified in *Ramirez-Barker v. Barker*, 107 NC App 71 (1992), relevant to determining best interest upon relocation of a parent to foreign jurisdiction, and the court of appeals agreed and remanded the case to the trial court.

In *Ramirez-Barker*, the court stated:

“In exercising its discretion in determining the best interest of the child in a relocation case, factors appropriately considered by the trial court include but are not limited to:

- the advantages of the relocation in terms of its capacity to improve the life of the child;
- the motives of the custodial parent in seeking the move;
- the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the courts of North Carolina;
- the integrity of the noncustodial parent in resisting the relocation;
- and the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent.

Although most relocations will present both advantages and disadvantages for the child, when the disadvantages are outweighed by the advantages, as determined and weighed by the trial court, the trial court is well within its discretion to permit the relocation.”

However, the court of appeals made it clear that a custody order is not “fatally deficient if the trial court fails to make explicit findings addressing each and every *Ramirez-Barker* factor.” The court stated that “the court’s primary concern is the furtherance of the welfare and best interests of the child and its placement in the home environment that will be most conducive of the full development of its physical, mental and moral faculties.... Nonetheless, these factors will be highly relevant to the best interest of the child in nearly all of these situations.”

In this case, the trial court’s decision was based primarily on the fact that plaintiff mother would have substantial family support to assist her in the care of the children in Indiana. The trial court order did not indicate that the trial court compared the living environment for the children in Indian to that of the children in North Carolina or that the trial court considered the other factors listed in *Ramirez-Barker* in relation to how the facts relating to those factors implicated the welfare of the children.

The court of appeals also noted that the trial court placed particular emphasis on the fact that father’s “failure to acknowledge his role in the failure of the marriage.” The appellate court stated that “[a] party’s fault for the failure of a marriage is not an appropriate consideration in determining whether relocation would be in the best interests of children.”

#### **Grandparent custody; temporary v. permanent order;**

- Trial court order designated as a temporary order was a permanent custody determination because it was not entered without prejudice to the parties, did not state a reconvening time to address permanent custody, and resolved all issues relating to the custody of the children for the indefinite future.
- Trial court erred in granting visitation rights to grandparents after concluding mother did not waive her constitutional right to exclusive care, custody and control of her children.

- When a parent is deceased, the other parent has a natural and legal right to custody of the children, even if the surviving parent was a noncustodial parent at the time of the other parent's death.

**Graham v. Jones, \_ N.C. App. \_, \_ S.E.2d \_ (April 7, 2020).** Plaintiffs are the paternal grandparents of the minor children at issue in the case. They filed this action for custody of the children against defendant mother following the death of their son who had primary custody of the children at the time of his death. The complaint alleged mother had abandoned the children and had acted inconsistent with her parental rights and that she suffered from mental health issues that made her unfit to have custody of the children. The trial court issued an ex parte custody order granting plaintiffs custody of the children and scheduled a temporary custody hearing. At the conclusion of the temporary custody hearing, the trial court entered an order granting defendant mother primary physical custody and sole legal custody and granting plaintiff grandparents visitation rights. The trial court concluded mother had not abandoned the children, had not waived her constitutional right to custody and had not acted inconsistent with her protected status.

Mother appealed the custody order, arguing that the trial court had no authority to award visitation rights to grandparents after concluding she had not waived her constitutional right to exclusive custody of the children.

Temporary or permanent order? Plaintiffs argued the appeal was inappropriate because temporary orders are interlocutory and not subject to immediate appeal. The court of appeals rejected this argument after concluding that the order was a permanent custody order even though it was designated a temporary order by the trial court. Specifically, the order was permanent because:

There was no indication in the order that it was entered without prejudice to either party; The order did not state a reconvening time for the matter to be considered more fully; and The order determined all issues raised by the parties and relating to the custody of the minor children for the indefinite future.

Because the order was a permanent custody determination rather than a temporary order, the appeal was proper.

Despite reaching the conclusion that the order was a final order subject to immediate appeal, the court of appeals nevertheless also addressed the issue of whether, had the order been temporary, it would have been subject to immediate appeal because it affected a substantial right of defendant mother. The court of appeals concluded that because the order granted visitation rights to plaintiff grandparents, the order affected a substantial right of mother in that it interfered with her constitutional right to exclusive care, custody and control of her children.

Grandparent visitation and rights of surviving parents following death of other parent. Mother argued on appeal that the trial court erred in applying the best interest analysis and awarding visitation to grandparents after the trial court concluded mother had not abandoned the children, had not waived her constitutional right to exclusive care, custody and control of her children and

was a fit and proper parent and the court of appeals agreed. Because there was no on-going custody dispute between the parents of the children (father was deceased), the plaintiffs could not invoke the grandparent visitation statutes to seek custody. Rather, grandparents were limited in this situation to seeking custody and/or visitation pursuant to GS 50-13.1, the general custody statute. A trial court may not award custody or visitation to a non-parent pursuant to GS 50-13.1 unless the court first concludes that the parent is unfit, has neglected the welfare of the children or has otherwise waived her constitutional right to exclusive care, custody and control of the children. Because the trial court concluded mother had not waived her constitutional right in this case, the trial court erred in awarding visitation to grandparent plaintiffs. The court of appeals stated that when one parent dies, the other parent has “a natural and legal right to custody and control of the minor children” and that this is “no less true when the sole surviving parent was the non-custodial parent of the children.”

### **Third party intervenors; attorney fees**

- Trial court has authority to order grandparent intervenors to pay attorney fees of parent related to grandparents’ visitation action.
- “Custody” and “visitation” are synonymous within the context of awarding attorney fees pursuant to GS 50-13.6. Therefore, action by intervening grandparents to secure visitation qualifies as an “action or proceeding for custody or support” of a minor child for purposes of GS 50-13.6.
- GS 50-13.6 allows the award of attorney fees to a party that the trial court finds acted in good faith and has insufficient means to defray the expense of the suit.
- Because that statute allows the award of a “reasonable” fee, the trial court also must support an order for fees with findings of fact to establish the reasonableness of the fee awarded. Required findings include the nature and scope of the legal services provided, the skill and time required, the attorney’s hourly rate, and its reasonableness in comparison with that of other lawyers.
- The findings of fact also must establish that the trial court award of fees is based only on fees incurred by the petitioning party in litigating the claims of the party ordered to pay the fees.

**Sullivan v. Woody, \_ N.C. App. \_, \_ S.E.2d \_ (April 21, 2020).** Paternal grandparents intervened in custody action between parents seeking visitation with the minor children and requesting an award of attorney fees. Final trial court order gave plaintiff mother primary physical custody, dad secondary physical custody and visitation to grandparent intervenors. The trial court also ordered father and grandparents to pay plaintiff mother’s attorney fees. The order stated that grandparents and father were “jointly liable” for the fees. Grandparents appealed the trial court order, arguing that GS 50-13.6 does not allow the trial court to order intervenors to pay attorney fees when intervenors asked for visitation rather than custody and arguing that the fee award did not distinguish fees incurred by plaintiff in defending against the grandparents’ claim and those she incurred defending against father’s claim for custody.

The court of appeals rejected grandparents’ argument regarding GS 50-13.6 and held that the statute allows the court to order parties seeking only visitation to pay attorney fees to a party acting in good faith with insufficient means to defray the expense of the proceeding. Although



GS 50-13.6 states that fees can be awarded in an “action or proceeding for custody or support”, the court of appeals held that within this context, “custody” and “visitation” are synonymous. However, the appellate court remanded the matter to the trial court for additional findings of fact because although the trial court made sufficient findings of fact to show plaintiff was a party acting in good faith with insufficient means, the trial court did not make all of the findings required to support the reasonableness of the fee awarded. The trial court made findings regarding the nature and scope of legal services provided to plaintiff, the skill and time required, the attorney’s hourly rate, and its reasonableness in comparison with that of other lawyers. However, the trial court order did not contain findings of fact to establish that the amount intervenors were ordered to pay were incurred by plaintiff defending against the grandparent visitation claim as distinguished from the amount plaintiff incurred in defending the claims of defendant father.

### **Modification; improvement in parent’s behavior and lifestyle**

- Party moving for modification has the burden of showing a substantial change in circumstances affecting the welfare of the children has occurred since the entry of the existing custody order.
- Positive changes in a parent’s behavior and lifestyle can support a conclusion that there has been a substantial change and that it is in the best interest of the children to have more contact with that parent.

**Padilla v. Whitley De Padilla, \_ N.C. App. \_, \_ S.E.2d \_ (May 5, 2020).** Original custody order between the parties entered in 2016 gave mother primary custody of the children and granted only minimal visitation to father due to issues related to his relationship with his girlfriend, his mental health and his unstable living conditions. In 2018, the trial court modified custody to substantially increase father’s visitation rights and mother appealed, arguing father failed to meet his burden of proving there had been a substantial change in circumstances affecting the welfare of the children.

The court of appeals rejected mother’s argument, concluding that evidence of father’s improved behavior and lifestyle was a substantial change in circumstances affecting the children. Evidence established that father had addressed and corrected many of the problems identified by the trial court in the original custody order. The court of appeals stated that although

“nothing has changed with mother’s continued ability to provide a safe, loving environment for the children, something substantial has changed. The children now have an opportunity to develop a more meaningful relationship with their father, while maintaining their healthy relationship with their mother. ... It is certainly not an abuse of discretion for a trial court to determine that it is in the best interest of children for them to have a meaningful relationship with *both* of their parents.”

**Child Support  
Cases Decided Between October 15, 2019 and May 5, 2020**

**Contempt; Rule 60(b)**

- Contempt order may have contained legal errors but was not void.
- Rule 60(b) cannot be used to set aside orders for legal errors.
- Contempt order entered by consent was an order of criminal contempt.
- Trial court had subject matter jurisdiction to enter criminal contempt order based on father's failure to pay child support as provided in child support order.
- Motion to set aside an order based on fraud pursuant to Rule 60(b)(3) must be brought within one year of entry of the order to be set aside.
- Order for arrest issued after father failed to comply with support obligation required by the consent contempt order violated due process because father was not given an opportunity to be heard before his suspended sentence was activated.

**Unger v. Unger, \_ N.C. App. \_, 834 S.E.2d 649 (October 15, 2019).** Order was issued for father to appear and show cause why he should not be held in contempt for failure to comply with child support order. Parties entered into a consent order finding father to be in contempt and reducing the amount of child support he was required to pay going forward. The contempt order stated:

“[Father] is hereby ordered into custody of the Sheriff ... for a period of thirty (30) days which shall be suspended by [father] abiding by the terms of this child support as herein set above or until such time as he purges himself of contempt.”

Father failed to pay the support order required in the contempt consent order and the trial court issued an order for arrest directing that father be arrested and held until he paid arrears.

No appeal was taken of the contempt order or the order for arrest. However, almost six (6) years after the orders were entered, father filed a motion pursuant to Rule 60(b)(3) alleging the consent contempt order was entered by fraud and pursuant to Rule 60(b)(4) alleging the contempt consent order was void. The trial court denied both motions and father appealed.

The court of appeals held that the Rule 60(b)(3) motion was not timely filed and affirmed the denial by the trial court. A motion to set aside an order or judgment based on fraud must be filed within one year of the entry of the order or judgment.

The court of appeals also affirmed the trial court's conclusion that the contempt order was not void for lack of subject matter jurisdiction. According to the court of appeals, the order was an order of criminal contempt because the order imposed a 30-day sentence that was suspended upon conditions. Because the trial court had subject matter jurisdiction to hold father in criminal contempt for the failure to comply with an order directing the payment of child support, the order was not void. The court of appeals held that while the contempt consent order “might contain legal errors which could have been the basis of a direct appeal if timely brought,” it was not void.

Noting that father did not make any argument on appeal about the order for arrest issued after the entry of the criminal contempt order, the court of appeals nevertheless explained that the order for arrest was “problematic” for at least two reasons. First, the arrest order required that father be held until all arrears were satisfied. However, the criminal contempt order imposed only a 30-day sentence. According to the court of appeals, any activation of the suspended sentence could not exceed the underlying sentence of 30 days. The arrest order was inappropriate because it did not make it clear father could not be held longer than 30 days.

Second, the arrest order was issued without first giving father notice and an opportunity to be heard. The court of appeals stated “while the trial court is authorized to suspend a sentence based on a finding of contempt, it a violation of due process to allow the sentence to be activated based on the alleged violation of a probationary condition without the opportunity first to be heard on the matter.”

### **UIFSA and compliance with the registration process; modification**

- NC court had subject matter jurisdiction to modify a Washington support order where Washington lost continuing exclusive jurisdiction to modify support when both parents and the children had relocated to NC.
- Fact that mother inadvertently filed only two parts of the three-part support order entered by the Washington court did not deprive the NC court of subject matter jurisdiction.
- While registration is required under UIFSA, registration is a procedural requirement and is not a jurisdictional requirement.
- Substantial compliance with the statutory registration process is sufficient to accomplish registration of a foreign support order.
- Where neither party was prejudiced by wife’s failure to file the third part of the Washington order along with her petition to register, the trial court properly concluded the Washington order had been registered in NC.
- Significant increase in amount of time father spends with the children after he relocated to NC from Washington was sufficient to support the trial court’s conclusion that there had been a substantial change in circumstances to support modification of support.
- A trial court is required to set a support obligation based on the income of the parties at the time of the modification hearing and the trial court has the discretion to make the modified amount payable from the date the request to modify was filed.

**Hart v. Hart, \_ N.C. App. \_, 836 S.E.2d 244 (November 5, 2019).** Trial court entered order modifying the child support obligation of father and mother appealed. The court of appeals rejected mother’s arguments and affirmed the trial court.

Uniform Instate Family Support Act (UIFSA)(GS Chapter 52C). Mother first argued that the trial court had no subject matter jurisdiction to modify the support order that had been entered by a court in Washington. The court in Washington had entered a support order but thereafter entered a “corrected order” to fix a “scrivener’s error” in the original support order. Both mother and father moved to NC after the entry of the corrected order in Washington. When mother registered the Washington order in NC for enforcement, she registered the original order and the order from the Washington court recognizing the “scrivener’s error’ but she did not file the final corrected

order. A few months after registration, father filed a motion to modify but mother argued the trial court had no subject matter jurisdiction because the final corrected order was not registered as required by UIFSA, GS 52C-6-602.

The court of appeals reviewed the requirements of UFISA, found in Chapter 52C of the NC General Statutes. The provisions of UIFSA prohibit modification of support orders entered in another state if the entering state retains continuing exclusive jurisdiction. If the state has lost continuing exclusive jurisdiction, a state with personal jurisdiction over an obligor has jurisdiction to modify. A person seeking modification of an order from another state that has lost continuing exclusive jurisdiction must register the order in the state where modification is sought. Registration requirements are set out in GS 52C-6-602.

In this case, Washington lost continuing exclusive jurisdiction to modify the support order when both parents and the children moved to NC and the court of appeals held that NC clearly had subject matter jurisdiction to modify the order. The court rejected mother's argument that NC failed to acquire subject matter jurisdiction because mother failed to comply with the registration process when she failed to file the final corrected order along with the other two parts of the Washington order. The court of appeals held that "registration is a procedural requirement, not a jurisdictional one" and that "substantial compliance" with the registration process is sufficient "to accomplish the registration of a foreign order." In this case, the court held that mother had substantially complied with the process and held that because both parties and the court knew about and had copies of the third part of the order, there was no prejudice resulting from her failure to include the final order.

Substantial change in circumstances. Mother also argued that the trial court erred in modifying the support order because there was insufficient evidence of a substantial change in circumstances since the entry of the Washington order. The court of appeals disagreed, concluding that while the trial court found "several material and substantial changes in circumstances, the significant changes in the parties' custodial arrangement alone was sufficient to warrant modification of the existing support order." The change in custody occurred because father moved from Washington to NC; a move that allowed him to spend much more time with the children.

Child support calculation. Mother's final argument was that the trial court erred in ordering the new amount payable as of the date father filed his motion to modify even though her evidence showed that her income changed during the time the motion to modify was pending. Mother argued this was error because, although the combined income of the parties exceeded the maximum monthly income to which the guidelines apply at the time of the modification hearing, the income of the parties did not exceed the upper limit of the guidelines during a period of approximately 18 months while the motion to modify was pending. The court of appeals rejected the argument without specifically addressing it. Instead the appellate court held that the evidence supported the trial court's findings as to mother's income at the time of the modification hearing. The court of appeals also stated that a trial court generally is required to set support based on income of the parties at the time of the hearing and has the discretion to set the new amount effective back to the date of the filing of the motion.

### **Automatic termination of child support obligation; emancipation; contempt**

- Trial court erred when it concluded father's child support obligation terminated automatically when teenaged child moved out of mother's home and assumed responsibility for most of his own living expenses.
- Order for child support terminates automatically if a minor child is emancipated by court order or marriage but not when a child simply moves out of the home of the parent and takes responsibility for his own support.
- In North Carolina, judicial order or marriage are the exclusive methods by which a child becomes emancipated.
- Vested child support obligations cannot be retroactively terminated by a trial court, meaning vested arrears cannot be vacated or forgiven.
- Trial court did not err in finding father was not in civil contempt for failing to pay support to mother. Finding that father did not pay because he mistakenly believed his obligation to pay terminated when child moved out of mother's home supported the trial court conclusion that his failure to comply with the support order was not willful.

**Morris (Powell) v. Powell, \_ N.C. App. \_, \_ S.E.2d \_ (February 4, 2020).** Trial court terminated father's child support order after concluding the teenaged son had effectively emancipated himself by moving out of mother's home. In addition, the trial court refused to order father to pay the support that accrued pursuant to the support order between the time the child moved out of his mother's home and the time of the hearing on mother's motion to enforce the support obligation. The trial court also denied mother's request that the court find father to be in civil contempt based upon a conclusion that father did not willfully violate the support order because he believed his support obligation terminated when the child left mother's home. On appeal, mother argued that the trial court erred in refusing to enforce the support arrears that accrued before the child support hearing and in refusing to hold father in civil contempt.

The court of appeals rejected father's argument that the child's 'self-emancipation' automatically terminated his child support obligation. Acknowledging that GS 50-13.4(a) provides that a child support obligation terminates automatically when a child turns 18 or is "otherwise emancipated," the court of appeals held that GS Chapter 7B provides the exclusive methods for a minor child to become emancipated. A court can emancipate a child through the judicial process provided in GS 7B-3500 and GS 7B-3509 provides that marriage emancipates a juvenile. However, GS 7B-3509 further provide that that "all other common-law provisions for emancipation are superseded by this Article."

Because the child support obligation did not terminate automatically when the child left mother's home, the trial court erred in relieving father of responsibility for the support payments that came due between the date the child left the mother's home and the date of the court hearing. The court of appeals held that "as a matter of law, vested child support obligations cannot be retroactively terminated." See GS 50-13.10.

The court of appeals affirmed the trial court conclusion that father was not in civil contempt. The trial court finding that father believed his support obligation had terminated supported the trial court conclusion that father's failure to comply with the support order was not willful.

### Contempt; right to appeal

- Court of appeals has no jurisdiction to consider an appeal of an order of criminal contempt because appeals of criminal contempt adjudications go first to superior court for a de novo hearing.
- There is no right to appeal a trial court order concluding respondent did not commit an act of criminal contempt.
- Order concluding respondent is in civil contempt is appealed directly to the court of appeals.
- Appeal of order determining respondent is not in civil contempt can be appealed to the court of appeals only if the order affects a substantial right.

**Hardy v. Hardy, \_ N.C. App. \_, \_ S.E.2d \_ (April 7, 2020).** Plaintiff mother filed a motion requesting defendant father be held in contempt for failure to pay child support and spousal support as provided in a California court order registered in North Carolina. The trial court issued a show cause order and held a hearing. The trial court denied plaintiff's request for contempt related to child support after concluding that the matter of child support had been settled by a consent order entered between the parties. The trial court held defendant had committed criminal contempt by failing to pay spousal support as required by the California order and entered an active sentence of incarceration suspended on the condition he pay monthly spousal support in an amount less than the full amount required by the California order. The trial court also denied plaintiff's request for attorney fees.

Plaintiff mother appealed the trial court order to the court of appeals but the appellate court dismissed the appeal for lack of jurisdiction. Pursuant to GS 5A-17(a), appeals of criminal contempt adjudications go first to the superior court for a de novo hearing. The appellate court has no jurisdiction to hear the appeal until the superior court issues an order. The court of appeals also stated that there is no right to appeal an adjudication concluding respondent is not guilty of criminal contempt and that there is no right to appeal a conclusion that a respondent is not in civil contempt unless the litigant seeking appeal can establish that the adjudication affects a substantial right. In this case, mother did not argue the denial of her request for civil contempt for father's failure to pay child support affected a substantial right.

### High income support calculation

- When the monthly income of parents exceeds \$25,000 (now \$30,000), the trial court must use the standard set out in GS 50-13.4(c) to set the amount of support. That statutory standard requires support "in such amount as to meet the reasonable needs of the child for health, education, and maintenance, have due regard for the estates, earnings, conditions, and accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case."
- When the guidelines do not apply, a child support order "must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount."

- Trial court findings must be supported by evidence in the record and be specific enough to show the appellate court that the trial court “took due regard of the particular estates, earnings, conditions, and accustomed standard of living of both the child and the parents.”
- Giving ‘due regard’ to the estates of the parties does not require detailed findings as to the value of each asset owned by each party but requires only that the trial court consider evidence of the assets and make sufficient findings to show appellate court that trial court considered the assets.
- Trial court properly relied on the financial affidavits of each party to establish the child’s accustomed standard of living because the affidavits established expenses incurred by each party for the benefit of the child.
- Prospective child support is determined based on circumstances at the time of the hearing and is payable from the date the action is filed.

**Kleoudis v. Kleoudis, \_ N.C. App. \_, \_ S.E.2d \_ (April 21, 2020).** Father appealed trial court child support order arguing that the trial court did not make findings of fact sufficient to support the amount of support ordered in case where income of the parties exceeded upper limit of the child support guidelines. In such cases, the trial court must determine support by applying the standard in GS 50-13.4(c). The court of appeals rejected father’s arguments and held the trial court properly considered and made findings of fact regarding all factors required by the statutory standard.

#### **Contempt; verified motion or affidavit is required for jurisdiction**

- Trial court has no subject matter jurisdiction to adjudicate civil contempt unless a verified motion or affidavit is filed to support the order to show cause or to support a motion for civil contempt.

**Walker v. Surles, unpublished opinion, \_ N.C. App. \_, \_ S.E.2d \_ (May 5, 2020).** Plaintiff filed a motion requesting the court to issue an order to show cause directing defendant to appear and show cause as to why he should not be held in civil contempt for failure to pay support. The motion was signed by plaintiff’s attorney but was not verified by plaintiff and was not accompanied by an affidavit executed by plaintiff. The trial court issued a show cause order and held a hearing. At the conclusion of the hearing, the trial court concluded plaintiff failed to establish defendant had the ability to pay support and determined defendant was not in civil contempt. Plaintiff appealed.

The court of appeals dismissed plaintiff’s appeal after concluding the trial court had no subject matter jurisdiction to adjudicate civil contempt. GS 5A-23(a) provides that a show cause order for civil contempt must be based on a verified motion or an affidavit containing facts sufficient to support the trial court’s finding of probable cause that defendant is in willful violation of a court order. In addition, GS 5A-23(a1) provides that a motion for civil contempt filed by a party who does not request a show cause order also must be verified or accompanied by an affidavit. Because the motion in this case was filed without a verification and without an affidavit, the trial court had no subject matter jurisdiction to adjudicate civil contempt.

## **Amendment to the Child Support Guidelines Regarding Child’s Health Care Coverage**

45 CFR sec. 302.56 requires that states adopt mandatory child support guidelines as a condition of receiving federal funds for programs such as TANF and child support services. That regulation also sets out the requirements for state guidelines. Similarly, 45 CFR sec. 303.8 prescribes the circumstances under which state child support orders must be reviewed and modified. Effective January 19, 2017, the federal Department of Health and Human Services (DHHS) adopted a final rule titled “Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs.” 81 Federal Register 93492 (Dec. 20, 2016) which, among many other things, modified both 45 CFR sec. 302.56 and 303.8 relating to health care coverage for children who are the subject of child support orders. [For a discussion of the provisions of this final rule dealing with the enforcement of child support obligations by contempt, see blog post from June 30, 2017, New Regulations Regarding Contempt in IV-D Child Support Cases].

The Conference of Chief District Court Judges recently amended the North Carolina Child Support Guidelines to bring the provisions in the guidelines relating to health care coverage into compliance with the amended federal child support agency regulations.

The modified Guidelines are effective March 1, 2020 and apply to child support actions heard on or after that date. The newly amended Guidelines will be available on the website of the Administrative Office of the Courts on that effective date.

### Definition of Health Care Coverage includes Medicaid

While child support guidelines have long been required to address how parents will provide for the medical needs of their child, until the 2017 amendment, a child’s eligibility for Medicaid could not be considered sufficient to meet the child’s health care needs. Following amendment, 45 CFR sec. 302.56 now requires that state child support guidelines “[a]ddress how the parents will provide for the child’s health care needs through private or public health care coverage and/or through cash medical support.” Health care coverage is defined in 45 CFR 303.31(2)(2) to include “public health care coverage, such as Medicaid.”

The “Health Insurance and Health Care Costs” section of the North Carolina Guidelines therefore were amended to provide:

“The court must order either parent to obtain and maintain medical health care coverage for a child if it is actually and currently available to the parent at a reasonable cost. Health care coverage includes fee for service, health maintenance organization, preferred provider organization, and other kinds of private health insurance and public health care coverage, such as Medicaid, under which medical services can be provided to the dependent child.”

### Modification of support orders

Amended 45 CFR sec. 303.8(d) now provides:

“Health care needs must be an adequate basis. The need to provide for the child’s health care needs in the order, through health insurance or other means, must be an adequate



basis under State law to initiate an adjustment of an order, regardless of whether an adjustment in the amount of child support is necessary.”

Therefore, the “Modification” section of the North Carolina Guidelines has been amended to provide:

“In compliance with 45 C.F.R. section 303.8(d), the need to provide for the child’s health care needs in a support order, through health insurance or other means, is a substantial change in circumstances warranting modification of a child support order, regardless of whether an adjustment in the amount of support is necessary.”

**Domestic Violence**  
**Cases Decided Between October 15, 2019 and May 5, 2020**

**Sufficiency of complaint to state a claim**

- Trial court erred in failing to consider handwritten pages filed along with the complaint when deciding whether to grant defendant’s request to dismiss the complaint pursuant to Rule 12(b) for failure to state a claim for relief.
- Allegations in the form complaint and handwritten pages filed along with the form complaint were sufficient to state a claim for relief pursuant to Chapter 50B.

**Quackenbush v. Groat, \_ N.C. App. \_, \_ S.E.2d \_ (May 5, 2020).** Plaintiff filed a complaint requesting a Chapter 50B DVPO alleging defendant had been verbally abusive to her and their children and that defendant had sexually abused their daughter. Defendant filed a motion to dismiss arguing the allegations in the complaint were insufficient to state a claim. The trial court dismissed plaintiff’s complaint after concluding that plaintiff failed to state the specific allegations of domestic violence in the body of her verified complaint.

The court of appeals reversed the trial court, holding that the trial court should have considered the handwritten pages plaintiff filed along with her complaint. The handwritten pages contained additional detail regarding the alleged acts of violence but the trial court did not consider them because plaintiff did not reference the handwritten pages in the body of the complaint form. The court of appeals rejected defendant’s argument that plaintiff was required to write “see attached pages” or “attached pages are incorporated herein by reference” or some similar statement to incorporate the additional pages into the complaint. The court of appeals held that the additional pages were file stamped along with the complaint and the additional pages referenced the specific paragraphs in the complaint being addressed in the additional papers. The court of appeals also noted that the AOC form complaint specifically informs plaintiffs that “additional sheets may be attached” to the form complaint.

The court of appeals also concluded that the complaint form and the additional sheets contained sufficient detail to state a claim for relief pursuant to Chapter 50B. The court explained that

“North Carolina remains a notice-pleading state, which means that a pleading filed in this state must contain a short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief. A complaint is adequate, under notice pleadings, if it gives a defendant sufficient notice of the nature and basis of plaintiff’s claim and allows defendant to answer and prepare for trial.”

In this case, the complaint and additional sheets alleged defendant was “verbally abusive” and provided some detail of “some alleged acts of abuse” and also alleged that the daughter of the parties had reported “allegations of sexual abuse committed by defendant to her school counselor.” The pages filed along with the complaint included a NC Safety Assessment and Agreement form created regarding the report of daughter’s allegations of sexual abuse made to DSS. According to the court of appeals, the detail provided to defendant was sufficient for

defendant and the trial court to “obtain a fair idea of what the Plaintiff is complaining and see that there is some basis for relief.” The court of appeals also noted that defendant did not allege that he actually did not know enough about plaintiff’s allegations to prepare his defense.

**Postseparation Support and Alimony  
Cases Decided Between October 15, 2019 and May 5, 2020**

**Denial of request for alimony and attorney fees; dependent spouse; consideration of estate of spouse**

- Trial court did not err when it determined wife was not a dependent spouse because she received proceeds from a \$1,000,000 life insurance policy shortly before separation and she also had the ability to earn substantial income.
- Consideration of wife's 'estate' was not inappropriate where trial court considered her estate in the context of considering her earnings and earning capacity and did not base the decision that she was not a dependent spouse on the fact she was capable of supporting herself through estate depletion. Dissent on this issue.
- Findings of fact made by the court to support the judgment of equitable distribution contained in the same document as the alimony order were sufficient to show the trial court properly considered and made all findings of fact required to support the trial court's decision on alimony.
- The trial court properly denied wife's request for attorney fees after concluding she was not a dependent spouse.

**Crago v. Crago, \_ N.C. App. \_, 834 S.E.2d 700 (November 5, 2019).** Trial court denied defendant wife's request for alimony and attorney fees after concluding she was not a dependent spouse. Defendant wife appealed and the court of appeals affirmed the trial court.

The wife argued on appeal that the trial court failed to consider all of the factors required by GS 50-16.3A. The alimony section of the Equitable Distribution and Alimony Judgment of the trial court concluded wife was not dependent at the time of trial because she had received \$1,000,000 in life insurance proceeds shortly before separation, she retained a significant portion of those proceeds at the time of the alimony hearing, and she had the capacity to obtain employment and earn substantial income. The court of appeals held that the trial court made findings concerning all other required factors, such as the financial circumstances of each party and the accustomed standard of living of the parties during the marriage, in the equitable distribution section of the judgment. The court of appeals held that when the judgment was reviewed as a whole, it was clear the trial court considered all required factors.

The majority opinion also rejects the argument of the dissent that the trial court erred by determining wife was not dependent solely because of the insurance proceeds and her ability to support herself through depletion of that estate. According to the dissent, the trial court cannot require wife to deplete her estate to support herself. The majority agreed that a decision to deny alimony cannot be based on the fact a spouse can support herself through estate depletion but held that estate depletion was not the basis of the trial court's decision in this case. Rather, the trial court considered the insurance proceeds as part of the court's analysis of her earnings and earnings capacity and determined that her earnings, assets and present earning capacity, along with all other factors concerning the finances of the parties and the accustomed standard of living supported the trial court's conclusion that she was not a dependent spouse at the time of the alimony hearing.

Because the trial court determination that wife was not a dependent spouse was affirmed, the court of appeals also upheld the trial court's denial of her request for attorney fees. GS 50-16.4 allows attorney fees only to a dependent spouse.

### **Disclosure of experts; sanctions for failure to disclose; explanation of alimony award**

- Due to a legislative amendment in 2015, Rule 26(b)(4)(a)(1) of the Rules of Civil Procedure now requires that expert witnesses be disclosed before trial, even if identification of experts is not required by a discovery request, discovery plan or a court order.
- Rule 26 does not specify when experts must be disclosed and does not provide a specific sanction for the failure to disclose.
- If a trial court determines a party failed to disclose an expert within a reasonable time prior to trial, the court has the inherent authority to determine an appropriate sanction.
- The trial court has discretion to exclude expert testimony as a sanction if the court in its discretion determines it is appropriate to do so because the failure to disclose gives a party an "unfair technical advantage."
- In granting or denying alimony, trial court must make findings of fact on all factors listed in GS 50-16.3A about which evidence is offered.
- Trial court must determine the reasonable needs of the parties at the time of trial considering not only their current expenses but also considering their expenses and standard of living during the marriage.
- Trial court must explain its reasons for amount and duration of alimony award and must explain why it denies a request to make alimony payable from the date of separation or from the date of the filing of the claim for alimony.

**Myers v. Myers, \_ N.C. App. \_, 837 S.E.2d 443 (January 7, 2020).** Wife appealed trial court alimony order, arguing the trial court erred by excluding her expert witness testimony regarding potential tax consequences of an alimony award and argued that the trial court failed to make findings of fact regarding all factors listed in GS 50-16.3A about which evidence was presented to support the alimony award. In addition, she argued the trial court failed to adequately explain its reasons for the amount and duration of the alimony awarded or to explain the reasons for denying her request to make alimony payable from the date of separation or from the date she filed her claim for alimony.

Expert testimony. The trial court excluded wife's expert witness's testimony regarding potential tax consequences of an alimony award because wife failed to disclose the expert to husband until the day before trial. The trial court determined that because of a 2015 legislative amendment to Rule 26, wife was required to disclose her expert witness before trial even if not requested to do so during discovery or required to do so by a discovery plan or other court order. Because wife did not disclose until a day before trial, the trial court ruled that Rule 26 required that the trial court exclude the expert testimony.

The court of appeals agreed with the trial court's conclusion that Rule 26 requires the disclosure of experts even if not requested in discovery, required by a discovery plan or required by a local rule or court order. However, the court of appeals did not agree that a violation of the disclosure provision of Rule 26 requires automatic exclusion of the testimony. The court of appeals held

that because Rule 26 does not specify how far ahead of trial disclosure must be made and does not mandate the consequence of a party's failure to disclose, the trial court must exercise its discretion to determine first that a party did not disclose in a reasonable amount of time before trial and then to determine, if disclosure was not made in a reasonable amount of time before trial, what the appropriate sanction should be. The court of appeals held that Rule 37 provides for sanctions when a party fails to comply with a discovery request or a discovery plan or court order but does not provide sanctions for the failure to disclose when disclosure has not been ordered or agreed to. However, the court of appeals held that a trial court has inherent authority to sanction a party for failure to comply with the mandatory disclosure requirement of Rule 26. The specific sanction imposed is within the discretion of the trial court and the sanction can be exclusion of the testimony altogether if the trial court determines the failure to disclose in a timely manner gave the party an "unfair technical advantage." Because the trial court in this case misinterpreted the law to require exclusion of the testimony, the court of appeals remanded the case to the trial court for further consideration and findings of fact to support the sanction the trial court determines to be appropriate.

Explanation of alimony award. Wife also argued the trial court failed to make findings regarding evidence presented regarding several factors listed in GS 50-16.3A. The court of appeals agreed the trial court failed to make findings regarding evidence concerning alleged marital misconduct by the husband and ordered the trial court to make findings on remand.

The court of appeals also agreed that the trial court failed to make findings and properly consider the accustomed standard of living of the parties during the marriage in determining wife's reasonable needs at the time of the alimony trial. The trial court determined wife's reasonable needs based only on her expenses at the time of trial. Wife's expenses were much lower at the time of trial than were husband's because she earned substantially less than he earned. His standard of living remained similar to that sustained during the marriage but wife's lifestyle was significantly different. The court of appeals stated: "[c]ertainly, there is no requirement that Wife enjoy the same lifestyle as Husband's current lifestyle, but the trial court must consider the accustomed standard of living developed during the marriage in determining Wife's reasonable need for support."

In addition, the court of appeals agreed with wife that the trial court failed to consider the parties' pattern of saving for retirement during the marriage in determining her reasonable needs. According to the court of appeals, "when the parties have established a pattern of saving for retirement as part of their accustomed standard of living during the marriage, this expense can be part of the accustomed standard of living and considered for purposes of alimony."

Amount and effective date of alimony award. The trial court ordered husband to pay \$1200 per month from the date of the entry of the order forward in time. The trial court denied wife's request to make the award payable from the date of separation or from the date she filed her claim for alimony. The court of appeals agreed with wife's contention that the trial court failed to explain the reason for the amount and duration of the award, noting that the evidence showed her expenses at the time of trial were greater than \$1,200 per month and that husband had the ability to pay "substantially more" than \$1,200 per month. In addition, the court of appeals held that

while evidence in the record shows husband made some voluntary support payments during the period of time from the date of separation until the time of the alimony trial, the trial court made no findings of fact about his payments and wife's needs sufficient to explain why the court denied wife's request for "retroactive alimony." The appellate court remanded this issue, instructing the court to reconsider and explain the award.

**Equitable Distribution  
Cases Decided Between October 15, 2019 and May 5, 2020**

**Classification of life insurance proceeds, tax debt**

- Trial court did not err when it used the ‘mechanistic approach’ to classify insurance proceeds received during the marriage and before the date of separation rather than the ‘analytic approach’.
- The ‘mechanistic approach’ provides that if property falls within the definition of marital property and does not fall within a definition of separate property, the property must be classified as marital.
- The analytic approach is used to classify personal injury proceeds and disability awards based on what the award is intended to replace.
- Where life insurance proceeds were received during the marriage and before the date of separation, and the premiums on the policy were paid in part with marital funds, the life insurance proceeds were marital property.
- The trial court did not err in failing to use the source of funds doctrine to classify the insurance proceeds as partially separate based on the percentage of premiums paid with separate funds where evidence failed to show any portion of the premiums were paid with separate funds.
- Where evidence established a tax debt existing on the date of separation arising from income tax and penalties owed for years the parties were married, the trial court properly classified the debt as marital debt even though plaintiff earned most of the income.
- Trial court was not required to make specific finding that defendant had funds to pay a distributive award where defendant had “obvious liquid assets” that could be used to pay the award.

**Crago v. Crago, \_ N.C. App. \_, 834 S.E.2d 700 (November 5, 2019).** Equitable distribution judgment entered by trial court and defendant wife appealed. Court of appeals affirmed trial court judgment.

Life insurance proceeds. Defendant wife purchased a life insurance policy on the life of her former husband before the date of her marriage to plaintiff husband. Some of the premiums on the policy were paid during the marriage between plaintiff and defendant with marital funds. The former husband died during the marriage and defendant wife received a \$1,000,000 benefit approximately two months before the parties separated. The trial court classified the life insurance proceeds as marital property and awarded 80% of the proceeds to defendant wife and 20% to plaintiff husband, ordering that plaintiff receive \$120,000.

The court of appeals held that the trial court appropriately classified the insurance proceeds using ‘the mechanistic approach’ and the court rejected defendant’s argument that the trial court should have used ‘the analytic approach’ to classify the proceeds according to what the proceeds were intended to replace. In this case, defendant argued the proceeds were intended to provide support to defendant’s children after the death of their father and therefore should be classified as separate property. The court of appeals held that precedent requires the application of the mechanistic approach to classify insurance proceeds rather than the analytic approach. The



mechanistic approach provides that property will be classified as marital if it meets the statutory definition of marital property and does not meet a statutory definition of separate property. In this case, the proceeds were marital because they were received by a spouse during the marriage and before the date of separation, were owned by the parties on the date of separation and did not fit within any category of separate property. The court of appeals also rejected defendant's alternative argument that application of the source of funds doctrine required that the funds be classified as partially separate property because premiums on the policy had been paid out of an account owned by defendant and opened by her before the date of marriage. The court of appeals upheld the trial court's finding that although the account was opened by defendant before the date of marriage, there was evidence that marital funds had been deposited into the account and no evidence that any of wife's separate funds remained in the account during the marriage.

Tax debt. The court of appeals also rejected defendant's argument that the trial court erred in classifying a tax debt as marital debt. The court of appeals held that the marital classification was supported by evidence that the tax liability was incurred during years the parties were married. The fact that plaintiff earned most of the income upon which the tax liability was based did not make the debt his separate debt.

Distributive Award. Finally, the court of appeals rejected defendant's argument that the trial court should not have ordered defendant to pay a distributive award to plaintiff without making specific findings of fact regarding defendant's access to funds to pay the award. The court of appeals held that while trial judges need to make such findings when the party being ordered to pay has "no obvious liquid assets", the amount of insurance proceeds in defendant's account at the time of separation established defendant had obvious liquid assets to use to pay the award.

#### **Effect of prior proceeding in superior court; constructive trust**

- Request for constructive trust in ED action was not barred by the doctrine of collateral estoppel. Summary judgment entered in prior superior court action between same parties did not address plaintiff's request for a constructive trust to bring property back into the marital estate.
- A court can impose a constructive trust to bring marital property back into the marital estate, even in the absence of fraud or breach of fiduciary duty, upon showing either of some circumstance making it inequitable for defendant to keep title to the property or that defendant acquired title in an "unconscientious manner."

**Poulos v. Poulos, \_ N.C. App. \_, \_ S.E.2d \_ (March 3, 2020).** Plaintiff filed action in superior court against her former husband and against several business entities and a trust. Plaintiff alleged fraud, constructive fraud, breach of fiduciary duty, and fraudulent transfers in violation of the NC Uniform Voidable Transactions Act (UVTA) and requested that the trust be set aside and that an accounting be ordered. All requests for relief were based on plaintiff's allegations that defendant former husband had engaged in a pre-divorce fraudulent scheme whereby he transferred marital assets to the other defendant business entities and the trust. The superior court granted partial summary judgment in favor of defendants on most claims. However, the superior court denied summary judgment for plaintiff's claims for breach of fiduciary duty and fraud

concerning two particular transfers and for the claims based on the UVTA regarding other transfers, after concluding there were material issues of fact to be resolved on those claims. After entry of the summary judgment order, plaintiff voluntarily dismissed all of her remaining claims.

Plaintiff thereafter amended her ED complaint pending in district court to allege facts relating to the fraudulent scheme alleged in the superior court action and requesting the imposition of a constructive trust upon marital assets wrongfully transferred. All business entities and the trust were joined as necessary parties to the ED action.

Defendants argued the claims raised in plaintiff's amended complaint were barred by the doctrine of collateral estoppel due to the summary judgment entered in the superior court action. The trial court agreed that the superior court judgment barred the trial court from considering the issue of whether the trust was validly created but rejected defendant's argument that plaintiff's request for the imposition of a constructive trust was barred.

The court of appeals agreed with the trial court, holding that issues resolved by the superior court "are not necessary to a determination of whether Plaintiff is entitled to a constructive trust in the equitable distribution action." The appellate court explained that a trial court can impose a constructive trust to bring marital property back into the marital estate, even in the absence of fraud or breach of fiduciary duty, upon showing either (1) some other circumstance making it inequitable for the defendant to retain the funds [title] against the claim of the beneficiary of the constructive trust, or (2) that the defendant acquired the funds [title] in an unconscientious manner."

#### **Filing before date of separation; tax value as evidence of value**

- While trial court had no subject matter jurisdiction to consider plaintiff's claim for equitable distribution because it was filed before the parties separated, the trial court did have jurisdiction to consider defendant's counterclaim for equitable distribution filed after the parties separated.
- Trial court cannot consider tax value as evidence of value of real property unless evidence is offered of tax value without objection by either party.

**Best v. Staton, \_ N.C. App. \_, \_ S.E.2d \_ (May 5, 2020).** Plaintiff filed action requesting equitable distribution before the parties began living separate and apart. Defendant filed an answer indicating that he would file for equitable distribution when the parties separated. Following separation, he filed a counterclaim for equitable distribution. Both parties filed motions to dismiss the other's claim. The trial court dismissed plaintiff's claim for lack of subject matter jurisdiction but did not dismiss defendant's counterclaim. Following entry of a judgment of equitable distribution, plaintiff appealed.

The court of appeals affirmed the trial court order denying plaintiff's motion to dismiss. While a trial court has no subject matter jurisdiction to consider an equitable distribution claim filed before parties begin to live separate and apart, the trial court had jurisdiction in this case to adjudicate defendant's counterclaim filed after separation. The court of appeals rejected plaintiff's claim that defendant's answer contained a claim for equitable distribution, holding that

the answer only stated an intent to file a claim later and did not include equitable distribution in the prayer for relief.

The court of appeals agreed with plaintiff's argument that the trial court erred in considering evidence of a passive increase in the value of the marital home following the date of separation and before the date of trial after consulting public tax records. The court of appeals held that tax value is not competent evidence of value unless it is admitted into evidence without objection from either party. In addition, the trial court erred in considering evidence of tax value if neither party offered evidence of tax value. The appellate court remanded the matter to the trial court to reconsider whether either party presented evidence of a post separation increase in the value of the marital residence.

**Spousal Agreements**  
**Cases Decided Between October 15, 2019 and May 5, 2020**

**Remedy specific performance**

- To receive the remedy of specific performance, a party must prove breach of contract and 1) that the remedy at law (a money judgment) is inadequate, 2) the obligor has the ability to perform, and 3) the party requesting specific performance has performed.
- The trial court erred in ordering specific performance as a remedy for husband's breach of contract because there was no evidence that the remedy at law was inadequate.
- While a judgment resulting from missed recurring payments due under a contract can support the remedy of specific performance, there must be evidence to support the conclusion that recovery of amounts due under the contract will require a "multiplicity of suits."
- Where husband failed to pay only because of his interpretation of the language of the contract, there was no evidence to support a finding that he was likely to continue to fail to pay in the future.

***Paez v. Paez, unpublished opinion, \_ N.C. App. \_, 837 S.E.2d 214 (January 21, 2020).*** The contract between the parties required husband to pay monthly alimony payments to plaintiff wife. Husband ceased paying when he lost his employment and he argued that the contract required him to pay only as long as he remained employed. The trial court disagreed with husband's interpretation and ordered that he pay the accumulated arrears and entered an order of specific performance requiring him to make all future payment required by the agreement. The court of appeals agreed with the trial court's conclusion that husband breached the contract but vacated the order of specific performance. According to the court of appeals, specific performance is an appropriate remedy only when the requesting party shows that a money judgment is an inadequate remedy. One way to show that the remedy at law is inadequate is to show a likelihood that securing full performance of the agreement will require a multiplicity of lawsuits in the future. Because there was no evidence that husband would not pay in the future, after the court of appeals interpreted the contract to require him to continuing paying despite his employment status, the remedy of specific performance was not appropriate.

**Jurisdiction to enforce separation agreement dividing military pension**

- North Carolina court had subject matter jurisdiction to adjudicate plaintiff's breach of contract claim regarding provisions in a separation agreement relating to the division of defendant's military pension where both parties agreed in the contract to adjudicate disputes in North Carolina.

***Poindexter v. Everhart, \_ N.C. App. \_, \_ S.E.2d 865 \_ (February 18, 2020).*** The parties executed a Separation Agreement and Property Settlement in NC in 2005. In the Agreement, both parties agreed to submit themselves to the jurisdiction of the NC courts to resolve all issues arising

out of the agreement. The Agreement also contained provisions relating to the division of defendant's military pension. Plaintiff filed this action in 2018 when the parties could not agree on the language for a military pension division order. At the time of filing, plaintiff lived in NC but defendant lived in Texas. The trial court dismissed the action after concluding NC had no subject matter jurisdiction to adjudicate a claim dealing with the division of defendant's military pension.

The court of appeals reversed, holding that GS 7A-244 grants subject matter jurisdiction to the district court to hear all matters relating to the enforcement of property settlement agreements between spouses. The court of appeals rejected defendant's contention that 10 USC 1408(c)(4) allows a state court to exercise subject matter jurisdiction over military retired pay only when the court has jurisdiction over the servicemember by reason of the member's residence in the state, other than because of military duty, or because the member is domiciled in the state, or when the member consents to the state's exercise of subject matter jurisdiction. Relying on *Judkins v. Judkins*, 113 NC App 734 (1994), the court of appeals held that this federal statute is a personal jurisdiction statute rather than a statute setting out requirements for a state court's ability to exercise subject matter jurisdiction. Because defendant consented to the personal jurisdiction of the NC courts in the separation agreement and stipulated in the present action that the court had personal jurisdiction over him, the trial court had both subject matter and personal jurisdiction to proceed with plaintiff's breach of contract claim.

**Chapter 50C Civil No-Contact Orders  
Cases Decided Between October 15, 2019 and May 5, 2020**

**Dismissal for failure to prosecute**

- A court has the authority to involuntarily dismiss an action pursuant to Rule 41 for a party's failure to prosecute an action.
- An involuntary dismissal for failure to prosecute must be supported by findings of fact, including findings that the trial court considered less severe sanctions before dismissing the proceeding.
- When a plaintiff in a 50C proceeding fails to appear at the hearing following the issuance of an ex parte 50C order, GS 50C-8(a) requires that the judge dismiss the ex parte order but it does not allow the judge to dismiss the entire 50C claim without additional findings of fact to support a sanction for failure to prosecute.

***Hopkins v. Edgerton, unpublished opinion, \_ N.C. App. \_, 833 S.E.2d 264 (October 15, 2019).*** Trial court dismissed plaintiff's claim for a Chapter 50C civil no-contact order when plaintiff failed to appear for the hearing scheduled following the issuance of an ex parte no-contact order. The court of appeals held that GS 50C-8(a) required the court to dismiss the ex parte order when plaintiff did not appear but held that the statute did not authorize the court to dismiss the entire proceeding. The court of appeals held that it is well-established in the law that a trial court cannot dismiss a case for failure to prosecute without making three findings of fact:

- First, that plaintiff acted in a manner which deliberately and unreasonably delayed the matter;
- Second, the amount of prejudice suffered by defendant as a result of plaintiff's delay, and
- Third, the reasons that a sanction other than dismissal will not suffice. (trial court must show it considered and rejected lesser sanctions and why it rejected lesser sanctions).

Because the trial court made no finding other than plaintiff failed to appear, the order of dismissal was vacated. ***See also Cornelius v. Cornelius, unpublished opinion, \_N.C. App. \_, 834 S.E.2d. 187 (November 5, 2019) (same).***