

Family Law Update

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1

Child Custody

2

Denial of visitation to parent

- Is the court required to conclude a parent is unfit or has waived his/her constitutional right to custody by conduct inconsistent with parental protected status before denying a parent access to the child in a case between parents?
 - *Moore v. Moore*, 160 NC App 569 (2003): YES
 - *Respass v. Respass*, 232 NC App 611 (2014): NO

3

Routten, 374 NC 571

- No
- GS 50-13.5(j) applies
 - Can deny 'reasonable visitation'
 - When parent is unfit OR
 - When visitation is not in best interest of child
- Constitutional analysis required in third party custody cases is not implicated in parent v. parent cases
 - Parents "have equal constitutional status"
- Best interest standard always resolves custody between parents

4

What constitutes a denial of 'reasonable' visitation?

- No visitation or visitation only as allowed by other parent
- Supervised visitation only
- But not:
 - Visitation generally unsupervised but longer periods of time supervised
 - *Paynich v. Vestal*, 837 SE2d 433 (2020)
 - Alternating weekends and visitation must take place within 100-mile radius of mother's home
 - *O'Connor v. Zalinske*, 193 NC App 683 (2008)

5

Findings required to establish best interest

- Findings must show why such a significant limitation is necessary
 - 'conclusory statements' of best interest are not sufficient
- Findings must establish nexus between the facts found and the welfare of the child
 - *Hinson*, 836 SE2d 309 (2019)
 - *Paynich v. Vestal*, 837 SE2d 433 (2020)

6

Parent vs Non-parent

- *Dunn v. Covington*, 846 SE2d 557 (2020)
 - Trial court must conclude parent has waived constitutional protection **BEFORE** considering evidence of best interest
 - Order must state that trial court applied clear, cogent and convincing standard of proof
 - A parent's socioeconomic circumstances are "irrelevant" to the determination of whether parent has waived constitutional protection

7

Dunn v. Covington

- "Socioeconomic factors that this Court has held do not show a parent's unfitness or acts inconsistent with constitutionally-protected status include the propriety of the parent's place of residence, that the parents move frequently, that their house at times lacked heat or was not cleaned regularly, their choice in spouse or babysitter, that the parent did not have relatives nearby to assist in caring for the child, a history of being unable to maintain stable employment, and loss of a job."
- *Cf. In re I.K.* (p. 10 of update)

8

Daly v. Kelly 846 SE2d 830 (2020)

- Dad subpoenaed therapist records and child's testimony
- Trial court:
 - Quashed subpoena for child
 - Denied request to make offer of proof
 - Ordered records delivered to trial judge; prohibited access by parents or attorneys
- Rule 43(c)
 - Offer of proof required unless "evidence not admissible on any grounds or witness is privileged."
 - Method of offer of proof is within discretion of court
- Therapist records
 - If court uses the information, parties must have access

9

Sherrill, 846 SE2d 336 (2020)



Attorney fee award review



When determining present income, court cannot consider evidence of imminent change in circumstances of parties

Dissent on this issue

10

Jurisdiction

- Inconvenient forum
GS 50A-207

11

Inconvenient Forum

Harter v. Eggleston
(8/4/20)(p.10)

- Evidence can be presented by affidavit and verified motion

Halili v. Ramnishta,
(9/1/20)(p.15)

- Determination can be made at any time during a custody proceeding
- Best interest determination is not required

12

Setting aside orders

- “Rule 60(b) is an improper method to remedy erroneous orders, which are properly addressed only by timely appeal.”
 - *Jackson v. Jackson* (Sept. 1, 2020)(p. 14)

13

Child Support

14

Initial child support

<ul style="list-style-type: none"> • <u>Retroactive support</u> • Support for time period <u>from the date of filing of complaint backward in time</u> – up to three years • Determined by guidelines applied at beginning of time period – up to three years back, <i>or</i> • Determined by actual expenses incurred on behalf of child during the time period covered 	<ul style="list-style-type: none"> • <u>Prospective support</u> • Support owed <u>from the date of filing of complaint forward in time</u> • Determined by guidelines or by deviation at the time of trial • Amount ordered presumed <u>payable from date of filing of complaint forward in time</u> <ul style="list-style-type: none"> • Deviation allowed if evidence presented and findings support amount ordered
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15



Guidelines can be used to calculate retroactive support

When guidelines are used, trial court is not required to make findings regarding reasonableness of childcare expenses

Trial court has authority to order annual exchange of income information including w-2s

16

Domestic Violence

17

Personal jurisdiction

- *Mucha v. Wagner*, 845 SE2d 443 (2020)
 - Under the specific circumstances of this case, defendant’s 28 cell phone calls to plaintiff in NC was sufficient to establish minimum contacts
 - Supreme court has granted discretionary review
 - *Cf. Mannise v. Harrell*, 249 NC App 322 (2016)



18

Equitable Distribution

19

Classification

- Gifts to “a” spouse during the marriage are the separate property of that spouse
- Party seeking to prove gift must show:
 - Property was transferred to spouse without consideration
 - Donative intent

20

Richter,
845 SE2d 99
(2020)

Life insurance proceeds paid to husband during marriage from policy on life of former wife were a gift to husband

Donative intent is inferred from a transfer without consideration

21

Stowe v. Stowe
846 SE2d 511
(2020)(p.23)

- When valuing business, court must “reasonably approximate” value using a sound valuation methodology
- Where trial court “merely evaluated one year’s past performance in the form of a balance sheet and a tax return,” valuation of marital business was not supported by sufficient findings of fact.
- Trial court erred in accepting multiplier of sales used by expert without making findings of fact sufficient to show the appropriateness of that multiplier

22

Valuation experts



- Civil Procedure Rule 26(b)(4)(a)(1) requires disclosure of expert prior to trial even without a discovery request, discovery plan or court order.
- Failure to disclose may or may not result in exclusion of the expert testimony
 - Sanction for failure to make timely disclosure is within discretion of trial court
 - Exclusion may be appropriate when the failure to disclose gives an “unfair tactical advantage at trial or defeats the purpose of “providing openness” as contemplated by Rule 26

23



Evidence Rule 702(A)

- (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, **a witness qualified as an expert by knowledge, skill, experience, training, or education,** may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
 - (1) The testimony is based upon sufficient facts or data.
 - (2) The testimony is the product of reliable principles and methods.
 - (3) The witness has applied the principles and methods reliably to the facts of the case.

24

<p><i>Stowe v. Stowe</i></p>	<ul style="list-style-type: none">• Experience of proposed expert goes to admissibility and qualification of witness and not just to the weight of the expert testimony.• <i>State v. McGrady</i>, 368 NC 880 (2016)
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25

<p><i>Stowe v. Stowe</i></p>	<ul style="list-style-type: none">• Tax consequences of a sale of an asset cannot be considered in valuation of that asset unless a sale is "imminent and inevitable"

26