Family Law Update
Cases Decided Between
June 2, 2020 and October 6, 2020

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

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Custody
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Denial of visitation to parent

- Before denying a parent 'reasonable' visitation, GS 50-13.5(i) requires that the court make findings 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 must be supported by the findings required by GS 50-13.5(i).
- A trial court is not required to conclude a parent is unfit or has otherwise acted inconsistent with their constitutional right to exclusive care, custody and control of their child before denying that parent reasonable visitation.
- The best interest analysis determines custody disputes between parents. The court is not required to consider the constitutional rights of parents before considering best interests because parents have equal constitutional status.

Routten v. Routten, 374 N.C. 571, 843 S.E.2d 154 (June 5, 2020).

My blog post from ON THE CIVIL SIDE, July 8, 2020

Child Custody: Denying Visitation to a Parent in a Case Between Parents

In this previous post, Child Custody: Denying or Significantly Limiting a Parent's Visitation (March 18, 2016), I wrote about a trial court's authority to deny 'reasonable' visitation to a parent in a child custody proceeding between two parents. I mentioned in that post the conflict between two opinions from the NC Court of Appeals regarding whether a trial court must consider the constitutional rights of a parent before denying that parent reasonable visitation in such cases. Those two conflicting opinions are *Moore v. Moore*, 160 NC App 569 (2003)(because a complete denial of visitation is 'tantamount to a termination of parental rights', the trial court must apply the constitutional analysis set forth in *Petersen* and *Price* before reaching a decision about a child's best interest) and *Respess v. Respess*, 232 NC App 611 (2014)(the constitutional analysis set forth in *Petersen* and subsequently clarified by *Price v. Howard*, 346 NC 68 (1997), applies in cases between a parent and a non-parent and has no application in custody cases between two parents).

In *Routten v. Routten* filed on June 5, 2020, the NC Supreme Court resolved this conflict and held that custody cases between parents do not implicate the parents' constitutional right to exclusive care, custody and control of their children that the trial court must consider in cases between a parent and a non-parent

Routten v. Routten

The trial court awarded sole physical custody of the children to Mr. Routten after mother repeatedly failed to provide the neuropsychological evaluation ordered by the court. The trial court concluded that sole physical custody to father was in the best interests of the children and allowed mother only two phone calls each week with the children.

The court of appeals agreed with mother's contention that the trial court order violated her constitutionally protected interest as a parent by awarding full physical custody to father without first finding she was unfit or that she had acted inconsistently with her protected status as a parent. *Routten*, 262 NC App 458. A dissenting opinion argued that the constitutional rights of parents relied upon by the majority are not applicable in cases between two parents.

GS 50-13.5(i) controls; *Petersen v. Rogers* does not apply

The supreme court agreed with the dissent in the court of appeals and affirmed the trial court order. According to the supreme court:

> "The resolution of the issue regarding the trial court's decision to deny visitation by defendant with the children without a determination that she was unfit to have visitation with them is governed by North Carolina General Statutes Section 50-13.5(i). As between two parents seeking custody and visitation of their children, the cited statutory provision states, in pertinent part, that
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> > "the trial judge, *prior to denying a parent the right of reasonable visitation,* shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child *or* that such visitation rights are not in the best interest of the child.
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> N.C.G.S. § 50-13.5(i) (2019) (emphasis added)."

The court rejected mother's argument that the statute requires that the trial court find her unfit before denying her any physical custody of her child, explaining:

> "A plain reading of this subsection reveals two points critical to the resolution of the issues in the matter here. First, this provision contemplates the authorized prospect of the denial to a parent of a right to visitation. Second, that such a denial is permitted upon a trial court's written finding of fact that the parent being denied visitation is deemed unfit to visit the child *or* that visitation would not be in the child's best interests. The unequivocal and clear meaning of the statute identifies two different circumstances in which a parent can be denied visitation, and the disjunctive term "or" in N.C.G.S. § 50-13.5(i) establishes that either of the circumstances is sufficient to justify the trial judge's decision to deny visitation. [citations omitted] Thus, contrary to the majority view and consistent with the dissenting view in the lower appellate court, in a dispute between two parents if the trial court determines that visitation with one parent is not in a child's best interests, then the trial court is authorized to deny visitation to said parent without a requirement to find the existence of the alternative circumstance that the parent in question is unfit."

The court further rejected the holding by the court of appeals that if a trial court does not find a parent to be unfit, the trial court must conclude the parent has waived his or her constitutionally protected status before denying that parent physical contact with his or her children. The supreme court disavowed the holding in *Moore v. Moore*, stating:

> "The majority decision of the Court of Appeals in this matter went astray due to its reliance upon *Moore*. The *Moore* case, as accurately recounted by the dissenting

> judge, "held that in a custody dispute between a child's natural or adoptive parents 'absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally protected paramount right of parents to custody, care, and control of their children must prevail.' " *Routten*, 262 N.C. App. at 458, 822 S.E.2d at 451 (citation omitted). The dissent notes that the Court of Appeals in *Moore* excerpted this language from our opinion in *Petersen v. Rogers*, 337 N.C. 397, 403–04, 445 S.E.2d 901, 905 (1994), "which established a constitutionally based presumption favoring a parent in a custody dispute with a non-parent," as controlling authority for the outcome in *Moore*. *Routten*, 262 N.C. App. at 459, 822 S.E.2d at 451.
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> However, the *Moore* court misapplied our decision in *Petersen*. The *Petersen* case established a presumption favoring a parent in a custody dispute *with a non-parent*; *Moore* wrongly employed this presumption in a custody dispute between two parents. This presumption is not implicated in disputes between parents because in such cases, a trial court must determine custody between two parties who each have, by virtue of their identical statuses as parents, the same "constitutionally-protected paramount right to custody, care, and control of their children." *Petersen*, 337 N.C. at 400, 445 S.E.2d at 903. Therefore, no constitutionally based presumption favors custody for one parent or the other nor bars the award of full custody to one parent without visitation to the other."

The supreme court also noted that this is not the first time it has held that the *Petersen* analysis has no application in cases between parents. The court stated that in *Owenby v. Young*, 357 NC 142 (2003):

> "we acknowledged the *Petersen* presumption and reaffirmed that "unless a natural parent's conduct has been inconsistent with his or her constitutionally protected status, application of the 'best interest of the child' standard in a custody dispute with a nonparent offends the Due Process Clause of the United States Constitution." *Id.* at 145, 579 S.E.2d at 266–67 (citations omitted). This Court went on to observe, however, that this "protected right *is irrelevant in a custody proceeding between two natural parents*, whether biological or adoptive, or between two parties who are not natural parents. In such instances, the trial court must determine custody using the 'best interest of the child' test." *Id.* at 145, 579 S.E.2d at 267 (citation omitted).

See also Adams v. Tessener, 354 N.C. 57, 61, 550 S.E.2d 499, 502 (2001)("In a custody proceeding between two natural parents (including biological or adoptive parents), or between two parties who are not natural parents, the trial court must determine custody based on the 'best interest of the child' test.").

What constitutes a denial of reasonable visitation?

Completely denying a parent physical custody time with a child clearly is a denial of reasonable visitation within the meaning of GS 50-13.5(i). The court of appeals also has consistently held that limiting a parent to supervised visitation is a denial of 'reasonable visitation' that requires

the findings set out in GS 50-13.5(i). *Maxwell v. Maxwell*, 212 NC App 614 (2011), *Hinkle v. Hinkle*, 131 NC App 833 (1998), and *Cox v. Cox*, 133 NC App 221 (1999).

However, the court of appeals has held that GS 50-135(i) did not apply in other cases where a parent's access to a child was significantly limited. Recently, in the case of *Paynich v. Vestal*, 837 S.E.2d 433 (2020), the court of appeals held that a **t**rial 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. And in *O'Connor v. Zalinske*, 193 NC App 683 (2008), 193 NC App 683 (2008), the court of appeals held that an order limiting father to alternating weekends from Thursday through Sunday and requiring that the visitation always occur within a one hundred mile radius of the custodial mother's home was not unreasonable visitation under the circumstances of the case.

What findings of fact are required to support a denial of reasonable visitation?

While the trial court is not required to conclude that a parent has lost his or her constitutional rights due to conduct inconsistent with the parent's protected status, the findings of fact supporting no visitation or supervised visitation must be sufficient to establish why such a significant limitation is in the best interest of the child. Conclusory statements of best interests are not sufficient. The court of appeals explained in *In re Custody of Stanci*l, 10 NC App 545 (1971):

> "The right of visitation is an important, natural and legal right, although it is not an absolute right, but is one which must yield to the good of the child. A parent's right of access to his or her child will ordinarily be decreed unless the parent has forfeited the privilege by his conduct or unless the exercise of the privilege would injuriously affect the welfare of the child, for it is only in exceptional cases that this right should be denied. But when it is clearly shown to be best for the welfare of the child, either parent may be denied the right of access to his or her own child."

See also Hinson v. Hinson, 836 SE2d 309 (2019)(trial court must identify the nexus between the facts found and the welfare of the child), and *Paynich v. Vestal*, 837 SE2d 433 (2020)(order denying a parent access to child's school and medical records must directly link that restriction to the welfare of the child).

TPR does not require 'minimum contacts'

- Due process does not require that a nonresident parent have minimum contacts with the State of North Carolina in order to establish personal jurisdiction over him or her for purposes of termination of parental rights proceedings.
- The status exception to the minimum contacts requirement applies to termination of parental rights proceedings.

- North Carolina must have subject matter jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (the UCCJEA) to adjudicate the termination of parental rights. G.S. 7B-1101.

In re F.S.T.Y., 374 N.C. 532, 843 S.E.2d 160 (June 5, 2020). Father resided in South Carolina when TPR petition was filed but NC was the child's home state pursuant to the UCCJEA. Father objected to personal jurisdiction because he lacked minimum contacts with North Carolina. The trial court terminated his parental rights and he appealed the personal jurisdiction issue. The supreme court affirmed the trial court, holding as a matter of first impression for the supreme court that minimum contacts are not required in a TPR proceeding. Rather, a child's relationship to her parents is sufficient to allow adjudication, based on status, in her home state even though the parents would not otherwise by subject to personal jurisdiction here. The court stated, "[u]pon considering the conflicting interests of the parent and child in termination proceedings, we join those states that have applied the status exception to the minimum contacts requirement in termination of parental rights proceedings." The court explicitly overruled *In re Finnican*, 104 NC App 157 (1991) and *In re Trueman*, 99 NC App 579 (1990).

Third-party custody; conduct inconsistent with protected status

- A trial court must conclude a parent is unfit or has otherwise acted inconsistent with their constitutional right to exclusive care, custody and control of their child **before** considering the best interest of the child in a custody dispute between a parent and a nonparent. The court cannot consider a child's best interest unless the court first determines the parent has waived his or her constitutional right to custody.
- A trial court's determination that a parent's conduct is inconsistent with his or her protected status must be supported by clear and convincing evidence.
- The trial court must state that it applied the clear and convincing standard rather than the greater weight of the evidence standard to allow the appellate court to determine that the appropriate standard was used.
- While factors relating to a parent's socioeconomic circumstances may be relevant to a best interest determination, "a parent's socioeconomic status is irrelevant to a fitness determination" or a determination that a parent otherwise has waived his or her constitutionally protected status.

Dunn v. Covington, __ N.C. App. __, 846 S.E.2d 557 (July 7, 2020). The trial court awarded full custody of the child to the child's paternal grandparents and mother appealed. The court of appeals vacated the order and remanded the case to the trial court after concluding that the trial court erred by applying the best interest of the child test before concluding the mother had waived her constitutional right to custody. The appellate court pointed to the custody order wherein the trial court first stated that it was in the best interest of the child to be in the custody of the grandparents and then stated that mother had waived her constitutional right to custody. The court of appeals held this established that the trial court erroneously considered best interest before concluding mother had lost her constitutional protections. Citing NC and US Supreme Court precedent, the court of appeals held that a trial court is precluded by Due Process from

considering a child's best interest in a custody case between a parent and a non-parent before concluding the parent has lost his or her constitutional right to custody.

The court of appeals also held that the trial court erred when it failed to state specifically that it applied the clear and convincing standard of proof in determining whether mother acted inconsistent with her constitutionally protected status. According to the court of appeals, if the trial court does not indicate that the appropriate standard was used, the appellate court must vacate the order because there is no way to determine whether the appropriate standard was applied.

The appellate court also held that the findings of fact regarding mother's economic circumstances relied upon by the trial court to support the conclusion that mother waived her constitutional right to custody established that the trial court erroneously "conflated the best interest of the child analysis with the independent and prior question of whether [mother] was unfit or has acted inconsistent with her constitutionally-protected status." The court of appeals explained:

> "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. [citations omitted] While socioeconomic factors such as the quality of a parent's residence, job history, or other aspects of their financial situation would be relevant to the determination of whose custody is in the best interest of the child, those factors have no bearing on the question of fitness.
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> In the present case, the findings the trial court relied on to conclude [mother] acted inconsistent with her constitutionally-protected status included that she was temporarily "homeless"; that she had "removed herself from the [grandparents'] home"; that she "not until recently, maintained gainful and continuous employment"; and that she previously "only worked sporadically." All of these are socioeconomic factors that may be relevant to a "best interest of the child" analysis but have no relevance to the preliminary question of whether [mother] is unfit or has acted inconsistent with her constitutionally-protected status."

The court of appeals also agreed with mother that other findings of fact relied upon the trial court to support the conclusion that mother had waived her constitutional right to custody were not supported by the evidence. The appellate court concluded that findings that mother "abdicated her daily nurturing, daily care and all the necessary activities related to child-rearing" to the grandparents, that the parents "provided no monetary support for their minor child while living with the [grandparents]", that mother was unable to remain gainfully employed, and that the parents were homeless, along with findings regarding mother's drug addiction and felony conviction were not supported by evidence in the record and were contradicted by evidence introduced by the parents.

Child testimony; offer of proof; review of therapy records

- Trial court erred when it refused to allow father to make an offer of proof after trial court quashed his subpoena to the child for testimony.
- Trial court erred by ordering child's therapist records produced to the court for in camera review only and using information in those records as evidence in the pending matters without allowing the parties and their counsel to review the records.

Daly v. Kelly, _ N.C. App. _, 846 S.E.2d. 830 (July 21, 2020). Mother filed a motion to modify custody and both parents filed motions for contempt based on alleged violations of existing order. Father issued a subpoena for records from the child's therapist and a subpoena for the child to appear and testify at the hearings on all pending motions. The trial court ordered the therapist records to be delivered to the court in camera and did not allow either parent or their attorneys access to the records. The trial court quashed father's subpoena for the child to appear and testify and denied father's request to make an offer of proof regarding the child's testimony after concluding that offering the testimony would cause the child emotional distress. The trial court then granted mother's motion to modify, ordering that mother have sole physical custody and suspending father's contact with the child until he completed a psychological evaluation and completed any education or treatment recommended by the evaluator.

Father appealed. The court of appeals reversed the trial court order and remanded the case for rehearing.

Offer of proof of child's testimony. Father argued that the trial court erred in modifying custody, in quashing his subpoena for the child to testify and in refusing his request to make an offer of proof regarding the child's testimony when the trial court quashed his subpoena. The court of appeals held that without the offer of proof, the appellate court could not review the trial court decision to modify custody or to quash the subpoena for the child to testify because the appellate court had no way of knowing the substance of the evidence to be provided by the child. The court also held that the trial court was required to grant father's request to make the offer of proof when the trial court granted the motion to quash the subpoena to the child. Rule 43(c) of the Rules of Civil Procedure requires a trial court to allow a party to make an offer of proof "unless it clearly appears that the evidence is not admissible on any grounds or that the witness is privileged." In this case, the trial court did not find either that the child's testimony was inadmissible under any grounds or was privileged so the court was required to allow father to make an offer of proof.

The court of appeals noted that the method for making the offer of proof is within the discretion of the trial court and pointed out that the child's testimony could be taken in a setting outside of the courtroom if the trial court determined it necessary to protect the welfare of the child as long as father's right to make a record is protected.

Denial of access by parties to therapist's record. The trial court based it's decision to not release the therapy records to the parties on the court's concern for "the therapeutic relationship and the potential harm that may come [to the child] from releasing the records." The court of appeals held that while the trial court could limit the parties' access to the records and order that they not

copy or disclose the content to others, the court could not deny the parties the right to "hear all evidence that was offered in this case." It was error for the trial court to consider the content of the records in deciding whether to grant the motion to quash the subpoena for the child to testify and in deciding whether to modify the existing custody order without allowing the parties access to all evidence considered by the court.

Finally, the court of appeals pointed out that father did not object to the trial court sealing the therapy records from public access and stated that the trial court order sealing the records from public view "is not the issue presented in this case." Nevertheless, the court of appeals stated that "it certainly is within the trial court's discretion to protect the child's therapy records from public access."

Attorney fees; determining when party has insufficient means

- Party seeking an award of attorney fees in a custody action must allege and prove that he/she is (1) an interested party acting in good faith and (2) has insufficient means to defray the expense of the suit. GS 50-13.6.
- A party has insufficient means to defray the expense of the suit when he/she is "unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as a litigant in the suit."
- In determining whether a party has insufficient means to defray the cost of the suit, the trial court must consider the party's actual present income at the time of the hearing and the reasonable expenses of the party at the time of the hearing.

Sherrill v. Sherrill, _ N.C. App. _, 846 S.E.2d 336 (July 21, 2020). Following entry of permanent custody order, the trial court granted plaintiff mother's request for attorney fees after concluding she was an interested party acting in good faith with insufficient means to defray the cost of the suit. Defendant appealed, arguing the trial court erred in calculating mother's income and in concluding she had insufficient means to defray the cost of the suit.

At the time of the hearing, the trial court determined that mother was working both as a kindergarten teacher and as an adjunct professor at a University. However, the court also found that because of the terms of the new custody order, mother would be required to relocate and leave her position as an adjunct professor. Therefore, the trial court did not consider the income mother earned as an adjunct professor in determining whether she had sufficient means to defray the cost of the custody litigation.

The court of appeals reversed and remanded, holding that the trial court erred when it failed to include her income from the adjunct professor position when determining whether she had insufficient means. The appellate court held that a trial court must consider a party's actual income and actual expenses at the time of the hearing on attorney fees and cannot base its decision on a change in income that might occur in the future. Judge Dillon dissented on this issue.

UCCJEA; inconvenient forum determination; affidavits as evidence

- To support a determination that North Carolina should stay the exercise of jurisdiction in a custody matter because another state is a more convenient forum, the trial court must make findings of fact as to the factors set out in GS 50A-2-207.
- Evidence provided in a verified motion or affidavit is competent to support the trial court's findings of fact required to support the determination that another state is the more convenient forum.

Harter v. Eggleston, _ N.C. App. _, _ S.E.2d. _ (August 4, 2020). Following the entry of a custody order in North Carolina, mother and child moved to Ohio. Following the move, the parties litigated several motions to modify in North Carolina. When father filed another motion to modify in November 2018, mother requested that the trial court stay the North Carolina proceeding pursuant to GS 50A-207 on the basis that Ohio was the more convenient forum. The trial court granted mother's motion and father appealed.

Father argued that the trial court erred by making finding of facts that were not based on competent evidence to support the conclusion that Ohio was the more convenient forum. Because the trial court did not hear testimony at the hearing and relied on the factual allegations in verified motions and affidavits filed by both parties, father argued that the findings of fact were "based on inadmissible hearsay evidence of an affidavit that was not properly introduced into evidence, arguments of [Mother's] counsel without the introduction of any evidence, and otherwise . . . devoid of any competent evidence whatsoever."

The court of appeals rejected father's argument, holding that a trial court can rely on affidavits and verified motions to supply the evidence necessary to support the findings of fact required to support a conclusion that another state is a more convenient forum based on the factors set out in GS 50A-107.

Conduct inconsistent with protected status

- Determination that parents have waived their constitutional right to custody by conduct inconsistent with that protected status must be based on clear cogent and convincing evidence.

In re: I.K., _ N.C. App. _, _ S.E.2d. _ (August 18, 2020). In context of a juvenile abuse/neglect and dependency proceeding, trial court concluded parents waived their constitutional right to custody. Parents argued on appeal that clear and convincing evidence did not support the trial court's conclusion, but the court of appeals disagreed. Dissent on this issue. The majority held:

- A parent acting inconsistently with their constitutionally protected paramount status must be supported by clear and convincing evidence. The determination is not a bright-line test but is instead fact-specific and is based on the parent's conduct and intention toward the child. The totality of the circumstances in the case support the determination that the parents acted inconsistently with their constitutional rights.

- The findings in this case are supported by clear and convincing evidence, and the findings support the conclusion that the parents acted inconsistently with their constitutionally protected rights.
    - Housing: The findings describe a cluttered (hoarding), crowded (parents living with one of their parents and their infant), dilapidated (holes in the floor) trailer and were supported by testimony and reports. The trial court gave more credibility to those reports and testimony when determining the day to day living conditions in the home than mother's photographic evidence of recent improvements. Credibility and weight of the evidence determinations are the role of the trial court and not the appellate court.
    - Domestic violence and substance abuse: Evidence of father's verbal aggression toward his mother, mother's drug seeking behavior, and both parents marijuana use support the court's findings that the issues with domestic violence and substance abuse have not been satisfactorily resolved.

Motion for new trial; Rule 11 sanctions

- Trial court did not err in denying father's motion for new trial pursuant to Rule 59.
- Trial court discretion regarding a motion under Rule 59 is "practically unlimited."
- Irregularities at trial are not grounds for a new trial unless shown to have caused prejudice to the moving party.
- Evidence that was accessible to party before trial was not newly discovered evidence.
- Mother's request for primary physical custody was not a surprise within the meaning of Rule 59(a)(3) where mother's pleadings clearly stated that she sought primary physical custody.
- Rule 11 sanctions can be imposed when a pleading or paper signed by a party or an attorney is not grounded in fact, not supported by existing law or a good faith argument for the extension of current law, or is offered for an improper purpose.
- When a party does not misrepresent facts to his attorney and absent an improper purpose, a party should not be sanctioned when he relies in good faith on the advice of counsel that his motions, pleadings or papers are well grounded in fact and law.
- An improper purpose is any purpose other than one to vindicate rights or to put claims of right to a proper test.
- Party requesting sanctions has burden of showing improper purpose.
- Sanctions were not proper where mother failed to show father filed motions "to gain a tactical advantage, cause unnecessary expense or delay, or to advance some other improper motive."
- Trial court findings of fact made to support the allocation of custody between the parties were supported by evidence in the record.

Jonna v. Yaramada, _ N.C. App. _, _ S.E.2d. _ (August 18, 2020). Trial court entered an order granting primary physical custody to mother and with secondary physical custody to father and father filed a motion pursuant to Rule 59 requesting a new trial. The trial court denied the motion and imposed Rule 11 sanctions against father based on the filing of the Rule 59 motion. Father appealed.

Rule 59 motion

The court of appeals first noted that the decision to grant or deny a Rule 59 motion for a new trial is within the discretion of the court and stated that this discretion is "practically unlimited." The court then addressed each of father's grounds:

- Father first argued that he was entitled to a new trial pursuant to Rule 59(a)(1) due to "irregularities at trial" because inadmissible hearsay was admitted during trial in the form of a police report regarding his acts of domestic violence against mother. The court of appeals held that, even assuming the reports were admitted in error, a party moving for a new trial pursuant to this section of Rule 59 must also show that the alleged irregularity at trial prejudiced him in some way. As there was other evidence of the domestic violence introduced without father's objection, the court of appeals held that he could not show the police reports deprived him of a fair trial.

- Father also argued that he was entitled to a new trial pursuant to Rule 59(a)(3) because of an "accident or surprise which ordinary prudence could not have guarded against." Father argued that because he and mother had shared physical custody equally under an earlier consent order, he was surprised and "shocked" at trial when mother requested primary custody. The court of appeals rejected this argument as well, stating that because mother clearly requested primary physical custody in her pleading and testified that she always had been the primary caretaker of the child, her request at the end of trial for primary physical custody was not a "surprise which ordinary prudence could not have guarded against."

- Finally, father argued that a new trial should have been ordered pursuant to Rule 59(a)(4) for newly discovered evidence. The evidence at issue was information that had been stored on father's computer before trial but only accessed by him after trial when he hired a computer expert to find it. In addition, he obtained day care records after trial that he did not obtain before trial because mother instructed the day care not to release the records to father. The court of appeals held that both of those items were available before trial and could have been recovered by father by hiring the computer expert before trial and by subpoenaing the day care records before trial.

Rule 11 sanctions

Father also argued that the trial court erred in imposing Rule 11 sanctions against him for filing three post-hearing motions that he maintains were a proper attempt to obtain appropriate post-trial relief from the custody order pursuant to Rule 59. The trial court agreed with mother that father was "merely upset with the [trial c]ourt's decision" and that his motions were not supported by facts or the law and were filed in bad faith.

Father asserted that he was properly attempting to obtain relief from the trial court's custody order in each motion by (1) convincing the trial court that it erred in the admission of evidence over his objection, to his prejudice, (2) exposing Defendant-Mother's misrepresentations to the trial court, and (3) bringing newly discovered evidence to the trial court's attention.

A Rule 11 sanction request demands a three-pronged analysis of the pleading, motion or other signed paper: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose. A violation of any of these prongs requires the imposition of sanctions.

1. Factual sufficiency: The court must determine (1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact.
2. Legal sufficiency: The court must look (1) to the facial plausibility of the pleading and, if the pleading is implausible under existing law, (2) to the issue of whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by existing law.
    - The court of appeals analyzed the first two prongs together, finding that the evidence did not support the trial court's assessment of sanctions against father on the ground that his post-trial motions had no basis in fact or law. Where father did not misrepresent the facts to his counsel, it was not unreasonable for him to believe, on the basis of his attorney's superior knowledge and skill, together with her willingness to undertake the pursuit of the Rule 59 motion on his behalf, that his motions were well grounded in fact and in law. The court of appeals held that absent an improper motive, Rule 11 sanctions should not be assessed against a client who relies in good faith on the advice of counsel.
    - In the present case, there was no evidence that Plaintiff misled counsel as to the relevant facts or posture of the case, so the assessment of sanctions against him on the grounds that his motions were not well grounded in fact or were not warranted by existing law is not merited.
3. Improper use: A court also must review the evidence to ascertain whether the pleading was filed for any purpose other than one to vindicate rights or put claims of right to a proper test.
    - An improper purpose is "any purpose other than one to vindicate rights or to put claims of right to a proper test". It is determined from the totality of the circumstances. The burden was on mother to prove that the motions were filed for an improper purpose in violation of Rule 11. Here, mother offered no evidence that father interposed his motions to gain some temporary tactical advantage, cause unnecessary expense or delay, or to advance some improper motive. All mother alleged was that filed his motions because he was "merely upset with the [trial c]ourt's decision." The appellate court noted, however, that this is usually the case in the wake of custody trial and does not constitute and improper purpose standing alone. The court reversed the trial court's order imposing sanctions.

Custody order

Father also argued on appeal that the trial court findings in support of the custody order were not supported by the evidence, but the court of appeals disagreed, concluding that each of the challenged findings of fact was supported by competent evidence. According to the court of appeals. father generally contended that the trial court erred by overlooking evidence that he presented at trial, or by making a credibility determination with which he disagrees. However, it

is within the trial court's discretion to decide the weight to be given to the evidence and to evaluations of credibility.

Rule 60(b); orders cannot be set aside for legal errors

- Trial court erred in setting aside custody order pursuant to Rule 60(b)(5) and (b)(6) because it did not contain findings of fact to support provisions requiring plaintiff to pay travel expenses related to the child.
- "Rule 60(b) is an improper method to remedy erroneous orders, which are properly addressed only by timely appeal."

Jackson v. Jackson, _N.C. App. _, _ S.E.2d. _ (September 1, 2020). In September 2017, the trial court entered a custody order which required that plaintiff reimburse defendant for travel to and from the child's preschool. Plaintiff did not appeal this custody order.

In June 2018, defendant requested that plaintiff be held in contempt for violating the payment provision. In response, plaintiff filed a motion pursuant to Rule 60(b) requesting that the trial court set aside the payment provision of the custody order. Plaintiff argued that the payment provision was a child support order and that it was entered in error because the trial court had no evidence and made no findings as to the incomes of the parties at the time the order was entered, the cost of the child's preschool or the cost of health insurance for the child.

The trial court granted the Rule 60 motion, concluding that because the support provisions were not supported by appropriate findings of fact, the order should be set aside pursuant to Rule 60(b)(5)(not equitable for the order to have prospective effect) and pursuant to Rule 60(b)(6)(irregularities justified relief).

Defendant appealed and the court of appeal reversed the trial court, leaving the custody order in place with the travel payment provisions. The court of appeals explained that a motion under Rule 60(b) cannot be used as a substitute for appellate review. An erroneous judgment cannot be attacked collaterally, it must be remedied by appeal. In this case, it was clear the trial court set aside the custody order due to the belief the support provisions were entered contrary to law. The only remedy for legal errors is direct appeal of the order or judgment.

Home state jurisdiction; temporary absence; inconvenient forum

- In determining how long a child has lived in a particular state for purposes of determining home state jurisdiction, a child's 'temporary absence" from a state is counted as time in that state.
- The trial court determines whether a child's absence from a state was a temporary absence by looking at the totality of the factual circumstances to determine the whether the absence was temporary or was a permanent change in where the child lived with a parent.
- A court with jurisdiction under the UCCJEA may decline to exercise that jurisdiction if it determines another state is a more convenient forum considering the factors set out in GS 50A-2-207.

- A trial court can determine that another state is a more convenient forum at any time during a custody proceeding and is not limited to considering only factors existing on the date the custody proceeding is filed.
- While the trial court must find that declining jurisdiction is appropriate under the circumstances, the UCCJEA does not require that the trial court specifically conclude that declining jurisdiction is in the best interest of the child.

Halili v. Ramnishta, _N.C. App. _, _ S.E.2d. _ (September 1, 2020). The trial court dismissed plaintiff's complaint for custody after concluding that North Carolina was not the home state of one child and was an inconvenient forum to litigate custody of another child. Plaintiff father appealed.

The following facts were not questioned on appeal:

- The first child of the parties, Opal, was born in New York in 2011.
- On June 28, 2017, Opal and her parents came to North Carolina. They returned to New York on July 9, 2017.
- The parties came back to North Carolina on August 18, 2017 to reside in a home they purchased in North Carolina.
- Second child Riley was born in North Carolina.
- On January 11, 2018, mother and children returned to New York and continued to live in New York at time custody action was filed on January 19, 2018.

Home state determination

The trial court found that Opal lived in NC with her parents from August 18, 2018 until January 11, 2018, not the 6 months required for NC to become the child's home state. The trial court found that the visit to NC from June 28, 2017 until July 9, 2017, was a temporary absence from New York. Because Opal did not live in NC for 6 months immediately preceding the institution of the custody action, NC did not have home state jurisdiction to determine custody of Opal.

Father argued on appeal that the parties moved to NC on June 28, 2017 and that the trip back to New York between July 9, 2017 and August 18, 2017 was a temporary absence from North Carolina that should be counted in the time to determine whether NC was Opal's home state. The court of appeals rejected father's argument, holding that the trial court properly examined the totality of the factual circumstances to determine that the parties did not begin living in NC until they moved into their home in NC in August. The court of appeals held that such factual determinations are for a trial court to make and as long as the facts are supported by evidence in the record, the appellate court will defer to the trial court's determination.

Inconvenient forum

While North Carolina was the home state for the child born in this state, the trial court held that New York was the more convenient forum for making a child custody determination regarding that child. Father argued on appeal that the trial court erred by considering factors occurring after

the institution of the custody matter to determine New York was the more convenient forum and erred in failing to find that litigation of the case in New York was in the best interest of the child.

The court of appeals rejected both arguments. First, the court held that the plain language of GS 50A-207 allows a court to determine another state is a more convenient forum "at any time" during a proceeding and requires that the court consider "all relevant factors" related to the parties at any point in time. Second, the court held that while the trial court is required to consider whether it is appropriate for a court of another state to exercise jurisdiction, the UCCJEA does not require the court to find specifically that declining jurisdiction is in the best interest of the child.

Reasonable visitation to parent

- Where trial court could not conclude father was unfit or that it was not in the best interest of the children to visit with him, the trial court could not deny father reasonable visitation even though visitation with father required the children to travel to Brazil.
- Fact that children and mother probably would not be able to return to the United States after traveling to Brazil was not sufficient reason to deny father visitation.

Jordao v. Jordao, _N.C. App. _, _ S.E.2d. _ (October 6, 2020). As a result of father's immigration status, he was forced to return to Brazil and could not return to the United States. As a result of the mother and children's immigration status, they probably will not be able to return to the United States if they leave the country. Mother filed a custody action and father responded seeking custody or visitation. The trial court awarded primary physical custody to mother and ordered visitation with father in Brazil.

Mother appealed, arguing, among other things, that the trial court erred when it ordered visitation in Brazil after making findings of fact that the mother and children probably will not be able to return to the United States if they leave the country. The court of appeals held that father is entitled to reasonable visitation unless he is unfit or the trial court concludes visitation is not in the best interest of the children. As the trial court found father fit and proper and concluded that it was in the best interest of the children to visit and maintain their relationship with him, the court of appeals affirmed the custody order.

Child Support
Cases Decided Between June 2, 2020 and October 6, 2020

Contempt; burden of proof; ability to pay; time limits on hearings

Civil contempt order must be supported with findings of fact that respondent's past failure to pay was willful supported by evidence that respondent had the ability to comply in the past.

In addition, civil contempt order must be supported with findings of fact that respondent has the present ability to comply with the order at the time of the contempt hearing.

When civil contempt proceeding is initiated by motion and the court does not issue a show cause order, the moving party has burden of proof to establish willfulness of respondent's noncompliance and respondent's present ability to comply with the order.

Trial court erred in shifting burden to respondent and holding respondent in civil contempt based on respondent's failure to prove he did not act willfully and did not have the ability to comply at the time of the contempt hearing.

Trial court abused its discretion when it limited father's total time to present evidence on plaintiff's motion to modify support to 20 minutes when plaintiff had used one hour and 40 minutes of court time on the same issue.

Price v. Biggs, __ N.C. App. __, 846 S.E.2d 781 (July 7, 2020). Trial court held respondent father in civil contempt for failure to pay child support as required by separation agreement incorporated into the parties' divorce judgment. Father argued on appeal that trial court inappropriately placed the burden of proof on him to establish why he should not be held in contempt and erred by holding him in contempt when there was no evidence that he had the ability to comply with the support order in the past or that he had the ability to comply at the time of the hearing. The court of appeals agreed, holding that when a civil contempt proceeding is initiated by motion without a show cause order, the moving party has the burden of first presenting evidence of respondent's ability to comply both in the past and at the time of the hearing. The trial court erred in this case by basing the civil contempt order on findings that respondent failed to establish his inability to comply and by holding father in contempt when there was no evidence introduced by either party establishing his ability to comply in the past and at the time of the hearing.

The court of appeals also agreed with father's argument that the trial court erred when it limited his time to present his case in response to mother's motion to modify support to 20 minutes. The issue was considered by the court during two separate court hearings. In the first hearing, plaintiff was allocated 1 hour and 45 minutes by the court and used 1 hour and 40 minutes. The parties then indicated they had reached a settlement agreement and the hearing concluded without father using any court time. The settlement fell through and there was a second hearing on the motion to modify. At the second hearing, both sides were limited by the court to 20 minutes. The court of appeals acknowledged that a trial court has the "inherent authority to supervise and control trial proceedings" and that the "manner of the presentation of the evidence is largely within the sound discretion of the trial judge." However, the court of appeals held that

in this case, the trial court did not have "a rational basis" for limiting father to less time than allowed mother.

UIFSA; rules of evidence; affidavit not required to be notarized

- UIFSA, NC General Statutes Chapter 52C, applies when parties in a child support matter reside outside of North Carolina.
- UIFSA includes "Special Rules of Evidence and Procedure" that allows the trial court to use affidavits that have not been notarized but were "given under penalty of perjury."

Gyger v. Clement, _N.C. _, 846 S.E.2d. 496 (August 14, 2020). Child support order entered in Switzerland was registered for enforcement in NC pursuant to registration provisions in UIFSA, NC General Statutes Chapter 52C. Defendant filed motion requesting trial court to vacate the registration. After concluding there was no evidence that the defendant had been given proper notice of the entry of the support order in Switzerland, the trial court vacated the registration pursuant to GS 52C-6-607(a)(1) and 52C-7-706(b)(3). Plaintiff filed motion to set aside the order vacating the registration and provided an Affidavit executed by mother to show father had received appropriate notice of the Swiss proceeding. The trial court denied the motion to set aside the order vacating the registration after concluding mother's affidavit was required to be notarized, finding that the affidavit "given under penalty of perjury" was not sufficient without notarization.

Mother appealed but the court of appeal affirmed the trial court, holding that a notarization is an essential element of an affidavit. The supreme court granted discretionary review and reversed the court of appeals, holding that while affidavits generally must be notarized, the General Assembly created an exception for certain proceedings pursuant to Chapter 52C in recognition of the challenges of international document production.

The court explained that Chapter 52C, the "Uniform Interstate Family Support Act," applies when parties in a child support case reside outside of North Carolina. It includes "Special Rules of Evidence and Procedure" to accommodate the difficulties that out-of-state residents may face, including G.S. § 52C-3-315(b) which provides that "[a]n affidavit . . . is admissible in evidence if given under penalty of perjury by a party or witness residing outside this State." Defendant argued that this subsection still requires affidavits to be notarized but the supreme court disagreed. The court concluded that the legislature intended to recognize and accommodate for the difficulties that international residents may face when involved with child support claims in North Carolina and therefore held that GS 52C-3-315(b) does not require that an affidavit given under penalty of perjury be notarized in order to be admissible.

Calculation of retroactive support; daycare expenses; exchange of financial information

- Trial court did not err in using the Child Support Guideline to calculate father's obligation for retroactive support.
- Trial court is not required to find day care expenses to be 'reasonable' if the court concludes the parent incurred the childcare expense due to her employment.

- Trial court has authority to order parties to exchange W-2's annually as part of a child support order.

Jonna v. Yaramada, _ N.C. App. _, _ S.E.2d. _ (August 18, 2020). Trial court entered an order requiring defendant father to pay both prospective and retroactive child support. In addition, the child support order required that the parents exchange copies of their W-2's and other evidence of their income annually. Father appealed, arguing that the trial court erred in calculating his child support obligation by including an amount for health insurance not supported by the evidence and by calculating his retroactive child support obligation using the Child Support Guidelines. He also argued that the trial court erred by including the cost of day care for the child in the calculation of support because his parents were available to provide day care for the child at no cost, making the mother's day care expense unreasonable. Finally, he argued that the trial court had no authority to order the parties to exchange W-2's annually.

While the court of appeals agreed that the trial court used an incorrect amount for the cost of health insurance based on a review of the evidence actually presented, the appellate court held that the trial court did not err in using the Guidelines to calculate the amount of retroactive support owed by father. Effective January 1, 2015, the Guidelines were amended to give the trial court the option of calculating retroactive support either by evidence of actual expenses incurred by the custodial parent during the time period before the filing of the complaint or by application of the Guidelines for time period.

In addition, the court of appeals held that the trial court did not err in considering the expense mother incurred for the child's daycare even though dad presented evidence that his parents were available to provide care for the child without cost. The court of appeals held that childcare expenses may be considered if the trial court concludes the expense is incurred due to a parent's employment. The court is not required to conclude that the expense is reasonable under the circumstances. Finally, the court of appeals held that the trial court order directing the parties to exchange W-2s annually did not exceed the authority of the court, stating that "ordering parties to exchange financial information annually is well within the inherent authority of the court to administer justice."

Domestic Violence
Cases Decided Between June 2, 2020 and October 6, 2020

Personal jurisdiction; minimum contacts; cell phone calls

- Trial court properly determined North Carolina could exercise personal jurisdiction over nonresident defendant.
- Under the specific circumstances of this case, defendant's 28 cell phone calls to plaintiff while she was in North Carolina were sufficient to establish defendant's minimum contacts with North Carolina to support the exercise of personal jurisdiction.

Mucha v. Wagner, **_ N.C. App. __, 845 S.E.2d 443 (June 2, 2020),** ***discretionary review granted,*** **_ N.C. _, _ S.E.2d _ (September 23, 2020).** Defendant Wagner and Plaintiff Mucha were in a dating relationship. Mucha ended the relationship and asked Wagner not to contact her again. At the time, Mucha was a college student in South Carolina and Wagner lived in Connecticut. Mucha later moved to North Carolina and, the day she moved, Wagner called her 28 times on her cell phone.

In one of the early calls, Mucha answered and told Wagner not to call her again. In a later call, Wagner left a voice message. When Mucha listened to the message, she suffered a panic attack. The next day, she filed a complaint for a domestic violence protective order in North Carolina. Wagner appeared solely to contest personal jurisdiction. The trial court denied his motion to dismiss and entered a protective order. Wagner appealed.

The court of appeals concluded that the trial court properly determined that it could exercise personal jurisdiction over Wagner, stating:

> "Although Wagner did not know at the time of the calls that Mucha moved from South Carolina to North Carolina that day, he knew that her semester of college had ended and she may no longer be residing there. Thus, his conduct—purposefully directed at Mucha—was sufficient for him to reasonably anticipate being haled into court wherever Mucha resided when she received the calls. Applying the due process factors established by the Supreme Court—the nature and context of Wagner's contacts within our State; our State's interest in protecting its residents from this sort of harmful interpersonal interaction; and the convenience to the parties, including Mucha's need to call witnesses of the events who were with her in North Carolina at the time—we hold that a North Carolina court properly could exercise personal jurisdiction over Wagner in this action."

The court of appeals stressed that this was "a close case" and that the result is based primarily on the fact that defendant knew Mucha could have been "in many different possible locations." Citing to an earlier decision in *Mannise v. Harrell*, 249 N.C. App. 322 (2016) wherein the court held defendant's contacts were not sufficient to support jurisdiction, the court in *Mucha* explained "[i]n another case, on different facts, phone calls to a cell phone of a person in an unknown location may not be sufficient to meet the due process requirements of personal jurisdiction."

Workplace Violence Prevention Act

- Trial court had the authority to order defendant to produce a video he recorded while committing the act of unlawful conduct that was the basis for the civil no-contact order.

Metlife Grp., Inc. v. Scholten, _ N.C. App. __, __ S.E.2d __ **(September 15, 2020).** Plaintiff employer obtained a civil no-contact order against defendant former employee after seeking the order pursuant to the Workplace Violence Prevention Act, GS 95-261, et. seq. That Act authorizes an action for a civil no-contact order by an employer on behalf of an employee who has suffered an act of unlawful conduct carried out at the employer's workplace. The trial court found defendant committed an act of unlawful conduct when he wrote threatening comments in blog posts and threatened and intimidated plaintiff's employees when he went to plaintiff's place of business during working hours. While in plaintiff's business, defendant recorded a video.

The civil no-contact order required defendant, among other things, to stay away from plaintiff's place of business and to stop harassing plaintiff's employees. In addition, the order required defendant to produce the video he recorded while he was in the plaintiff's place of business. When defendant failed to produce the video in accordance with the court order, the trial court held defendant in civil contempt.

On appeal, defendant argued that the trial court could not hold him in contempt for violating an order the trial court had no authority to enter. Defendant argued that the Workplace Violence Prevention Act does not give the court authority to order defendant to produce documents or other evidence when no discovery request is pending. The court of appeals disagreed, holding that the catch-all relief provision in GS 97-264(b)(6) authorizing the court to order "other relief deemed necessary and appropriate by the court" gave the trial court the authority to order production of the video.

Personal relationship; person acting in loco parentis

- When plaintiff is the parent, grandparent or person acting in loco parentis to the defendant, no DVPO can be entered against the defendant if defendant is under the age of 16. GS 50B-1(a)(3).
- A person in loco parentis is a person who has assumed the status and obligations of a parent without a formal adoption.
- Whether a person stands in loco parentis is "a question of intent to assume parental status and depends on all of the facts and circumstances."
- A change in circumstances can change the statute of a person acting in loco parentis, meaning a person acting in loco parentis can stop acting in loco parentis.
- To be subject to the exclusion in GS 50B-1(a)(3), plaintiff must be acting in loco parentis to defendant at time complaint is file requesting a DVPO.

Gibson v. Lopez, _ N.C. App. __, 845 S.E.2d 443 (October 6, 2020). Defendant is the 14-year old stepson of plaintiff. The trial court entered a DVPO against defendant after concluding defendant committed an act of domestic violence. The trial court rejected defendant's argument

that because plaintiff stepmother was a person acting in loco parentis to him, no domestic violence protective order could be entered against him because GS 50B-1(a)(3) excludes children under the age of 16 from actions brought by a parent, grandparent or person acting in loco parentis to that child. The trial court concluded that while plaintiff was defendant's stepmother and resided in the same house with him, she was "never able to act in loco parentis" to defendant due to his violence behavior towards her.

The court of appeals vacated the DVPO after concluding the trial court erred in finding plaintiff never acted in loco parentis to defendant and remanded the case back to the trial court to determine if plaintiff was acting in loco parentis at the time the complaint requesting the DVPO was filed. The court of appeals held that in loco parentis status is established by evidence showing an "intent to assume parental status" and an assumption of parental responsibilities. According to the court, the evidence established plaintiff in this case clearly had acted in loco parentis to defendant in the past when she quit her job to care for defendant and cared for defendant by, for example, cooking of him and taking him to school and to doctor's appointments. Plaintiff herself testified that at one time, she had considered herself as parenting her husband's children. The court of appeals therefore held that the evidence did not support the trial court's conclusion that plaintiff never acted in loco parentis.

However, the court of appeals held that the status of in loco parentis can change if the person stops acting or intending to act as a parent. In this case, the court of appeals suggested there may be evidence that plaintiff stopped acting in loco parentis to defendant due to his violent behavior against her and remanded the issue to the trial court.

**In a footnote the court of appeals explains that the trial court could not find a personal relationship between the parties based on one of the other relationships listed in GS 50B-1(a), such as 'current or former household members' unless the court first concludes that plaintiff stepparent was not acting in loco parentis to the child at the time the complaint was filed. If she was acting in loco parentis, the specific provision in GS 50B-1(a)(3) would control and prohibit the use of other relationships to support a DVPO.

Equitable Distribution
Cases Decided Between June 2, 2020 and October 6, 2020

Classification of assets purchased with life insurance proceeds; proving a gift

Proceeds of life insurance policy on the life of husband's former wife from a previous marriage received by husband during the marriage to plaintiff wife was a gift to husband.

Party seeking to prove property received during the marriage was a gift to that party has the burden of showing that the alleged donor intended to transfer ownership of the property to that party without receiving consideration in return.

A trial court may look at the circumstances of a transfer and may infer donative intent from a transfer made without consideration.

Assets acquired with the insurance proceeds during the marriage and owned on the date of separation were the separate property of husband.

Richter v. Richter, __ N.C. App. __, 845 S.E.2d 99 (June 2, 2020). Trial court determined that life insurance proceeds received by husband during the marriage were a gift to him from his former spouse. Because the proceeds were a gift to husband, the trial court classified assets purchased with those proceeds during the marriage and owned on the date of separation as his separate property. Wife appealed and the court of appeals affirmed the trial court classifications.

The appellate court held that where the husband did not own the life insurance policy and paid no premiums during the marriage, the trial court did not err in classifying the proceeds received by husband during the marriage upon the death of his former spouse as a gift to him and therefore his separate property pursuant to GS 50-20(b)(2). Because property purchased during the marriage with separate property is separate property, the trial court classification of the assets owned on the date of separation as separate property was appropriate as well. The court of appeals rejected wife's argument that husband failed to establish the insurance proceeds were a gift to him because he failed to introduce any evidence of former wife's donative intent. The court of appeals held that "the trial court may look to the circumstances of the case and may infer donative intent from a transfer made without consideration."

Valuation; expert testimony; consideration of tax consequences

- Trial court is required to 'reasonably approximate' the value of a marital business interest using a sound valuation methodology.
- Trial court erred in valuing marital business by utilizing incompetent evidence, incorporating methodology that did not approximate the value of the practice and goodwill, and by double counting revenue in the calculation.
- A business owner is competent to testify to the value of his business or property unless it affirmatively appears that the owner does not know the market value of the property.
- Trial court did not err in denying defendant's request to qualify witness as expert in field of business valuation because of his lack of experience in business valuation.

- Trial court cannot consider hypothetical tax consequences of a distribution; therefore, a trial court cannot consider the tax consequences that may result from the sale or liquidation of a marital asset unless the distribution requires the 'imminent or inevitable' sale or liquidation of that asset.

Stowe v. Stowe, _ **N.C. App. __, 846 S.E.2d 511 (July 7, 2020).** Trial court entered an equitable distribution judgment and defendant appealed.

Valuation of marital business. The parties acquired an independent insurance agency during the marriage and owned the business on the date of separation. The business operated as a sub-S corporation. Plaintiff wife presented expert witness testimony as to the value of the business on the date of separation and the trial court accepted her expert's valuation. The court of appeals held the trial court erred in accepting this value because:

1) The expert used an article written by another person as support for the multiplier of sales used in his calculation of value. The record contained no information about the qualifications of the author as an expert in business valuation. In addition, the article addressed the appropriate multiplier for a captive insurance agency, but the agency at issue in this case was an independent agency rather than a captive agency. The trial court did not address the qualifications of the author of the article relied upon by the expert witness and failed to acknowledge and reconcile the differences between a captive agency and an independent agency that impact the ultimate value of the two different types of companies.
2) The trial court found defendant husband's own opinion as to the value of his business not to be credible, in part because husband was not tendered or accepted by the court as an expert in business valuation. The court of appeals stated that "[a] business owner is competent to testify as to the value of his business or property" unless it is shown he has no actual knowledge of the market value. The court of appeals also stated that the weight given to the opinion of an owner is for the finder of fact to determine. The appellate court did not specifically state that the trial court erred in failing to consider husband's opinion.
3) The trial court failed to consider factors set out by the IRS for valuing the stock of a closely held corporation or the factors identified in *Poore v. Poore*, 75 NC App 414 (1985), including "the nature of the business and the history of the enterprise from its inception, the economic outlook in general and the condition and outlook of the specific industry in particular, the financial condition of the business, the company's earning capacity, [and] the market price of corporations engaged in the same or a similar line of business".
4) The trial court failed to address the factors required by the *Poore* decision to support a finding regarding the value of the goodwill of the company, including "the age, health, and professional reputation of the practitioner, the nature of the practice, the length of time the practice has been in existence, its past profits, its comparative professional success, and the value of its other assets."
5) Plaintiff's expert counted a cash asset and a note receivable twice in the asset section of the valuation spreadsheet and neither the expert nor the trial court provided a "reason for this double discount."

Refusal to qualify defendant's witness as an expert in business valuation. Defendant offered a witness as an expert in "business valuation in forensic accounting and certified public accounting." Based on the *voir dire* of the witness, the trial court found he was a certified public accountant but had minimal experience in business valuation, had maintained only minimal continuing education in business valuation practices and had not prepared business valuations more than twice in the last 30 years. The trial court did not qualify the witness as a business valuation expert and therefore did not consider his opinion as to the value of the marital business.

The court of appeals affirmed the trial court on this issue, rejecting defendant's arguments that the lack of experience of the witness in business valuation should go only to the weight given his opinion rather than to the admissibility of his opinion. The court of appeals held that pursuant to Rule 702(a) of the Rules of Evidence, the qualifications of a tendered expert goes to admissibility as well as to weight and held that the trial court did not abuse its discretion in concluding the witness was not an expert in business valuation.

Trial court consideration of tax consequences of a sale of retirement accounts distributed in ED judgment. The trial court distributed IRA and 401k accounts. Despite finding that "there is no evidence that these accounts will be immediately liquidated," the trial court nevertheless discounted the value of the accounts based on the testimony of plaintiff's expert that the accounts will have tax consequences when liquidated. The court of appeals held the trial court erred in by considering a "hypothetical tax consequence" in violation of rule that the trial court cannot consider tax consequences unless an actual sale is "imminent and inevitable."

Spousal Agreements
Cases Decided Between June 2, 2020 and October 6, 2020

Prenuptial agreement before Uniform Act; Dead Man's statute; statute of limitations

Dead man's statute, codified in Rule 601(c) of the NC Rules of Evidence, barred wife's testimony regarding her allegations that husband failed to disclose financial information before she signed a prenuptial agreement the night before their wedding.

For an agreement executed before the effective date of the Uniform Premarital Agreement Act, Chapter 52B, wife's claim that agreement was voidable based on duress was barred by the three-year statute of limitations.

For Agreements executed on or after July 1, 1987, GS 52B-9 tolls the statute of limitations on claims related to the execution of the agreement during the marriage of the parties.

Crosland v. Patrick, __ N.C. App. __, __ S.E.2d __ (September 15, 2020). Wife instituted an action seeking an elective share following the death of her husband. Husband's estate argued that a prenuptial agreement executed in 1978 on the night before the marriage of the parties barred wife from seeking an elective share. Wife argued that the prenuptial agreement was void or voidable because it was executed under duress and without disclosure by husband of his financial information. The trial court granted summary judgment for husband's estate and wife appealed.

The court of appeals affirmed the trial court, concluding that the Dead Man's statute barred wife from offering evidence about the conversations between the husband and wife at the time of the prenuptial agreement was executed and that the statute of limitations barred wife from attacking the agreement on the basis of duress or failure to disclose financial information.

Dead Man's statute

The court of appeals explained that Rule 601(c) of the Rules of Evidence prohibits evidence of statements made by a deceased person offered by a person who would potentially benefit from the alleged statements of the deceased person. Because wife's claim that the prenuptial agreement was void required testimony by her about the conversations between herself and her husband regarding the execution of the agreement and regarding the exchange of financial information, Rule 601(c) made it impossible for wife to prove her allegations. She could not offer evidence to establish a contested issue of fact regarding the validity of the prenuptial agreement so summary judgment in favor of husband's estate was appropriate.

Statute of Limitations

The court of appeals also held that the 3-year statute of limitations barred wife's claims to void the prenuptial agreement due to duress at the time of execution as the agreement was executed more than 37 years before wife made her claim. The court noted that the agreement at issue in this case was executed before the effective date of the Uniform Premarital Agreement Act applicable to agreements executed on or after July 1, 1987. For agreements executed on or after

the effective date of the Uniform Act, statutes of limitation are tolled during the marriage of the parties. GS 52B-9.