Family Law Update
Cases Decided Between
October 20, 2020, and June 15, 2021

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Custody
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Allocation of legal custody; attorney fees

- Trial court did not err in granting joint legal custody to parents but granting mother final decision-making authority on all major issues involving the children.
- Trial court order contained sufficient findings of fact to support award of attorney fees to mother.

Ward v. Halprin, _ N.C. App. _, 853 S.E.2d 7 (December 1, 2020). The trial court granted mother primary physical custody and awarded father visitation. The trial court granted joint legal custody but provided mother would have final decision-making authority on all major issues regarding the children if the parents could not agree. The trial court supported the legal custody decision with findings that both parents had made unilateral decisions about the children in the past which made "co-parenting ineffective." Citing these unilateral decisions, the parents' inability to communicate, and the impact the inability to communicate had on the children, the court concluded that the allocation of final authority to mother was in the best interest of the children. The trial court also awarded attorney fees to mother after making the statutorily required findings of fact.

On appeal, father argued that the trial court erred by awarding final decision-making authority to mother and in awarding attorney fees. The court of appeals affirmed the trial court, finding the trial court findings regarding the parents' inability to communicate and the impact of this inability on the children was sufficient support for the allocation of legal custody. In addition, the court of appeals affirmed the award of attorney fees, noting that father did not challenge any specific finding of fact made by the trial court. As the trial court found that the mother acted in good faith and had insufficient means to defray the cost of the litigation and made findings to support the reasonableness of the amount awarded, the majority affirmed the trial court award.

Judge Murphy dissented on both issues and an appeal is pending before the supreme court. The dissent argues that the findings of fact were not sufficient to support granting mother final decision-making authority on all issues and argues that the trial court should have considered payment of mother's attorney's fees by her parent as a gift to her and therefore part of her estate in determining whether she had insufficient means to defray the cost of the litigation.

Denial of visitation to parent

- Where evidence in the record was insufficient to support the trial court's findings of fact that supported the court's conclusions that mother was not a fit and proper person to have custody or visitation with her child and that it was not in the best interest of the child to have contact with her, trial court order denying mother visitation was reversed and remanded to trial court.

Sherrill v. Sherrill, _ N.C. App. _, 853 S.E.2d 246 (December 15, 2020). The trial court granted father sole legal and physical custody and denied mother visitation with the child after concluding mother had inappropriately touched the minor child on one occasion. The court of

appeals agreed with mother's argument on appeal that the evidence did not support the trial court's finding of fact that she had touched the child inappropriately. The court of appeals remanded the case to the trial court with instruction to resolve the ultimate fact of whether mother intentionally committed an act of sexual abuse against the child.

UCCJEA; home state

- North Carolina was home state of child at time TPR petition was filed even though her parents resided in Virginia; the child was born in a hospital in NC and placed with foster parents in NC when she left the hospital and she had lived with the foster parents in NC for at least six months by the time the TPR petition was filed.

In re N.P., 376 N.C. 729, 855 S.E.2d 203 (March 12, 2021).
(the following summary was prepared by Sara DePasquale)

Facts: In 2017, when respondent mother and father were visiting North Carolina, from their home in Virginia, mother went into premature labor. The baby was born in New Hanover County 23 weeks prematurely and remained in the hospital due to all her medical needs. DSS become involved and filed a petition, where the infant was adjudicated neglected and dependent. In that matter, the trial court determined it had temporary emergency jurisdiction under the UCCJEA. Mother and father returned to their homes in Virginia after they entered into a case plan with DSS. The parents remained in Virginia while the child remained in NC in foster care. In October 2018, DSS filed a TPR petition which was granted. Mother appeals, raising the district court's lack of subject matter jurisdiction.

The Supreme Court affirmed.

Subject matter jurisdiction cannot be conferred by consent or through waiver and may be raised at any time, including on appeal. A court has no authority to act without subject matter jurisdiction and any orders entered are void. If the lower court lacks subject matter jurisdiction, the appropriate action for the appellate court is to vacate orders that were entered without authority.

Subject matter jurisdiction is established by the Juvenile Code. G.S. 7B-1101 states the district court has exclusive original jurisdiction in TPR cases for any juvenile who resides in, is found in, or is in the legal or actual custody of a county DSS in the judicial district at the time the TPR petition/motion is filed. It further provides that there must be jurisdiction under the UCCJEA and that a nonresident parent's rights may be terminated when the court has jurisdiction under initial or modification jurisdiction under the UCCJEA and the parent has been served pursuant to G.S. 7B-1106. The question of subject matter jurisdiction in a TPR under G.S. 7B-1101 focuses on the custody, location, or residence of the *child* in a TPR, not the *parents*. (emphasis at Sl.Op. at 10). At the time the TPR petition was filed the conditions of G.S. 7B-1101 were satisfied: the juvenile resided in New Hanover County and was in the legal custody of New Hanover County DSS; NC was the juvenile's home state; and mother was served pursuant to G.S. 7B-1106 (there is no dispute on this last factor).

The UCCJEA is an overarching jurisdictional scheme that applies to abuse, neglect, dependency and TPR proceedings. Initially, in the neglect/dependency action, the NC district court exercised temporary emergency jurisdiction in the underlying neglect and dependency action. Mother argues temporary jurisdiction should have expired given the parents' residence in Virginia. In assuming arguendo that temporary emergency jurisdiction expired before the TPR petition was filed (as mother argues), "We are not required to determine with exactness the junction at which the temporary emergency regarding the child's well-being may have ended." Sl.Op. at 10. At the time the TPR was commenced, NC was the child's home state – child lived with a person acting as a parent (the foster parents) for at least 6 consecutive months immediately preceding the commencement of the TPR action. *See* G.S. 50-102(7).

Although mother argues the court should have applied the dispositional alternative G.S. 7B-903(a)(6) in the neglect/dependency case to transfer custody of the juvenile to the responsible authorities in her home state, Virginia, North Carolina was the juvenile's home state such that G.S. 7B-903(a)(6) was not an option.

Grandparent visitation statute unconstitutional as applied

- Award of visitation to grandparents by the trial court in this case pursuant to GS 50-13.2(b1) and 50-13.5(j) violated mother's constitutional right to exclusive right to care, custody and control of her child which includes the right to control with whom her child associates.
- Application of grandparent visitation statutes to award visitation rights to grandparents without a showing of deference to the parent's decision regarding grandparent visitation and in such a way as to interfere with the parent/child relationship violated Due Process.
- A trial court must presume a parent's determination of whether and when it is in a child's best interest to visit with a grandparent is correct.

Alexander v. Alexander, _ N.C. App. _, 856 S.E.2d 136 (March 16, 2021).
Mother and father settled custody by a consent custody order when they divorced. When father became ill a few years later, he began living with his parents and he filed a motion to modify custody. His parents also filed a motion to intervene and filed a request for visitation pursuant to the grandparent visitation statutes, GS 50-13.2(b1) and 50-13.5(j). The trial court granted the grandparents' motion to intervene, but father died before the court heard his motion to modify or grandparents' request for visitation. Following his death, the trial court entered a permanent order granting mother primary physical and legal custody and awarding grandparents extensive visitation rights. Mother appealed.

Statutory authority to order visitation

Mother first argued that the court had no statutory authority to grant visitation to the grandparents following the death of father. The court of appeals disagreed, holding that current case law interprets the grandparent visitation statutes to allow a court to award visitation when grandparents request visitation while there is an on-going action for custody between the parents. The appellate court held that because the grandparents had been allowed to intervene before father died, their claim remained pending when father passed away and the trial court had statutory authority to consider their request for visitation.

Constitutional authority to order visitation

Mother then argued that the grandparent visitation statutes are unconstitutional as applied in her case in that they allowed the trial court to impermissibly interfere with her fundamental Due Process right to exclusive care, custody and control of her child and the court of appeals agreed. The appellate court first noted that the grandparent visitation statutes are not facially unconstitutional in that both the US Supreme Court and the NC Supreme Court have recognized that there are situations where a trial court can award visitation rights to grandparents without violating Due Process, citing as an example the situation where a parent is found to be unfit or to have waived her constitutional right to custody. However, relying primarily on *Troxel v. Granville,* 530 U.S. 57 (2000), the court of appeals held that the trial court violated mother's constitutional right to control with whom her child associates by awarding visitation without giving sufficient deference to mother's decision regarding whether her child should visit with grandparents and by awarding such extensive visitation as to interfere with the parent/child relationship.

Required deference to parent's decision regarding visitation

Citing *Troxel's* holdings that fit parents are presumed to act in the best interest of their children and that this presumption cannot be overturned "merely because a judge believes that a different decision would be better", the court of appeals stated that "the court must *presume* that the Mother's determination [about the appropriateness of visitation with the grandparent] is correct." (italics in original) Neither *Troxel* nor the court of appeals in this case gives specific guidance as to what specific circumstances will be sufficient to rebut the presumption, but the court of appeals suggests that one situation may be where the child has a significant bond with the grandparent and the mother denies all contact without justification. In this case, the court of appeals noted that the trial court order gave no indication that the court afforded any deference to mother's decision regarding visitation and contained no findings of fact indicating whether mother denied visitation altogether or about her reasons for her decision about visitation.

Interference with the parent/child relationship

Also based on *Troxel,* the court of appeals held that any award of visitation cannot "adversely interfere with the parent-child relationship". The trial court in *Alexander* granted grandparents every other Thanksgiving and Christmas with the child as well as every other weekend. The court of appeals stated:

> "Mother, as the Child's sole custodial parent, has the right to determine with whom her Child spends these major holidays and should not be deprived of any right to spend these holidays with her Child. Also, the grant of visitation every other weekend is too extensive. Mother, as the Child's sole custodial parent, has the right to direct how her Child spends a large majority of the weekends."

The court of appeals remanded the visitation issue to the trial court with the instruction to consider grandparents' request for visitation by applying "the appropriate legal standard set forth

in *Troxel* and other binding authority, recognizing the paramount right of Mother to decide with whom her Child may associate."

Where are we now?

Until there is further guidance from the appellate courts, this is what we know now about a court's authority to award grandparent visitation rights.

1. Pursuant to G.S. 50-13.1, the court can grant custody or visitation to a grandparent if the court concludes the parent has waived her constitutional right to custody by being unfit, neglecting the welfare of the child or otherwise acting inconsistent with her fundamental Due Process right to exclusive care, custody and control of her child, and the trial court concludes visitation is in the best interest of the child; and
2. Pursuant to the grandparent visitation statutes, GS 50-13.2(b1) and G.S. 50-13.5(j), the court can grant grandparent visitation when there is an on-going custody dispute between the parents and:
    a. The grandparent overcomes the presumption that the parent's decision regarding visitation is in the best interest of the child,
    b. The court concludes visitation is in the best interest of the child, and
    c. The visitation awarded does not adversely interfere with the parent/child relationship.

Modification in third party custody case; self-evident impact of change on children

- When existing custody order grants custody to a nonparent third party such as a grandparent, the parent is not entitled to constitutional protection in a subsequent modification proceeding. This is true even if original custody order did not conclude the parent had lost constitutional protection by being unfit or acting inconsistent with their protected status.
- Father's "series of developments" in his life constituted a substantial change in circumstances that had a self-evident impact on the welfare of the minor child.

Fecteau v. Spierer v. Spierer, _ N.C. App. _, S.E.2d (April 20, 2021).

A consent custody order granted grandparents primary physical and legal custody of child, granted visitation to father, and granted supervised visits to mom. The consent order contained no findings of fact or conclusions of law that the parents were unfit or had acted inconsistent with their constitutional protections.

Father subsequently filed a motion to modify, alleging a substantial change in circumstances. The trial court concluded there had been changed circumstances and granted primary custody to father, visitation to grandparents and continued mother's supervised visitation. Grandparents appealed.

Grandparents first argued that the trial court erred by considering the lack of a conclusion in the consent custody order that the parents had waived their constitutional right to custody when determining whether the consent order should be modified. The court of appeals held that a trial court should not consider the lack of such a conclusion. Citing *Bivens v. Cottle*, 120 NC App 467

(1995), the court of appeals held that once a third party is granted custody, the parent is not entitled to assert their constitutional right to custody in a subsequent modification proceeding. The only issue before the court at the modification stage is whether there has been a substantial change in circumstances warranting modification. This is true even if the original custody order did not contain the conclusion that the parent waived the parent's constitutional right to custody. In this case, the court of appeals concluded that, while the modification order contained findings of fact referencing the lack of the conclusion in the original consent order, the trial court made sufficient findings of fact to support the conclusion that there had been a substantial change in circumstances affecting the welfare of the child and that modification of the order was in the best interest of the child. The additional findings regarding the lack of a conclusion in the original consent order were "immaterial."

Grandparents also argued that the trial court findings of fact were insufficient to support the conclusion that there had been a substantial change in circumstances affecting the welfare of the child. The court of appeals disagreed, holding that the trial court findings of fact showed changes that had a 'self-evident' impact on the welfare of the minor child, including the father's new and stable employment that provided health insurance, paid vacation and more flexibility for father to spend more time with the child, his marriage and the child's close relationship with the step-mother and her child. These "series of developments" in father's life constituted a substantial change in circumstances that had a self-evident impact on the welfare of the child.

Modification jurisdiction; another state "transferring" jurisdiction to NC is not sufficient to give NC jurisdiction

- NC court erred in exercising custody modification jurisdiction even though the state with jurisdiction entered an order "releasing jurisdiction to NC" because NC was not the home state of the children and NC did not have significant connection/substantial evidence regarding the children and parents.
- To modify an order from another state, GS 50A-203 requires that the NC court determine that the state that entered the order no longer has exclusive continuing jurisdiction or that the state has determined NC is a more convenient forum. In addition, NC also must have a basis for exercising initial determination jurisdiction; that means NC must be the home state or have significant connection/substantial evidence regarding the children and parents.

In re: K.R., K.R. and K.R., *unpublished opinion*, _ N.C. App. _, 857 S.E.2d 149 (April 20, 2021). A custody order was entered in Ohio in 2019. Mother and children moved to NC in July 2019. In August 2019, a petition was filed in NC alleging that the children were neglected and dependent. The NC court exercised emergency jurisdiction and contacted the Ohio court. The Ohio court entered an order acknowledging Ohio had continuing exclusive jurisdiction and "releasing" jurisdiction to the NC court. The NC trial court adjudicated the children neglected and dependent and mother appealed.

Mother argued that the trial court had no jurisdiction to modify the Ohio custody order and the court of appeals agreed. The court acknowledged that the NC court had temporary emergency jurisdiction when the petition was filed but held that NC had to meet the requirements of GS

50A-203 before entering the final adjudication "permanently modifying" the Ohio custody order. Even though Ohio "released jurisdiction" [assuming that meant Ohio determined NC was the more convenient forum"], GS 50A-203 also requires that NC have grounds to exercise initial determination jurisdiction. Because NC was not the home state at the time the petition was filed and did not have grounds to exercise significant connection/substantial evidence jurisdiction, NC did not meet the requirements of GS 50A-203.

§ 50A-203. Jurisdiction to modify determination.

Except as otherwise provided in G.S. 50A-204, a court of this State may not modify a child-custody determination made by a court of another state unless a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2) **AND:**

(1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or

(2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state. (1979, c. 110, s. 1; 1999-223, s. 3.)

§ 50A-201. Initial child-custody jurisdiction.

(a) Except as otherwise provided in G.S. 50A-204, a court of this State has jurisdiction to make an initial child-custody determination only if:

(1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;

(2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:

a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and

b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

Divorce and Annulment
Cases Decided Between October 20, 2020, and June 15, 2021

Date of separation; holding out as husband and wife

- "In divorce cases, separation implies living apart for the entire period in such manner that those who come in contact with them may see that the husband and wife are not living together."
- Trial court findings of fact supported the conclusion that the parties separated on the date defendant ceased marital cohabitation with defendant and that they continued to live separate and apart after that time.
- Findings that the parties shared two dinners and attended one church service together with their daughters, that both attended sporting events involving their daughters, and that defendant stayed in a basement apartment in the marital home for a number of nights solely for the purpose of spending time with the children of the marriage while the children were home from college and boarding school, did not establish that the parties held themselves out as husband and wife after defendant ceased cohabitation with plaintiff.

Fish v. Fish, *unpublished opinion,* _ N.C. App. _, 857 S.E.2d 140 (March 2, 2021). The trial court concluded that the date of separation of the parties was the date defendant ceased cohabitation with plaintiff in the marital residence and began to reside at a second home owned by the parties. Plaintiff argued that the parties continued to hold themselves out as husband and wife after that point in time in that the parties had dinners together with their daughters, attended the daughters' sporting events together, attended a church service together with their daughters, and defendant spent a number of overnights in the basement apartment of the marital residence when the children were home from college and boarding school. The trial court concluded that these interactions were for the purpose of spending time with the children and were not sufficient to establish that the parties held themselves out as husband and wife. The court of appeals agreed.

Domestic Violence
Cases Decided Between October 20, 2020, and June 15, 2021

Authentication of screenshot of Facebook post

- Screenshots of Facebook posts were properly admitted into evidence after being authenticated by sufficient circumstantial evidence to show the screenshots were what they were purported to be.

State v. Clemons, _ N.C. App. _, 852 S.E.2d 671 (December 1, 2020).
[The following summery was written by my SOG colleague Chris Tyner):

In this violation of a DVPO case, screenshots of Facebook posts were authenticated by sufficient circumstantial evidence showing that the screenshots in fact depicted Facebook posts and that the comments in the post were made by the defendant such that the screenshots were properly admitted into evidence. Shortly before the defendant was scheduled to be released from prison, the victim renewed a DVPO prohibiting him from contacting her. Soon after his release, the victim began receiving phone calls from a blocked number and Facebook comments from her daughter's account that the victim believed were written by the defendant rather than her daughter. These communications were the basis for the DVPO violation at issue.

The court first reviewed precedent to determine that the question of whether evidence has been sufficiently authenticated is subject to de novo review on appeal. The court then held that when screenshots of social media comments are used as they were here – to show both the fact of the communication and its purported author, the screenshots must be authenticated both as photographs and written statements. The victim's testimony that she took the screenshots of her Facebook account was sufficient to authenticate the images as photographs. The victim's testimony of receiving letters from the defendant while he was in prison and distinctive phone calls from a blocked number after his release, together with evidence of the defendant's access to the daughter's Facebook account was sufficient to authenticate the comments as written statements potentially made by the defendant such that admission of the screenshots into evidence was proper.

Judges Bryant and Berger concurred in result only, without separate opinions.

For a more detailed discussion on authentication of social media evidence, see this blog post written by SOG faculty member Jonathan Holbrook:

https://nccriminallaw.sog.unc.edu/new-guidance-on-authenticating-social-media/

Statutory definition of dating relationship unconstitutional as applied

- Denial of domestic violence protection order to plaintiff on the sole basis that she was in a same-sex dating relationship with defendant rather than a heterosexual relationship violated both the US and the NC Constitution.
- Trial courts are instructed to define personal relationship as applied in Chapter 50B proceedings to include all persons who are in or have been in a dating relationship, whether they are persons of the same sex or of the opposite sex.

M.E. v. T.J., _ N.C. App. _, 854 S.E.2d 74 (Dec. 31, 2020). Plaintiff M.E. filed a complaint seeking both an ex parte and a permanent DVPO pursuant to Chapter 50B alleging defendant T.J. had committed acts of domestic violence against her. Plaintiff alleged she had been in a dating relationship with defendant. The trial court denied plaintiff's request for ex parte relief, stating in the order that although plaintiff's allegations of violence were "significant", the trial court could not grant the ex parte DVPO because plaintiff did not establish a personal relationship with defendant. While plaintiff and defendant had been in a dating relationship, they were of the same sex and G.S. 50B-1(b)(6) does not include same-sex persons in a dating relationship in the definition of personal relationship. Following the hearing on plaintiff's request for a permanent relief, the trial court entered an order denying plaintiff's request, stating in the order that:

> "[P]laintiff has failed to state a claim upon which relief can be granted pursuant to the statute, due to the lack of statutorily defined personal relationship. …[H]ad the parties been of opposite genders, th[e] facts [presented] would have supported the entry of a Domestic Violence Protective Order (50B)."

Plaintiff appealed, arguing that the denial of her requests for both an ex parte DVPO and a permanent DVPO because she was in a same-sex relationship with defendant "violated her 14th amendment and state constitutional rights to due process and equal protection of the laws." The court of appeals agreed, concluding that "[n]o matter the [level of constitutional] review applied, N.C.G.S. § 50B-1(b)(6) does not survive Plaintiff's due process and equal protection challenges under either the North Carolina Constitution or the Constitution of the United States."

The court of appeals held (emphasis added):

> "We therefore reverse the trial court's denial of Plaintiff's complaint for a Chapter 50B DVPO, and remand for entry of an appropriate order under Chapter 50B. **The trial court shall apply N.C.G.S. § 50B-1(b)(6) as stating: "Are persons who are in a dating relationship or have been in a dating relationship." The holdings in this opinion shall apply to all those similarly situated with Plaintiff who are seeking a DVPO pursuant to Chapter 50B; that is, the "same-sex" or "opposite-sex" nature of their "dating relationships" shall not be a factor in the decision to grant or deny a petitioner's DVPO claim under the Act."**

There is a dissent by Judge Tyson arguing that the appellate court had no jurisdiction to consider the appeal in this case because plaintiff's appeal was not properly before the court due to several significant procedural problems. Appeal to the NC Supreme Court is pending.

Domestic Violence Legislation

Hearings held by video conference.

S 255, sec. 10.(i), 10.(j) and 10.(k) (Ratified but not yet signed by the Governor).

Effective on the date the legislation is signed by the Governor, GS 50B-2(e) is amended to remove the provision prohibiting the court from holding the hearing on the permanent DVPO via video conference.

Section 9.(a) of the legislation creates new section GS 7A-49.6 to allow judicial officials to "conduct proceedings of all types using audio and visual transmission in which the parties, the presiding official, and other participants can see and hear each other." Parties can object to conducting a civil proceeding by video conference and if the judicial official finds good cause for the objection, the proceeding shall not be conducted by video conference. When a civil proceeding involves a jury, the court may allow a witness to testify by video conference only upon a finding that good cause exists for doing so.

Child Support
Cases Decided Between October 20, 2020, and June 15, 2021

Modification in high-income case; reasonable needs of child

- Trial court did not abuse its discretion when it considered the estates and relative accustomed standard of living of each party in determining the reasonable needs of the child.
- Trial court did not err in ordering father to pay more than the amount of the child's actual needs where the trial court concluded the child's reasonable needs were higher than the amount currently being spent on the child due to the significant disparity in the incomes of the parents.

Bishop v. Bishop, _ N.C. App. _, 853 S.E.2d 815 (December 31, 2020). The trial court concluded there had been a substantial change in circumstances based on a substantial increase in father's income and a substantial change in the needs of the child and modified child support to increase father's obligation. On appeal, father argued that the trial court abused its discretion by ordering support in an amount greater than the actual expenses incurred by the parties for the needs of the child. Pointing to the significant disparity in income and standard of living between mother and father, the court of appeals affirmed the trial court's conclusion that the child's reasonable needs exceeded the amount currently being spent by the parties. The court of appeals held that in high-income cases, the trial court applies the standard set out in GS 50-13.4(c) to determine the amount of support; that is support is set giving "due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the childcare and homemaker contributions of each party, and the facts of the particular case." The trial court did not err in giving significant weight to father's ability to provide for the child in determining the reasonable needs of the child. Dissent on this issue.

Extraordinary expenses; residential treatment costs; unreimbursed medical expenses

- Costs associated with child's mental health treatment at a residential treatment facility including travel expenses and evaluation costs constituted an extraordinary expense pursuant to the Child Support Guidelines.
- A trial court has discretion to order parents to pay extraordinary expenses in addition to the basic monthly support obligation pursuant to the Guidelines.
- Ordering payment of extraordinary expenses is not a deviation from the Guidelines and the trial court is not obligated to make specific findings of fact regarding the child's reasonable needs or the parents' ability to pay.
- Findings regarding the disparity in income of the parties were sufficient to show the trial court did not abuse its discretion when it ordered defendant to pay 100% of the child's unreimbursed medical expenses.

Madar v. Madar, _ N.C. App. _, 853 S.E.2d 916 (December 31, 2020). The youngest child of the parties suffered from severe mental illness and was residing in a residential treatment program at the time of the child support hearing. The trial court determined that the expenses related to the child's treatment, including travel expenses and cost of evaluations, were

extraordinary expenses as defined by the Child Support Guidelines and ordered that defendant pay 60% of the costs and that plaintiff pay 40% of the costs in addition to the basic child support obligation calculated pursuant to the Guidelines. In addition, the trial court ordered defendant to pay all the child's unreimbursed medical expenses.

Defendant first argued on appeal that the trial court erred in concluding both parents had a duty to pay for the child's residential treatment. The court of appeals disagreed, holding that the Child Support Guidelines authorize the court to order payment of extraordinary expenses in addition to the monthly child support obligation required by the Guidelines. The Guidelines state:

> "extraordinary child-related expenses (including (1) expenses related to special or private elementary or secondary schools to meet a child's particular education needs, and (2) expenses for transporting the child between the parent's homes) may be added to the basic child support obligation and ordered paid by the parents in proportion to their respective incomes if the court determines the expenses are reasonable, necessary, and in the child's best interest."

The court of appeals held that a trial court has discretion to determining whether an expense constitutes an extraordinary expense, whether to order payment of an expense as an extraordinary expense, and to determine how the expense should be apportioned between the parties. Because ordering payment of extraordinary expense is not a deviation from the Guidelines, the trial court is not required to make specific findings of fact regarding the needs of the child and the ability of the parties to pay. The trial court findings of fact in this case established that the trial court did not abuse its discretion in apportioning the expenses between the parents.

Defendant also argued that the trial court erred in requiring that he pay all of the child's unreimbursed medical expenses. The court of appeals disagreed, holding that the trial court has discretion to apportion unreimbursed medical expenses between parents and that decision will be upheld absent a showing that the allocation is "manifestly unsupported by reason." The findings in this case showing the disparity in income between plaintiff and defendant were sufficient to show the trial court did not abuse its discretion.

Registration of foreign support order; personal jurisdiction

- Trial court did not err in dismissing mother's petition to register a Florida support order for failure to state a claim and lack of subject matter jurisdiction.
- Where mother's petition was in substance and form a petition to register the child custody provisions pursuant to Chapter 50A, the UCCJEA, it was not sufficient to meet the requirements for a petition to register a foreign support order pursuant to Chapter 52C, UIFSA.
- Custody jurisdiction is determined by the location of the child while child support jurisdiction requires personal jurisdiction over a defendant.

Halterman v. Halterman, _ N.C. App. _, 855 S.E.2d 812 (March 2, 2021). A Florida court entered an order addressing both custody and child support between plaintiff and defendant.

Plaintiff filed a petition in NC seeking to register the Florida "Foreign Custody and Support Order". The petition stated that it was being filed pursuant to GS 50A-305, the statute containing the registration provisions for custody orders in the UCCJEA, and the petition contained everything required by the custody statute. Father filed a motion to dismiss the request to register the support provisions, arguing that the petition failed to state a claim for registration of a support order and arguing the court lacked both personal and subject matter jurisdiction to register the support order. The trial court dismissed mother's petition to register the support order and mother appealed.

The court of appeals affirmed the trial court, holding that mother's petition was in substance and form a petition to register a custody order pursuant to the UCCJEA and not a petition that meets the requirements of UIFSA found in GS 52C-6-602 and 52C-3-301. The appellate court rejected mother's argument that registration of the custody provisions in the order was effective to register the entire Florida order, including the support provisions. The court of appeals noted that the jurisdictional foundation for custody and support are different; custody depends on the child's location while support depends on personal jurisdiction over the payor. Because jurisdiction is different for the two types of orders, registering one will not register the other even though both are contained in the same order. The court of appeals also rejected mother's argument that her petition should not be dismissed because it substantially complied with the requirements in GS 52C-6-602. The court held that mother did not substantially comply with the registration requirements of UIFSA where the petition did not request modification or enforcement of support and did not set out support arrears as required by the statute. As it was clearly "in substance and form' a petition to register a custody order, it was insufficient to state a claim for registration of the support provisions.

Income from self-employment; credit for other children living with parent

- Child support order did not contain sufficient findings of fact to show how trial court calculated father's income from self-employment. Income from self-employment is determined by subtracting a parent's actual reasonable business expenses from the gross income earned from the business.
- Child support order did not sufficiently explain why trial court did not give father credit for one child residing in his home. The order stated only that father's name was not listed on the child's birth certificate as justification for not crediting father for that child when calculating his guideline support obligation.

Craven County o/b/o Wooten v. Hageb, _ N.C. App. _, _ S.E.2d _ (June 1, 2021). Trial court ordered father to pay support for two children and father appealed. Father first argued that the trial court did not make sufficient findings of fact regarding his income from self-employment. The trial court made findings about the gross income, stated that the court had reviewed the tax returns, and made a finding that father paid many personal expenses from the gross business income. The court of appeals agreed with father that the trial court also should have made findings about what the court found to be father's specific reasonable business expenses to show how the court calculated the self-employment income.

The father had two additional children living in his home at the time of the support hearing. The trial court credited father with one additional child but did not credit him for the second child after finding that father's name was not on the child's birth certificate. The court of appeals remanded for additional findings regarding this child, noting that a child's paternity can be established in ways other than reviewing the child's birth certificate.

Findings required to support deviation from the guidelines; bonus income

- When trial court deviates from the guidelines, the court must make findings (1) stating the amount of the obligation pursuant to the guidelines, (2) determining the reasonable needs of the children and the relative ability of the parties to provide support, (3) supporting the trial court's conclusion that the amount of support due pursuant to the guidelines is inadequate or excessive, or that application of the guidelines is otherwise unjust or inappropriate, and (4) stating the basis on which the court determined the amount of support ordered.
- The trial court deviated from the guidelines by applying the guidelines to father's base income but ordering father to pay a percentage of his bonus income that did not comply with the guidelines.
- Trial court failed to make findings regarding the amount of support due pursuant to the guidelines when the trial court ordered a percentage of future bonuses to be paid as support but did not calculate father's income to include the bonuses.
- Trial court failed to make sufficient findings to establish the reasonable needs of the children.
- Trial court failed to resolve factual dispute between the parties regarding payment for extracurricular activities of the children and failed to include the expenses in the determination of either guideline support or in the reasonable needs of the children.
- Trial court did not err in including housing and utilities paid by mother's mother in the calculation of mother's income.
- Trial court findings of fact were insufficient to support trial court's order that mother repay father for the overpayment of child support.

Kincheloe v. Kincheloe, _ N.C. App. _, _ S.E.2d _ (June 15, 2021). The trial court entered an order modifying child support. The order reduced the amount of monthly support paid by father, ordered him to pay 2% of his annual bonus each year and determined mother owed father $5,313 for overpayment of child support and unreimbursed expenses. The court also ordered the parties to each pay a percentage of unreimbursed medical expenses and agreed-upon extra-curricular activities. Mother appealed.

Mother first argued that the trial court deviated from the guidelines without making the required findings of fact to support deviation and the court of appeals agreed. The appellate court concluded that the trial court deviated from the guidelines because the trial court ordered father to pay a percentage of his bonuses that was different than the percentage required by the guidelines. The guidelines require that non-recurring lump-sum payments be included as income and provide that the court "may average or prorate the income over a specified period of time or require obligor to pay a percentage of the non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support." Because the trial court ordered father to pay a percentage of the bonus that was not the percentage of his recurring income paid

for support, the trial court deviated from the guidelines. The court of appeals vacated and remanded the case to the trial court to make the findings required to support deviation.

Mother also argued that the trial court erred in including amounts for housing and utilities provided to her by her mother in the calculation of her income but also using her "reduced living expenses" as grounds to deviate from the guidelines. The court of appeals held that "maintenance received from persons other than the parties" is included as income to the receiving party when the maintenance reduces the party's living expenses. In this case, the trial court correctly included $1,041 in mother's income to account for the housing and utilities provided to her by her mother. However, the court of appeals remanded the issue to the trial court for more findings of fact to determine whether the trial court "double-dipped" by including the maintenance as income and also using mother's reduced living expenses as a reason to deviate.

Paternity of Sperm Donor, Choice of Law
[The following case summary was prepared by Sara DePasquale]

Warren County DSS ex rel Glenn v. Garrelts, ___ N.C. App. ___ (June 15, 2021)
Held: Reversed and remanded

- Facts: Defendant agreed to be a sperm donor for mother. The verbal contract was made and the artificial insemination occurred in Virginia where mother resided. Mother remained in Virginia and gave birth in Virginia in 2011. Mother was the only parent listed on the birth certificate. In 2019, Warren County DSS in NC filed a child support action alleging Defendant was the father. Defendant resided in NC. At the child support hearing, Defendant argued VA law applied, which states a sperm donor does not legally qualify as parent so no child support was owed. DSS argued NC law applies. The district court applied NC law and ordered that Defendant was the father and established current and past due child support. Defendant appealed.
- Issue: Choice of law between artificial insemination laws of Virginia and North Carolina in determining whether a sperm donor is a parent.
- The Full Faith and Credit doctrine is inapplicable because there was not an existing order from another state, Virginia. Instead, the court must apply a choice of law analysis because there are multiple states with conflicting substantive laws. Conflict of laws is a legal conclusion that requires a de novo review.
- Matters affecting substantial rights (e.g., causes of actions and damages) are determined by lex loci, the laws of the situs of the claim – the state where the cause of action accrued. Matters determining procedural rights (e.g., statute of limitations) are determined by lex foci, the law of the forum.
- Paternity law is substantive requiring the lex loci test because parenthood is a fundamental right that is protected by the legal system. Virginia was the situs of the claim – it was where the verbal contract, artificial insemination, pregnancy, and child's birth occurred. Virginia is the state where "the last event necessary to make the actor liable" took place. Sl.Op. ¶15. This approach follows Illinois and Kansas decisions and ensures predictable and equitable results and prevents forum-shopping to a state that has the most favorable laws for paternity.

Alimony
Cases Decided Between October 20, 2020, and June 15, 2021

Dependency; amount and duration

- Trial court findings of fact that plaintiff's reasonable expenses exceeded her income supported the trial court's determination that she was a dependent spouse.
- Trial court findings that defendant's income exceeded his reasonable expenses supported the conclusion he was a supporting spouse.
- While the trial court made adequate findings of fact to show it considered all of the factors required by GS 50-16.3A(a), the trial court erred by failing to "include findings to support its rational for awarding plaintiff the specific amount" ordered and to explain the duration of the award.

Madar v. Madar, _ N.C. App. _, 853 S.E.2d 916 (December 31, 2020). The trial court concluded plaintiff wife was a dependent spouse, defendant was a supporting spouse, and ordered defendant to pay alimony. On appeal, defendant argued the findings of fact did not support the trial court's conclusions and that the trial court failed to adequately explain the amount and duration of the alimony award.

The court of appeals affirmed the trial court's conclusions regarding plaintiff's entitlement to alimony. The evidence established that her reasonable expenses exceeded her income and therefore supported the trial court's conclusion she was a dependent spouse. Similarly, the court of appeals held that the evidence established that defendant's income exceeded his reasonable expenses and therefore supported the trial court's conclusion he was a supporting spouse. However, the court of appeals agreed that the trial court failed to adequately explain "its rational" for the amount ordered and the duration of the award. The trial court made extensive findings regarding each factor set out in GS 50-16.3A(a) but did not explain in its findings how it determined the specific amount and duration.

Equitable Distribution
Cases Decided Between October 20, 2020, and June 15, 2021

Contempt for failure to comply with judgment; Rule 11 sanctions

- The trial court properly determined husband was in continuing civil contempt for failing to comply with ED judgment even though husband had been found in civil contempt for the same violation 2 years earlier. Husband still had not complied with the judgment at the time of the second hearing, so he was in continuing civil contempt.
- A court may order that a person found in civil contempt be incarcerated until the person complies with the purge provision imposed by the court. However, a person found in civil contempt for the nonpayment of money other than child support cannot be incarcerated longer than 90 days. If civil contempt continues at the end of that 90-day period, the person can be subjected to 3 successive additional 90-day imprisonments, but the court must conduct a hearing de novo and determine the person still is in civil contempt before each additional incarceration.
- Wife was not entitled to entire balance in account at time of contempt hearing where ED judgment ordered husband to pay a sum certain from the account and did not order that he transfer the account to wife.
- Trial court failed to make sufficient findings of fact to support denial of wife's request for Rule 11 sanctions against Husband.

McKenzie v. McKenzie, _ N.C. App. _, 853 S.E.2d 278 (Dec. 15, 2020). The ED judgment ordered that "the [date of separation] balance of $236,014 in [a certain money market account] shall be distributed to wife. Husband shall immediately transfer this balance by delivering a certified check to wife."

When husband failed to pay, a trial court found him to be in civil contempt and held that he could purge himself of contempt by "transferring the [then] gross balance in the account to wife." The court did not order husband to be imprisoned until he complied with the purge.

Two years later, when husband still had not complied with the judgment, the trial court found him to be in continuing civil contempt and ordered that he be imprisoned until he paid the sum certain identified in the ED judgment. The trial court denied wife's motion for Rule 11sanctions.

Wife appealed, arguing that the trial court erred in ordering husband to pay the sum certain rather than requiring him to turn over the entire account which had appreciated in value since the time of the ED order. Wife argued that the ED order distributed the account to her rather than a specific sum and, in the alternative, she argued that the trial court in the second contempt hearing was bound by the determination in the first contempt order that husband was required to turn over the entire account.

The court of appeals rejected mother's arguments regarding the contempt order. The court held that the ED judgment clearly ordered the payment of a sum certain rather than the distribution of the entire account. Because the judgment was for a sum certain rather than the account itself,

wife was entitled only to that sum certain and not to the entire value of the account at the time of the contempt hearing.

The court of appeals also held that the trial court in the second contempt hearing was not bound by the purge condition in the first contempt hearing. The appellate court explained that a person in continuing civil contempt for the nonpayment of money can be incarcerated until the money is paid or up to 90 days, whichever is less. The person can be imprisoned for 3 additional 90-day periods if the court conducts a de novo hearing and determines the person still is in civil contempt before each consecutive 90-day period. The court of appeals held that the trial judge entering the second contempt order in this case was conducting a de novo hearing on the continuing civil contempt and was required to determine the appropriate purge de novo. The purge condition in the first contempt hearing did not bind the parties regarding how the ED judgment should be interpreted because a purge condition may or may not track the obligation because a purge must reflect what the contemnor has the actual ability to pay at the time. The first order may have established what husband had the ability to pay at the time of the first contempt, but it did not conclusively interpret the ED judgment.

Wife also argued on appeal that the trial court failed to make sufficient findings of fact in denying her request for Rule 11 sanctions against husband for his "abusive use of frivolous motions, complaints, and appeals to avoid compliance with the ED judgment." The court of appeals concluded that the trial court failed to make findings of fact regarding the evidence wife presented in support of her request for sanctions and remanded the sanction issue to the trial court for additional findings of fact.

Spousal Agreements
Cases Decided Between October 20, 2020, and June 15, 2021

Interpretation of premarital agreement; gifts; real property in foreign country

- Trial court erred in concluding wife did not provide consideration for the acquisition of property where she personally guaranteed the loans obtained to acquire the assets.
- A valid gift occurs when there is donative intent and actual or constructive delivery.
- A gift does not occur if a transfer is made with the intent that the title transferred will be held in trust for the grantor.
- A gift can be conditional such that a gifted interest will revert to the donor upon certain conditions, such as a separation of the parties.
- Trial court erred in concluding that the language of the premarital agreement established husband's lack of intent to gift property acquired during the marriage to wife.
- Presumption that property titled as tenants by the entirety was gifted to the marriage is a common law presumption that exists outside of the context of equitable distribution.
- Trial court has jurisdiction to order parties to transfer title to real property located in a foreign country.

Poythress v. Poythress, _ N.C. App. _, 854 S.E.2d 27 (December 31, 2020). Husband brought action to enforce the terms of a premarital agreement between the parties, requesting that the court declare certain properties acquired during the marriage to be his sole property even though the properties were titled in the names of both husband and wife. The premarital agreement provided that property owned by husband prior to marriage would remain his sole property and that all property he acquired during the marriage would also be his sole property and would remain his sole property upon the separation of the parties. However, the agreement also provided that husband could make gifts to the wife and to the marital estate. The trial court concluded husband was the sole owner of all the contested properties and ordered wife to execute all documents required to transfer title to him alone. The trial court concluded that husband provided all of the consideration for the properties acquired during the marriage and that he did not make a gift of any of the properties to the wife, despite titling the property in their joint names. Wife appealed.

The court of appeals held that the trial court erred in concluding that one asset, an LLC owned by both parties, was husband's sole property pursuant to the terms of the agreement because he provided all of the consideration used to acquire the properties held by the LLC. The court of appeals held that wife provided consideration when she executed personal guarantees for loans and lines of credit used to acquire the properties.

The court of appeals also held that the trial court erred in concluding husband did not make a gift to wife of the LLC and the properties titled in the name of the LLC. First, the court of appeals held that the trial court erred in concluding that the language of the premarital agreement itself established by clear, cogent and convincing evidence that husband did not intend to make a gift to wife or to the marriage when the assets acquired during the marriage were titled in the joint names of the parties. According to the court of appeals, while the agreement clearly stated the intent that all properties acquired by him during the marriage would be his sole property, the

agreement also clearly stated that he could make gifts of his separate property to wife and to the marriage that would then become wife's property.

Second, the court held that the fact that wife provided the personal guarantees for the loans used to acquire the assets held by the LLC was strong evidence that husband intended to gift the property or an interest in it to wife. In addition, the court pointed to other evidence indicating husband intended wife to be a joint owner at the time the LLC was created.

The court of appeals explained that a gift is established by evidence of donative intent and delivery of title, and the court remanded the gift issue to the trial court to determine whether husband made an actual gift of the properties held by the LLC without relying on the language of the agreement as evidence on that issue. The court of appeals noted that the transfers would have created a trust rather than a gift if husband intended that wife only hold his interest for his benefit, and also pointed out the transfers may have been a gift but a conditional gift, meaning husband intended all interest gifted to wife would be returned to him upon a condition, such as separation. The appellate court instructed the trial court on remand to determine the actual intent of the parties at the time of the various transfers.

The court of appeals also held the trial court erred in concluding that a beach house acquired by husband during the marriage but titled as tenants by the entirety was not gifted to the wife. According to the court of appeals, the presumption that the creation of a tenancy by the entirety with separate property is a gift to the marriage is a common law presumption that predates and applies outside of the context of equitable distribution. The presumption is rebutted only by clear, cogent and convincing evidence. The trial court's reliance on the language of the agreement was insufficient to support the conclusion that the presumption had been rebutted by husband.

Finally, the court of appeals rejected wife's argument that the trial court had no jurisdiction to declare husband the owner of real property located in Peru. The court held that because the NC court had jurisdiction over the parties, the court had jurisdiction to order the parties to transfer title to real property located in another country.

Chapter 50C Civil No-Contact Orders
Cases Decided Between October 20, 2020, and June 15, 2021

Stalking requires finding of specific intent

- Chapter 50C authorizes the entry of a civil no-contact order when the trial court concludes defendant committed unlawful conduct against plaintiff.
- Unlawful conduct is defined as nonconsensual sexual conduct or stalking.
- Stalking is defined as, on more than one occasion, following or other harassing with the intent to place plaintiff in fear for plaintiff's safety or the safety of family members or close personal associates or with the intent to cause plaintiff to suffer substantial emotional distress by placing plaintiff in fear of death, bodily injury, or continued harassment and that in fact causes substantial emotional distress.
- The trial court erred in entering a 50C order without finding defendant had the specific intent required by the statutory definition of stalking.
- AOC form for a 50C civil no-contact order does not inform the court that specific intent is a required finding of fact.

Diprima v. Vann, _ N.C. App. _, _ S.E.2d _ (May 18, 2021). Trial court entered a civil no-contact order against 17-year-old defendant after concluding defendant had engaged in unlawful conduct against minor plaintiff. Both minors attended an educational institution for children with special needs and learning differences. Specifically, the court found that defendant engaged in "stalking" as defined in GS 50C-1 by harassing plaintiff in the following ways:

> "The Defendant has been intimidating and harassing the Plaintiff by the following actions: November 8-11, 2019, Defendant repeatedly followed and touched the Plaintiff without her consent and after telling the Defendant to stop; on July 30, 2018, September 20-21, 2018, October 26-27, 2018, June 23, 2019, and October 1, 2019 the Defendant has threatened suicide; on Oct[ober] 1, 2019, Defendant threatened to kill and physically harm the Plaintiff if she "crosses" him or if she stops being his friend; Defendant has threatened to shoot up the school; Defendant told the Plaintiff he wanted to kill and torture two separate teachers at the parties' school: Defendant tried to cut himself with a pen in class when he was upset with Plaintiff: November 8-11, 2019, Defendant told the Plaintiff that he wanted to fight both of her parents; Defendant admitted to the Plaintiff that he has suicidal ideations; Defendant has researched how to make bombs and shoot up the school. On more than one occasion, the Defendant has followed and otherwise harassed the Plaintiff and has placed the Plaintiff in reasonable fear for her safety and the safety of the Plaintiff's parents and the Defendant has caused the Plaintiff to suffer substantial emotional distress by placing the Plaintiff in fear of death, bodily injury, or continued harassment and has, in fact, caused the Plaintiff substantial emotional distress."

On appeal, defendant argued that the trial court erred by failing to make findings of fact that he had the specific intent to stalk or otherwise commit "unlawful conduct" against plaintiff and the court of appeals agreed.

GS 50C-1 defines unlawful conduct as nonconsensual sexual conduct or stalking. Stalking is defined as, on more than one occasion, following or other harassing **with the intent** to place plaintiff in fear for plaintiff's safety or the safety of family members or close personal associates or **with the intent** to cause plaintiff to suffer substantial emotional distress by placing plaintiff in fear of death, bodily injury, or continued harassment and that in fact causes substantial emotional distress. The court of appeals held that entry of a civil no-contact order requires not only that the court find defendant harassed plaintiff, but also requires that defendant's harassment was "accompanied by the specific intent described in GS 50C-1."

The court of appeals rejected plaintiff's argument that specific intent can be inferred from the trial court's other findings. The appellate court also noted that the AOC form order for a no-contact order does not inform a judge that a finding of specific intent is required.

*******But cf***, Alicea v. Vaughn, *unpublished decision*, _ NC App _, 852 S.E.2d 737 (December 31, 2020)(finding of specific intent is not required; intent can be inferred from the conduct).**

Legislation

Hearings held by video conference.

S 255, sec. 10.(i), 10.(j) and 10.(k) (Ratified but not yet signed by the Governor)

Effective on the date the legislation is signed by the Governor, GS 50C-7 is amended to remove the provision prohibiting the court from holding the hearing on the permanent civil no-contact order via video conference.

Section 9.(a) of the legislation creates new section GS 7A-49.6 to allow judicial officials to "conduct proceedings of all types using audio and visual transmission in which the parties, the presiding official, and other participants can see and hear each other." Parties can object to conducting a civil proceeding by video conference and if the judicial official finds good cause for the objection, the proceeding shall not be conducted by videoconference. When a civil proceeding involves a jury, the court may allow a witness to testify by video conference only upon a finding that good cause exists for doing so.

Miscellaneous Civil Procedure
Cases Decided Between October 20, 2020, and June 15, 2021

Personal jurisdiction; long-arm statute; calls and emails to person in NC

- When defendant objects to personal jurisdiction, the plaintiff has the burden to prove by a preponderance of the evidence that grounds exist for the exercise of jurisdiction over defendant.
- In the exercise of specific jurisdiction, a long-arm statute must authorize the action and there must be sufficient minimum contacts between the defendant and the state 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."
- Frequent cell phone calls and email solicitations by an out-of-state defendant regarding a romantic relationship have been held sufficient to meet the requirements of the long-arm statute GS 1-75.4(3) for an alienation of affection action against an out-of-state defendant.
- Trial court findings that defendant made frequent calls to plaintiff's wife in NC were not supported by the evidence.
- Plaintiff failed to establish facts sufficient to meet the requirements of the long-arm statute.

Ponder v. Been, _ N.C. App. _, 853 S.E.2d 302 (December 31, 2020). Plaintiff filed action for alienation of affection against defendant. Defendant filed a motion to dismiss pursuant to Rule 12(b)(2) arguing a lack of personal jurisdiction over him, a resident of Florida. The trial court denied his motion, concluding defendant availed himself of the laws of NC by making numerous phone calls and email 'solicitations' to plaintiff's wife sufficient to establish defendant had minimum contacts with NC.

Defendant appealed and the court of appeals reversed the trial court and held plaintiff failed to establish facts sufficient to meet the requirements of the long-arm statute applicable to alienation claims, GS 1-75.4(3)(injury to a person in this state). The court of appeals acknowledged that the NC Supreme Court held in *Brown v. Ellis*, 363 NC 360 (2009), that frequent cell phone calls and email solicitations by a defendant regarding a romantic relationship with plaintiff's spouse in NC were sufficient to meet the requirements of the long-arm statute, but the court held that the plaintiff in this case had failed to produce evidence that defendant made frequent or numerous calls to plaintiff's wife in NC. The court held that once a defendant raises an objection to personal jurisdiction, the burden to prove a basis for the application of the long-arm statute falls on plaintiff. In this case, the plaintiff produced evidence of calls made by defendant to a phone with a 704-area code but did not offer evidence connecting that phone to plaintiff's wife.

Dissent by Judge Stroud and appeal is pending in the supreme court.

Time to refile following voluntary dismissal; methods of commencing civil action

- A party has one year to refile an action following a voluntary dismissal pursuant to Rule 42 of the Rules of Civil Procedure.
- Rule 3 of the Rules of Civil Procedure provides that an action is commenced either by the filing of a Complaint or by the issuance of a summons and an order by the court granting an extension of up to 20 days to file a Complaint.
- Where plaintiff obtained an extension of time to file a Complaint from the clerk of court before one year had passed following a voluntary dismissal but no summons was issued, the Complaint filed more than one year following the voluntary dismissal was properly dismissed as untimely filed.

Lunsford v. Teasley, _ N.C. App. _, _ S.E.2d _ (April 6, 2021). Plaintiff voluntarily dismissed his civil action. Before one year had passed, plaintiff obtained an extension of time to file a Complaint from the clerk. He filed the new Complaint within the time allowed by the clerk but outside of one year after the filing of the voluntary dismissal. The trial judge dismissed the Complaint as untimely filed and plaintiff appealed.

The court of appeals affirmed, holding that Rule 3 provides the exclusive methods for initiating a civil proceeding and plaintiff failed to initiate the new civil action within one year of filing the voluntary dismissal. Rule 3 provides that a civil action is commenced by filing a Complaint, or by the issuance of a summons and a court order extending the time to file a Complaint up to 20 days. In this case, plaintiff obtained an extension of time to file from the clerk, but no summons was issued. Therefore, his new action was commenced when he filed the Complaint, outside of the one-year time frame for filing following a voluntary dismissal.