

**Family Law Update**  
Cheryl Howell  
School of Government  
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**Child Support**

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***Clements*: Incompetent Parent**

- ▶ District Court can appoint a Rule 17 GAL
- ▶ Clerk of Court can appoint a Guardian
- ▶ Either can set support obligation of incompetent
- ▶ Court where second action is filed must defer to court where action filed first

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### District Court vs. Clerk

- ▶ Concurrent jurisdiction regarding custody and support obligation of an incompetent person
- ▶ Court with original jurisdiction (first filing) retains jurisdiction to exclusion of other
- ▶ See
  - *Clements* (child support)
  - *Cline v. Cline*, 92 NC App 257 (1988)(alimony)
  - *McKoy v. McKoy*, 202 NC App 509 (2010)(custody)

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### Adoption is different....

- ▶ Clerk has exclusive jurisdiction over adoption until clerk transfers to district court or party appeals final order
  - *Norris v. Norris*, 203 NC App 566 (2010)
- ▶ Adoption order supersedes any existing custody order
  - *Griffin v. Griffin*, 118 NC App 400 (1995)

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### When custody case is pending....

- ▶ Impact of adoption proceeding on district court jurisdiction to determine custody is unclear
  - Before 1996, district court action stayed by adoption proceeding - whenever it was filed
    - *Griffin* (both because adoption was superior court and because it was "permanent" resolution for child)
  - Since 1996, adoption has been district court proceeding
- ▶ Once both adoption and custody are in district court, consolidation probably is appropriate
  - See *Oxendine v. Catawba County DSS*, 303 NC 699 (1981)

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# Contempt

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**Mauney, 268 NC 254 (1966)**

- ▶ Order must contain findings of fact that person in contempt had the ability to comply with the order at issue
- ▶ For civil contempt, findings also must show present ability to comply with purge conditions
- ▶ Evidence that party is "able-bodied, not incapacitated, presently employed or able to work" is not sufficient to support necessary findings
- ▶ *But cf. Tardini v. Tardini*, 201 NC App 728 (2010)(okay for judge to take "judicial notice" that jobs were available for defendant in the community)

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**Civil Contempt: GS 5A-23**

- ▶ Initiated by show cause order or by motion
- ▶ Show cause order issued based on verified motion or affidavit showing basis for contempt order
- ▶ After show cause issued, burden shifts to defendant due to finding of probable cause by judge
- ▶ Final order must contain facts to establish willfulness and ability to pay, regardless of defendant's evidence or lack thereof.
  - See *Durham County DSS v. Danisi*, (unpublished)

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### Show cause orders

- ▶ Clerk of court can issue a show cause order only in cases where statute gives clerk specific contempt power
  - *Moss v. Moss* – clerk is not a “judicial official” within the meaning of Chapter GS 5A
  - Show cause order signed by clerk for alleged violation of equitable distribution judgment was not proper; contempt deemed to have been initiated by motion of the party.

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### Show cause orders for child support: GS 50-13.9(d)

- ▶ “Upon affidavit of an obligee, *the clerk* or a district court judge may order the obligor to appear and show cause why the obligor should not be subjected to income withholding or adjudged to be in contempt, or both”
- ▶ “The order shall ... order the obligor to bring to the hearing records and information relating to the obligors employment, licensing privileges and disposable income”
- ▶ These orders to show cause are served by Rule 4 service of process

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### Equitable Distribution

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## Pretrial Orders

- ▶ Rule 16, Rules of Civil Procedure
  - Judge has discretion to hold pretrial conference
- ▶ Rule 7, Rules of Practice for District and Superior Court
  - There shall be a pretrial conference in every civil case
- ▶ GS 50-21(d)
  - 3 required pretrial conferences in ED cases
- ▶ Stipulations in pretrial orders are binding on parties and judge unless set aside

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## Setting Aside Stipulations

- ▶ Trial court has authority to set aside stipulations to prevent injustice
- ▶ Trial court can set aside stipulation on the court's own motion
- ▶ Trial court cannot set aside stipulations without giving parties an opportunity to be heard and [maybe] to offer evidence on matters that had been stipulated
  - *Plomaritis v. Plomaritis*

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## Delay in Entry of Judgment

- ▶ 18 month delay required new trial
  - *Plomaritis*
- ▶ 21 month delay did not require new trial where no prejudice was shown
  - *Wright v. Wright*

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*Whitworth v. Whitworth*

- ▶ Court has no jurisdiction to enter any order after a claim is resolved by final judgment, unless a post-judgment motion is filed
- ▶ *Nunc pro tunc* authority is very limited authority to correct the court record to reflect something that actually happened in the past
- ▶ *Nunc pro tunc* cannot be done ex parte

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*Whitworth*

- ▶ “*Nunc pro tunc* orders are allowed only when a judgment has been actually rendered, or decree signed, but not entered in the record, in consequence of accident or mistake or the neglect of the clerk provided that the fact of its rendition is satisfactorily established and no intervening rights are prejudiced”

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*Nunc pro tunc*

- ▶ If no substantive ruling actually made at a hearing, entry of *nunc pro tunc* is ineffective because “what the court did not do cannot be done now simply by using these words”
  - *Rockingham County DSS v. Tate*, 202 NC App 747
- ▶ “Like any other court order, alimony order cannot be ordered to take effect on a date prior to the date actually entered, unless it was decreed or signed and not entered due to mistake and provided that no prejudice has arisen”
  - *Hill v. Hill*, 105 NC App 334 (1992)

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## “Decreed” or “Rendered”

- ▶ Must “precisely set out the trial court’s order” including findings of fact and conclusions of law
  - *Whitworth*: No rendition where trial judge made no statement from bench about statutory basis for intervention, made no statement of the findings of fact ultimately included in written order, and simply stated that court was allowing motion to intervene.

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## Post-judgment actions

- ▶ “A court retains jurisdiction of a case until final disposition, but jurisdiction ceases with rendition of a final judgment or decree”
- ▶ Final disposition is defined as such a conclusive determination of the subject matter that after the award, judgment or decision is made, nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation can arise thereon”
  - *Whitworth* [noting some statutes provide authority for post-judgment motions]

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## Custody

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## Third party custody

- ▶ *Sides v. Ikner* – COA reversed trial court determination that parent had waived constitutional protection
  - Leaving child in custody of nonparent is not enough to prove waiver even if custody arrangement is long term
  - Key to waiver in such cases is the intent of the parent
  - Nonparent must prove parent intended to permanently create a parent-child relationship between nonparent and child

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## Intervention

- ▶ Grandparent can request custody pursuant to GS 50-13.1 even when there is no on-going dispute between parents
  - *McIntyre v. McIntyre*, 362 NC 503 (2008)
  - *Sides v. Ikner*
  - On-going custody dispute is necessary only when grandparent is proceeding under GP visitation statutes
- ▶ If not proceeding under GP visitation statute, grandparent custody complaint must allege facts sufficient to establish that parent has waived constitutional protections
  - *Grindstaff v. Byers*, 152 NC App 288 (2002)

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## Divorce and Annulment

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### *Mussa v. Palmers-Mussa*

- ▶ Bigamy is the only action that renders a marriage *void ab initio*
- ▶ There is a presumption that a second marriage is valid. That presumption arises once it is shown the second marriage was entered into in accordance with the law
- ▶ Party seeking to void a second marriage cannot rely on presumption of continued validity of a first marriage

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## 50B and 50C

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### Legislation

- ▶ GS 50B-2(c)
  - 50B *ex parte* hearing can be continued only once unless all consent or good cause is shown
  - Applies to actions filed on or after Oct. 1, 2012
- ▶ GS 50C-9
  - When defendant is not in court for trial, order can be served by any manner authorized by Rule 4 of the Rules of Civil Procedure
  - Effective June 7, 2012

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