

FAMILY LAW UPDATE

JUDGE BETH KEEVER
OCTOBER 22, 2021

1

DOMESTIC VIOLENCE

- Mucha v Wagner NC Supreme Court August 13, 2021 (p 13)
- Personal Jurisdiction - Status Exception
 - Divorce – Custody – Termination of Parental Rights
 - Not extended to Domestic Violence actions

2

Minimum Contacts

- For cell phone communication to provide minimum contacts, must show that Defendant knew where Plaintiff was located when calls initiated by Defendant
- Where Defendant did not know that Plaintiff was in North Carolina when he made 28 calls to her cell phone in one day, he did not avail himself of the benefits and protections of North Carolina’s laws
- Court does not have to inquire into personal jurisdiction on its own motion since personal jurisdiction can be waived
- NCGS 50B does not require that incident of domestic violence occur in North Carolina for the Court to have jurisdiction over the action but NCGS 50C does

3

Denial of DVPO – Findings

- D.C. And J.M. v D.C. NC COA September 21, 2021 (p 14)
- Civil Procedure Rule 52(a)(1) requires finding of facts and conclusions of law when granting or denying a DVPO

4

Chapter 50C Civil No-Contact Orders

- Angarita v Edwards NC COA August 3, 2021 (p 19)
- Correcting an order
 - Civil Procedure Rule 60(a) allows Court to **correct** order on its own motion or upon request from party
 - Court has discretion to determine what, if any, notice is given prior to correction
 - Correcting clerical error **not** amending order
 - Amendment of order alters the effect of the original order
 - Can correct omissions as well as incorrect provisions
 - May be corrected after order is appealed until appeal is docketed
 - See also Civil Procedure Rule 59

5

Angarita continued

- In this case, based on the trial court's findings, it is clear that the Court believed that the Defendant was stalking the Plaintiff and the failure to check the box to not stalk the Plaintiff was in fact a clerical error
- Based on the actions of the Defendant, the Court's order for the Defendant to obtain a mental health evaluation under the catch-all provision of Chapter 50C was related to the findings in the order and therefore appropriate

6

EQUITABLE DISTRIBUTION

- Bradford v Bradford NC COA September 7, 2021 (p. 15)
- NCGS 50-11(e) Absolute divorce destroys the right of a spouse to ED unless the right is asserted prior to the judgment of divorce
- Party may refile action within one year after dismissing a claim without prejudice under Civil Procedure Rule 41(a)(1)
- If a party dismisses a claim for ED prior to the entry of a divorce, the provision allowing the refiling of the claim within one year is limited by NCGS 50-11(e). The new action must be refiled prior to the entry of the divorce or within one year of the dismissal whichever occurs first.

7

Bradford continued

- If the ED claim is filed before divorce but dismissed after entry of a divorce judgment, party has one year in which to refile the claim for ED.
- Entry of divorce judgment occurs when it is written, signed, and filed in the Clerk's office (CPRule 58).
- Once all claims are dismissed or orders entered, cannot refile claim for ED or Alimony in that file. Must file new action
- Claim for ED may be filed as a separate action or as a counterclaim in another Chapter 50 action. Claim may also be filed as a motion in the cause in an active Chapter 50 action.

8

Statute of limitations on enforcement of ED judgment

- Welch v Welch NC COA (unpublished) July 6, 2021 (p. 15)
- NCGS 1-47(1) provides a 10-year statute of limitations on enforcement of judgments
- This provision applied to bar request to hold plaintiff in contempt for failure to transfer interest in retirement filed 11 years after judgment
- Provision also barred request under Civil Procedure Rule 70 to direct another individual to execute document
- QDRO?

9

CHILD SUPPORT

- Guilford County v Mabe NC COA October 5, 2021 (p. 12)
- Father contesting finding of paternity must allege pursuant to NCGS 49-14(h) that the order was entered as a result of "fraud, duress, mutual mistake, or excusable neglect"
- Upon proper allegation, Court shall order genetic testing
- If the father does not make the proper allegations, the Court cannot order genetic testing because the original order is res judicata on the issue
- NCGS 49-14(h) is only available in cases involving child born out of wedlock

10

CUSTODY

- **UCCJEA** Waly v Alkamary NC COA August 17, 2021 (p. 8)
- Home state of minor child - where child has resided for the 6 months immediately preceding the filing of a complaint
- Court retains jurisdiction until final adjudication even if all parties and the child leave the state during the pendency of the action
- Court could elect to relinquish jurisdiction to a more convenient state upon proper motion and filing of an action in that state
- Once adjudication is entered, if all parties and the minor child have left the state, court no longer has continuing exclusive jurisdiction of action

11

Waly continued

- Order that parties use Our Family Wizard did not violate the terms of New Jersey DVPO prohibiting all contact between parties
- OWF is on-line platform providing messaging board and calendar but does not require the parties to communicate directly
- Mother handed to Court a letter requesting the Court to stay further proceedings and allow New Jersey to determine custody. Because it was not filed with the Clerk and served on opposing counsel, Court did not have to consider the "motion". (CP Rule 7)

12

Modificaton

- Henderson v Wittig NC COA July 6, 2021 (p. 2)
- Motion to modify consent custody order which contained no findings of fact as to circumstances at time of entry of order, trial judge may hear evidence and make findings to establish 'base line' at time of original order to determine if there has been a substantial change of circumstances
- Evidence must show that change in circumstances impacts the welfare of the child and court should make findings to that affect
- Where effects of change on child are "self-evident" and supported by substantial evidence, COA will uphold without specific findings

13

Henderson continued

- Here, parents' inability to communicate and agree on issues related to child did not have "self-evident" impact on child and related primarily to the relationship between the parents and not to the effect on child
- "Self-evident" impact is most often represented by a series of events rather than one individual event

14

Relocation/Deployment

- Munoz v Munoz NC COA August 3, 2021 (p. 5)
- Factors set out in Ramirez-Barker v Barker (107 NC App 71) not mandatory list in relocation cases and specific findings relating to those factors not required in determining best interest of child
- NCGS 50-13.2(f) provides that "a court may not consider a parent's possible future deployment as the only basis in determining best interest of child" but COA found it could be one factor considered

15

Contempt/Attorney Fees

- Walter v Walter NC COA August 17, 2021 (p. 6)
- Must show a willful violation of order to be found in contempt
- When order's terms are ambiguous and one party's interpretation of terms is as reasonable as other party's interpretation, no contempt for alleged violation of order
- If party is found not to be in contempt, award of attorney fees not available

16

Contempt

- Blanchard v Blanchard NC COA September 21, 2021 (p. 9)
- Request for contempt does not have to designate whether proceeding on criminal or civil contempt but must contain sufficient allegations for respondent to be on notice of basis for request for contempt finding
- Movant not required to elect whether proceeding on criminal or civil contempt at beginning of hearing but Court cannot find both on same facts
- Criminal contempt request must be initiated by a show cause order. Show cause order not required to proceed on civil contempt
- If party complies with order prior to hearing on contempt, cannot be found in civil contempt

17

Blanchard continued

- After finding of civil contempt, court can delay incarceration for limited period (in this case – 10 days) to allow purge
- “Sentence” is not suspended but incarceration is delayed
- Appropriate for court to schedule review hearing to determine if compliance has occurred
- Purge provision in this case that set out how telephone visitation was to occur was not a modification of the custody order but was an enforcement of order by specifying how the telephone visitation was to occur in the future. Original order simply provided for telephone visitation with little specificity

18

Attorney Fees/Hearing after Appeal

- Blanchard v Blanchard NC COA September 21, 2021 (p. 11) Additional opinion
- NCGS 1-294 – “when an appeal is perfected...it stays all further proceedings in the court below upon the judgment appealed from...but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from”
- Attorney fees in custody actions are not dependent on being the “prevailing party” and therefore not dependent on outcome of the appeal of the custody order (not affected by the judgment appealed from)

19

Blanchard continued

- Court may order “payment of reasonable attorney’s fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit” NCGS 50 – 13.6
- Therefore, court may proceed to hear claim for attorney’s fees in custody action after appeal is perfected
- When 2 COA opinions conflict, the earliest opinion controls

20

POST SEPARATION SUPPORT/ALIMONY

- Putnam v Putnam NC COA August 3, 2021 (p. 17)
- Trial court is not required to accept “at face value the assertion of living expenses offered by the litigants themselves”. Court can rely on “common sense and every-day experiences in calculating reasonable needs and expenses”
- Court is not required to “produce a redline itemization for all reasonable or unreasonable expenses listed on a financial affidavit”
- Court must provide sufficient detail to show that it considered all relevant factors in calculating reasonable monthly needs and setting amount of alimony

21

**NEW LEGISLATION
SL 2021 – 119 (SB 35)**

- Marriage Statute NCGS 51-2 and 51-2.1 Effective 8/18/2021
- Minimum age to marry is 16
- If 16 or 17, cannot be more than 4 years difference in age of bride and groom
- If 16 or 17 and custodian does not consent, must apply to District Court for permission to marry
- Files civil action with payment of court costs
- Summons served on both parents and any custodian

22

Marriage continued

- No party entitled to appointed counsel
- Must appoint attorney GAL – paid by IDS. Prepares report and may question witnesses at hearing
- Written findings showing best interest of minor to marry (or not)
- Rebuttable presumption that if all living parents oppose the marriage– not in best interest of minor
- No appeal of right

23