

**Family Law Case Update**

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**CHERYL HOWELL**  
**OCTOBER 2011**

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**3<sup>rd</sup> Party Custody**

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- **No best interest test until you conclude parent has waived constitutional right to exclusive custody**
  - Except: you can enter temporary orders
    - *Smith v. Barbour*, 154 N.C. App. 402 (2002)
  
- **Don't try the issue too early in the case**
  - *See Best v. Gallup*

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**Waiver**

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- ***Jones v. Russell and Jones* (unpublished)**
  - Grandparents v. unwed father and mother
    - Mom consented to grandparent custody
  
  - No waiver where father did not know he was father
  
  - *Cf.* TPR/adoption cases ??????

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Waiver

- *Powers v. Wagner*
  - Leaving child with grandparents for 15 months not sufficient to prove waiver without additional findings about mom's intent
  - Intent is key according to NC Supreme Court
    - No waiver if parent intended relinquishment to be temporary
      - *Price v. Howard*
      - *Boseman v. Jarrell*

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*Cf. Best v. Gallup*

- Mom permanently ceded exclusive decision-making authority and created family unit
- Proved by evidence that:
  - They decided together to adopt child
  - They cared for and supported child together before and after adoption (6 years)
  - Adoptive parent 'publically acknowledged' other as dad
- No mention of intent??

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Custody Mediation

- S.L. 2011-411
  - Waiver of mediation based on distance now discretionary rather than mandatory
  - Effective September 15, 2011

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### Child Support

- No 'credit' for dad's health insurance required when child already covered by mom's policy and dad does not pay extra to cover child
  - *Clayton v. Hamilton*
- Agreements for automatic increases in support violate public policy
  - *Wilson v. Wilson*

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### Setting Aside Paternity Judgment

- New Legislation: S.L. 2011-328
- Applies to motions or claims for relief filed after January 1, 2012
- Two separate sections to new law:
  - Setting aside paternity judgments and acknowledgements
  - Setting aside existing child support orders

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### Paternity Judgments and Acknowledgements

- Without regard to time limitations in Rule 60(b), judgment or affidavit can be set aside if:
  - Fraud, duress, mutual mistake or excusable neglect, AND
  - Genetic tests prove he is not the father

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### Terminating Child Support

- Request to set aside obligation must be filed within one year of date party knew or should have known he was not the father

- Except:
  - Time tolled during military deployment, and
  - Everyone with a claim can file before January 1, 2013

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### Child Support Obligation Ends if.....

- Paternity judgment or Acknowledgement was set aside under new law, *OR*

- Party shows:
  - Genetic testing disproving paternity, AND
  - No previous public acknowledgement of paternity
    - × (or he only acknowledged because he believed it was true)

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### Support Obligation

- Suspended while motion pending, but support being paid to mom is **NOT** suspended

- Arrears are not affected
  - If fraud, can order mom to repay amounts received since motion filed

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### Broader Opportunity for Relief??

- If relief is granted pursuant to the new child support section, party may “to the extent otherwise provided by law, apply for modification or relief from any judgment or order involving the moving party’s paternity of the child.”
  - New GS 50-13.13(h)

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### Equitable Distribution

- Dismissal of claims with prejudice for failure to prosecute requires consideration of ‘lesser sanctions’
  - *McKoy v. McKoy*
  - *Ross v. Ross*
  - *Church v. Dellinger*
    - ✦ unpublished Aug. 2011
    - ✦ Motions in custody and support case

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### *Romulus v. Romulus*

- Postseparation appreciation of dental practice
  - Appreciation is divisible property unless shown to be caused by actions of spouse
  - Showing spouse worked business is not enough to rebut presumption that appreciation is divisible
    - ✦ Evidence must show effort caused the increased value

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*Romulus v. Romulus*



- Separate property titled as tenants by the entirety
  - *McLean* presumption: separate property was gifted to marriage and became marital property when title was transferred to spouses as tenants by the entirety
  - Presumption can be rebutted by clear, cogent and convincing evidence that transfer was not intended to be a gift
  - Testimony of donor spouse is competent evidence of intent
    - ✦ Judge assigns weight afforded that testimony

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*Romulus v. Romulus*



- Execution available to enforce distributive award
- If ED judgment is appealed, trial court loses jurisdiction to determine arrears owed on distributive award ordered to be paid in installments

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**Alimony**



- Alimony is terminated by cohabitation
  - Terminates whether alimony obligation is imposed by consent judgment, incorporated agreement, or judgment entered after litigation
  - Parties cannot contract that alimony in a court order will not terminate on cohabitation
    - ✦ *Underwood*

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*Underwood v. Underwood*

- If payments are really property settlement instead of support, they are not true alimony even if called alimony
- Payments are property settlement if given as reciprocal consideration for property provisions
- Presumption is that payments are *not* reciprocal consideration for property provisions
- "Integration clause" alone is not sufficient to rebut presumption

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*Underwood v. Underwood*

- Payments in consent order clearly were alimony where order:
  - "Methodically enumerates" elements required for alimony pursuant to GS 50-16.3A
  - Finds defendant is dependent spouse and plaintiff is supporting spouse
  - Refers to payments as "alimony" at least 16 times
  - Designates one section of order as 'Alimony' and designates a separate section 'Property Settlement'

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**Role of Marital Misconduct**

- PSS
  - Only considered if raised first by supporting spouse
  - Weight always within discretion of judge
- Alimony
  - Generally a factor with weight within discretion of judge
  - But, illicit sexual behavior before date of separation:
    - By dependent spouse only: no alimony
    - By supporting spouse only: must pay alimony
    - By both: weight within discretion of judge
- Definition of 'illicit sexual behavior'
  - See *Romulus v. Romulus*

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