

**Family Law Update
Cases Decided and Legislation Enacted
June 21, 2011 through September 30, 2011**

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Child Custody

Cases Decided/Legislation Enacted Between June 21, 2011 and September 30, 2011

Determining whether order is temporary or permanent; ordering mental health evaluations; denying visitation to a parent

- Trial court order was a permanent order even though it stated that the custody arrangement would be reviewed after father completed a psychological evaluation. To be considered temporary, order must contain a specific reconvening time.
- Trial court has authority to order parties to submit to mental health evaluations as part of the trial court's broad discretion in child custody proceedings. Trial court does not need to follow procedure required by Rule 35 of the Rules of Civil Procedure.
- Trial court erred in denying father any visitation without making specific findings that father was unfit or that visitation with father is not in the child's best interest.

Maxwell v. Maxwell, 713 S.E.2d 489 (N.C. App., June 21, 2011).

Trial court entered an order modifying a previous consent judgment which had granted mom primary custody and dad visitation. The modification order required father to submit to a mental health evaluation, suspended all visitation by father pending that evaluation, and stated that the court would schedule a review of the custody/visitation schedule upon father's completion of the mental evaluation. Father appealed the order. "As a preliminary matter," the court of appeals determined that the appeal was not an inappropriate interlocutory appeal because the order entered by the trial court was a final order. Although the order clearly anticipated further action by the trial court at some point in the future, the order is a final determination unless the trial court "sets a specific date on which to reconvene and review father's evaluation." The trial court then rejected father's argument that the trial court erred in ordering that he submit to a psychological evaluation without following the procedure set out in Rule 35 of the Rules of Civil Procedure which grants authority to trial courts to order medical evaluations of parties. The court of appeals held that the evaluation in this case was ordered pursuant to a trial court's "broad discretion in child custody cases" rather than pursuant to the authority granted by Rule 35. Therefore, the trial judge was not required to comply with the procedural requirements of Rule 35. The court of appeals agreed with father that the trial court erred by failing to make the specific findings required by GS 50-13.5(i) before denying father all visitation with the child. That statute provides that parents cannot be denied all visitation unless the trial court makes specific findings to support a conclusion that the parent is unfit or that visitation with the parent is not in the best interest of the child.

Third party custody; waiver of parental rights

- Trial court findings of fact were sufficient to support conclusion that father had not waived his constitutionally protected status where father did not learn of child's birth until child was three years old and he began paying child support and seeking to establish a relationship with the child as soon as he learned the child was his daughter.

Jones v. Russell and Jones, unpublished opinion, _S.E.2d_ (N.C. App., July 19, 2011).

Maternal grandparents filed action in 2008 against parents seeking custody and child support of child who had resided with them since the child's birth in 2004. The mother of the child agreed

that plaintiffs should have custody of the child but father filed a counterclaim for custody. Grandparents argued that father had waived his constitutional protection because he did not pay support for the child or seek to establish a relationship with the child for the first three years of the child's life. The trial court concluded father had not waived his protected status because he did not know of the birth of the child until 2007 and did not have a DNA test confirming his paternity until 2008. The trial court determined that the father acted quickly to pay support and establish a relationship with the child after learning he was the child's father. As father had not waived his constitutional right to custody, the trial court correctly awarded full custody to father and no custodial rights to grandparents.

Modification; hostility toward father and new spouse; relocation

- Trial court findings of fact were sufficient to support conclusion that there had been a substantial change in circumstances affecting minor children where findings established that mother had shown extreme hostility toward father and his new spouse on numerous occasions in the presence of the children and also had moved temporarily to a home in another town causing the children to have a very long commute each day between the new home and school and extracurricular activities.
- Fact that children were well-adjusted, happy and doing well in school did not prohibit the trial court from concluding that the changes had affected the children.
- Trial court findings were sufficient to support conclusion that it is the best interest of the children to move to the primary physical custody of the father.

Stephens v. Stephens, _S.E.2d_ (N.C. App., July 19, 2011).

Mom was awarded primary custody of two children in original custody order. Dad made motion to modify and trial court found there had been a substantial change in circumstances. The trial court then concluded that it would be in the best interest of the children to reside in the primary custody of the dad. The court of appeals affirmed the order, holding that the findings of the trial court clearly showed substantial changes that affected the welfare of the children. The trial court made findings regarding numerous instances where mother had "sought to undermine father and alienate him from his children," "shown extreme hostility toward him and his present wife in the presence of the minor children," "routinely used visitation with the children as leverage, put the children in the middle of arguments between Plaintiff and Defendant, and sought to undermine the relationship between [father] and [father's] wife with his children." The trial court identified the nexus between mom's conduct and the children by finding that the ongoing course of conduct had been detrimental to the children's emotional well-being, making it difficult for the children to "remain emotionally secure and bonded to both parents". The findings of the trial court also showed that mom had moved in with her boyfriend who lived in Durham, one hour driving time away from where the children attended school. Mom claimed the move was temporary and she drove the children to school each day and to their extracurricular activities. The trial court found the hour-long commute each way each day had a detrimental effect on the children. The court of appeals rejected mom's argument that evidence showing the kids were doing well in school, generally happy and well-adjusted precluded the conclusion that the

circumstances affected the children. The court of appeals stated that a trial court does not have to “wait until the substantial change in circumstances causes harm” before modifying custody.

The court of appeals also rejected mom’s argument that the trial court erred in concluding that it is in the best interest of the children to change primary physical custody to the father. The court of appeals held that evidence showing mom’s hostility and emotional volatility and instability, her inability to stay employed due to the fact that she frequently did not go to work, and the frequent absences of the children from school all supported the trial court’s conclusion regarding best interest.

Third party custody; waiver of parental rights; jurisdictional findings

- Trial court findings of fact were not sufficient to support conclusion that mother had waived her constitutionally protected status by leaving child in the care of the grandparents for 15 months because the trial court made no findings regarding the mother’s intent regarding the long-term relationship between the grandparents and the child.
- “Better practice” is for trial court order to specify facts and conclusions regarding the jurisdiction of the trial court to make a child custody determination pursuant to the UCCJEA.

Powers v. Wagner and Ali, _S.E.2d_ (N.C. App., July 19, 2011).

Paternal grandparents sought custody of grandchild who had resided with them for 15 months before the action was filed. The mother of the child lived in Florida. The trial court concluded that mother had waived her constitutional right to custody of the child by allowing the grandparents to act as parents of the child on a day-to-day basis for 15 months and by not visiting the child. On appeal, the mother first argued that North Carolina did not have subject matter jurisdiction to make a child custody determination because Florida previously had made a custody determination regarding the child and mother still lived in Florida. The court of appeals disagreed, holding that while the Florida court had entered a child support order that contained a finding of fact that the child resided in the custody of the mother at the time the support order was entered, that finding of fact was not sufficient to make the order a “child custody determination” within the meaning of the UCCJEA. The court of appeals also rejected mother’s argument that the trial court order was invalid because it did not contain a specific conclusion that North Carolina was the home state of the child at the time the action was filed. The court of appeals held that while “it is the better practice for the trial court to make an express finding about the child’s home state,” the order in this case was sufficient because it contained findings of fact establishing that North Carolina was the home state of the child at the time the action was filed.

However, the court of appeals held that the trial court findings were not sufficient to support the conclusion that mother had waived her constitutional right to exclusive care, custody and control of the child. The court held that the findings established that the mother had left the child for an extended period of time with the grandparents and had not visited in the child during that time, but the order contained no findings regarding the mother’s intent or reason for leaving the child. The court of appeals, citing the supreme court opinions in *Boseman v Jarrell*, 346 NC 537 (2010)

and *Price v. Howard*, 346 NC 68 (1997), held that “when a parent brings a nonparent into the family unit, represents that a nonparent is a parent, and voluntarily gives custody of the child to the nonparent without creating an expectation that the relationship would be terminated, the parent has acted inconsistently with her paramount protected status.” The court stated that there may be many reasons a parent might relinquish custody on a temporary basis that would not result in a waiver of protected status, such as medical reasons, military service, or the need to find employment. Waiver of protected status occurs when a parent “cedes paramount decision-making authority . . . and creates no expectation that the arrangement is only for a temporary period.” Accordingly, intent of the parent is the “critical issue” in determining waiver. According to the court of appeals, the trial court in this case did not resolve the factual issues about why the mother left the child in the care of the grandparents and whether she intended the relationship to be temporary or permanent. On remand, the trial court needs to “consider the legal parent’s intentions regarding the relationship between her child and the third parties during the time that relationship was being formed and perpetuated.”

Third party custody; waiver of parental rights

- Trial court erred in concluding facts were not sufficient to support conclusion that adoptive mother had waived her constitutionally protected status by intentionally “bringing a nonparent into the family unit, representing that the nonparent is a parent and voluntarily giving custody of the child to the nonparent without creating an expectation that the relationship would be terminated.”

Best v. Gallup, _S.E.2d_ (N.C. App., September 6, 2011).

Plaintiff and defendant took custody of defendant’s niece in 2004, when the parties were involved in a romantic relationship. They cared for the child together and the child called them “mother” and “father”. They planned to adopt the child but learned that, since they were not married, only one could adopt. Defendant legally adopted the child in 2008. The parties continued to jointly care for the child, even after their romantic relationship ended. Plaintiff filed a complaint seeking custody of the child in 2010. Defendant filed a motion to dismiss, and the trial court concluded that defendant was entitled to constitutional protection as the adoptive parent and that plaintiff failed to show defendant had waived her protected status by conduct inconsistent with that protection. The court of appeals disagreed, reversing the trial court decision and concluding that the facts establish the mother had waived her protected status. The court of appeals held that the facts in this case “seem to track” the holding in both *Price v. Howard*, 346 NC 68 (1997) and *Boseman v. Jarrell*, 364 NC 537 (2010), where the supreme court held that a parent waives constitutional protection by intentionally creating a family unit involving a nonparent, and ceding a portion of the parent’s exclusive decision-making authority to the nonparent without intending that the relationship be temporary. In this case, the trial court findings of fact established that from the time the parties took custody of the child in 2004 until late 2009 or 2010, the parties shared responsibility for the child, the child was allowed to refer to plaintiff as ‘daddy’, and the mother publically acknowledged plaintiff as the father of the child. The trial court also had concluded that visitation with plaintiff would be in the best interest of the child, but did not order visitation after concluding defendant had not waived her protected status.

Because neither party challenged the best interest determination on appeal, the court of appeals remanded the case to the trial court with the instruction that the trial court set the visitation schedule.

Conviction for attempted statutory rape; sex offender status

- Nothing in NC law prohibits a father from seeking visitation of child born from the actions which led to his conviction for attempted statutory rape.
- Nothing in NC law prohibits a person required to register as a sex offender from seeking visitation with his child.

Bobbitt v. Eizenga, _S.E.2d_ (N.C. App., September 6, 2011).

Plaintiff pled guilty to attempted statutory rape of defendant and was required to register as a sex offender. A child was born to defendant as a result of the actions which were the basis of that conviction. Plaintiff's paternity was established through DNA testing, and plaintiff filed this action seeking visitation with the child. The trial court dismissed the claim after concluding that plaintiff was prohibited from seeking custody or visitation due to his conviction for attempted statutory rape and due to his registered sex offender status. The court of appeals reversed, holding that nothing in NC law prohibits his custody claim. The court of appeals acknowledged that GS 50-13.1(a) prohibits custody claims by "any person whose actions resulted in the conviction for [first-degree rape] or [second-degree rape] and the conception of the child." However, there is no similar statutory prohibition based on statutory rape, attempted statutory rape, or registered sex offender status.

Request for a continuance based on withdrawal of counsel

- Trial court abused its discretion in denying a request for a continuance by defendant mother where defendant mother was not provided reasonable notice of the withdrawal of her attorney.

Skelly v. Skelly, _S.E.2d_ (N.C. App., September 20, 2011).

Defendant informed her attorney that she wanted to speak to another lawyer about her case approximately 7 days prior to a scheduled custody trial. Defendant's lawyer filed a motion to withdraw the next day. The lawyer informed the client of the motion to withdraw at the time it was filed. Approximately 6 days before trial, the lawyer also requested a continuance of the custody trial but the trial court denied his motion. However, the attorney did not inform defendant that the motion to continue had been denied. When the parties appeared on the scheduled trial date, defendant's attorney asked to be allowed to withdraw. The trial court asked the defendant when she was informed the attorney would withdraw and she replied that she had known for approximately 7 days. The trial court determined that she had reasonable notice of the withdrawal motion and refused to grant her request for continuance. The court of appeals held that the trial court abused its discretion in refusing a continuance after allowing the attorney to withdraw because the attorney failed to inform defendant that the attorney's earlier request for continuance of the custody trial had been denied. According to the court of appeals, a trial court has discretion to deny a continuance request based on an attorney's withdrawal, but only if the trial court first determines that the party had "reasonable notice" of the withdrawal. The failure

on the part of the withdrawing attorney to inform the defendant that the continuance request had been denied was sufficient to show that although defendant had actual notice that her attorney would withdraw, that notice was not reasonable under the circumstances.

Legislation

Waiver of Custody Mediation

S.L. 2011-411. Effective September 15, 2011. Amends GS 50-13.1(c) to provide that child custody and visitation mediation *may* be waived (was shall be waived) if either party resides more than 50 miles from the court.

Child Support

Cases Decided/Legislation Enacted Between June 21, 2011 and September 30, 2011

Contempt; findings to support conclusion that father had ability to pay

- Mom's testimony that father had remained employed since the support order was set and that he had told her he had the financial resources required to continue fighting her in court for the rest of her life was sufficient to support trial court's finding that father had the ability to pay child support.

Maxwell v. Maxwell, 713 S.E.2d 489 (N.C. App., June 21, 2011).

Trial court found father in civil contempt based on his failure to pay child support required by consent order. Trial court contempt order contained only a general finding that father had the ability to pay. The court of appeals rejected father's argument that the general finding contained in the contempt order was insufficient to support the conclusion that father was in contempt. The court of appeals held that the record contained sufficient evidence to support the trial court finding of fact where the record showed mother testified that to the best of her knowledge, the father maintained employment continuously from the time the support order was entered. Further, wife testified that father has threatened her by saying that he had the financial resources necessary to "keep me in court for the rest of my life."

Enforcing support order against estate of deceased parent; imposition of constructive trust

- Trial court properly imposed a constructive trust on proceeds received by beneficiaries of deceased father's life insurance policy and other death benefits plans where consent order between parents provided that father would name child as beneficiary but he did not do so before his death.

Myers v. Myers, _S.E.2d_ (N.C. App., July 5, 2011).

Consent judgment resolving claims arising out of parents' divorce provided that father would maintain life insurance through his employment and name the child of the parties as the beneficiary of that insurance policy as well as any other death benefit provided by his employer. At the time father died, he had not named the son as beneficiary and father's sons from a previous marriage were the only named beneficiaries. After father's death, mom filed motion for contempt in the existing case along with a motion to substitute father's estate. The estate was substituted and the trial court imposed a constructive trust on the death proceeds received by the beneficiaries in favor of the child of the parties. The court of appeals affirmed, holding that the constructive trust was appropriate under the circumstances. The court rejected the claims by the beneficiaries that a trust was inappropriate because they had not received the money through any fraud or wrongdoing on their part. The court of appeals held that a constructive trust can be imposed by a trial court "against anyone who in any way against equity and good conscious, either has obtained or holds the legal right to property which he ought not, in equity and good conscious hold and enjoy."

Submitting proposed orders after hearing; income

- It is not an inappropriate ex parte communication for an attorney to send a proposed order to the trial judge after the trial judge instructed the attorney to draft the order and where the attorney also sent a copy to the opposing attorney at the same time the order was sent to the judge.
- Trial court did not err in entering the order resolving the case out of session and out of term.
- Trial court was correct when it refused to include child support received for other children in the determination of custodial mother's income and when it refused to give defendant credit for health insurance which covered the child where child's coverage did not change the premium he already paid and where child already was covered by the mother's policy.

Orange County ex. rel. Clayton v. Hamilton, _S.E.2d_ (N.C. App., July 5, 2011).

Father filed motion to modify his support obligation, arguing that a change in the needs of the children and an increase in the mother's income resulted in a substantial change in circumstances sufficient to support a downward modification of his support obligation. At the conclusion of the hearing, the trial court instructed the attorneys for both parties to draft a proposed order and submit it to the court. The mother's attorney drafted an order, sent it to both the trial judge and father's attorney, and the trial judge entered that order. Father argued on appeal that the order was entered as the result of an inappropriate ex parte communication. The court of appeals rejected the argument, noting that case law has recognized and approved of the practice of attorneys drafting proposed orders for the trial court, and that North Carolina State Bar Formal Ethics Opinion 13 specifically approved of the practice of submitting proposed orders to trial judges as long as the attorney was instructed by the judge to prepare the proposed order and the attorney mailed the order to the other side at the same time it was mailed to the judge. In addition, the court of appeals rejected father's argument that the order was invalid because it was entered by the trial court sometime after the expiration the session of court during which the matter was tried. The court of appeals held that Rules 6 and 58 of the Rules of Civil Procedure provide that orders can be entered after term or session "unless an express objection to such action was made on the record prior to the end of that term or session at which the matter was heard."

Incorporated agreement for child support, automatic increases, termination when child ceases to be in "good academic standing"

- Automatic increases in a court order for support are invalid, even if based on an incorporated agreement between the parties.
- Trial court did not err in concluding that child remained in "good academic standing" when parent stopped paying support in violation of the consent order where, by the time of hearing, the child had graduated and earned his degree.

Wilson v. Wilson, _S.E.2d_ (N.C. App., August 16, 2011).

Parties executed a separation agreement that was incorporated into the divorce judgment. The agreement provided that child support would be paid in a set amount, that the obligation would continue while each child attended college as long as the child remained in "good academic standing," and that the support obligation would automatically increase when father received a bonus or an increase in his salary. Plaintiff filed for contempt, arguing that father had failed to pay in accordance with the provision providing for automatic increases based on salary increases and that father has stopped paying while one child still attended college. Dad argued on appeal

that automatic increases in child support agreements or orders are unenforceable and that he stopped paying support because he interpreted the order to require him to pay only if child was regularly attending classes and maintaining a C average. The court of appeals agreed that automatic increases violate state public policy because they allow a child support order to be amended without a showing of a substantial change in circumstances. The court of appeals noted that an increase in the income of the paying parent is never enough to show a substantial change in circumstances. However, the court of appeals rejected father's argument that the child was not in "good academic standing" by stating simply that by the time of hearing, the child had completed college by graduating and receiving his degree.

Legislation

S.L. 2011-328. "AN ACT ESTABLISHING A PROCESS TO SET ASIDE AN ORDER OF PATERNITY OR AN AFFIDAVIT OF PARENTAGE UNDER LIMITED CIRCUMSTANCES, AND TO ALLOW RELIEF FROM A CHILD SUPPORT ORDER WHEN THE OBLIGOR IS NOT THE CHILD'S FATHER."

Applies to motions or claims for relief filed on or after January 1, 2012.

- 1. Amends GS 49-14 (paternity statute) and GS 110-132 (affidavit of parentage and voluntary support agreement statute) to allow paternity judgments to be set aside beyond the one-year time limitation contained in Rule 60(b).**

New section GS 49-14(h) is added to state that, notwithstanding the time limitations contained in Rule 60(b) of the Rules of Civil Procedure, an order of paternity can be set aside if 1) the paternity order was entered as the result of fraud, duress, mutual mistake, or excusable neglect, and 2) genetic tests establish that the putative father is not the biological father.

The statute provides that the burden of proof is on the moving party, and a court cannot order a blood test unless there is a motion properly alleging fraud, duress, mutual mistake, or excusable neglect. The court may set aside the paternity order if the party with the burden of proof establishes both elements.

Affidavit of parentage statute GS 110-132 is amended to provide the same procedure for setting aside an affidavit of parentage.

- 2. Adds new GS 50-13.13 to provide that child support obligation may be terminated based on proof of nonpaternity.**

New statute allows a person who is subject to a court order requiring the payment of child support to file a motion to terminate that support obligation within one year of the date the party

knew or reasonably should have known that he was not the father of the child. [The one-year period is tolled for a service member who is deployed on military orders]. The child support obligation may be set aside if a paternity order has been set aside pursuant to the new statutory provisions set out above, or if genetic tests show the party is not the father of the child AND the party has not acknowledged paternity of the child, or acknowledged paternity without knowing he was not the child's father. [****Notwithstanding the requirement that all motions be filed within one year of discovery that moving party is not the father, the act allows "any person who would otherwise be eligible to file a motion or claim may file a motion or claim pursuant to this act prior to January 1, 2013.]

The party's child support obligation is suspended while the motion is pending, if the child support is being paid on behalf of the child to the State, or any other assignee, or where the moving party is an obligor in a IV-D case. However, the support obligation is not suspended if support is being paid to the mother of the child.

If the motion is granted and child support is terminated, any support due and owing at the time the action was filed remains due and owing. If the court finds that the mother used fraud, duress, or misrepresentation, resulting in the moving party's belief that he was the father of the child, the court may order the mother to reimburse any support paid since the filing of the motion pursuant to this new section. There is no right to reimbursement for any support paid to the State, or to any other assignee of child support, where the child is in the custody of the State or other assignee, or where the moving party is an obligor in a IV-D case.

If a motion is granted pursuant to this section, the clerk of court must notify the State Registrar so the child's birth certificate can be amended. Also, if relief is granted pursuant to this section, a 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."

Paternity

Legislation Enacted Between June 21, 2011 and September 30, 2011

S.L. 2011-328. “AN ACT ESTABLISHING A PROCESS TO SET ASIDE AN ORDER OF PATERNITY OR AN AFFIDAVIT OF PARENTAGE UNDER LIMITED CIRCUMSTANCES, AND TO ALLOW RELIEF FROM A CHILD SUPPORT ORDER WHEN THE OBLIGOR IS NOT THE CHILD’S FATHER.”

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The statute provides that the burden of proof is on the moving party, and a court cannot order a blood test unless there is a motion properly alleging fraud, duress, mutual mistake, or excusable neglect. The court may set aside the paternity order if the party with the burden of proof establishes both elements.

Affidavit of parentage statute GS 110-132 is amended to provide the same procedure for setting aside an affidavit of parentage.

- 4. Adds new GS 50-13.13 to provide that child support obligation may be terminated based on proof of nonpaternity.**

New statute allows a person who is subject to a court order requiring the payment of child support to file a motion to terminate that support obligation within one year of the date the party knew or reasonably should have known that he was not the father of the child. [The one-year period is tolled for a service member who is deployed on military orders]. The child support obligation may be set aside if a paternity order has been set aside pursuant to the new statutory provisions set out above, or if genetic tests show the party is not the father of the child AND the party has not acknowledged paternity of the child, or acknowledged paternity without knowing he was not the child’s father. [****Notwithstanding the requirement that all motions be filed within one year of discovery that moving party is not the father, the act allows “any person who would otherwise be eligible to file a motion or claim may file a motion or claim pursuant to this act prior to January 1, 2013.]

The party's child support obligation is suspended while the motion is pending, if the child support is being paid on behalf of the child to the State, or any other assignee, or where the moving party is an obligor in a IV-D case. However, the support obligation is not suspended if support is being paid to the mother of the child.

If the motion is granted and child support is terminated, any support due and owing at the time the action was filed remains due and owing. If the court finds that the mother used fraud, duress, or misrepresentation, resulting in the moving party's belief that he was the father of the child, the court may order the mother to reimburse any support paid since the filing of the motion pursuant to this new section. There is no right to reimbursement for any support paid to the State, or to any other assignee of child support, where the child is in the custody of the State or other assignee, or where the moving party is an obligor in a IV-D case.

If a motion is granted pursuant to this section, the clerk of court must notify the State Registrar so the child's birth certificate can be amended. Also, if relief is granted pursuant to this section, a 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."

Spousal Agreements

Cases Decided/Legislation Enacted Between June 21, 2011 and September 30, 2011

Consent order: interpretation and enforcement

- A consent order is a court order for all purposes and contract remedies are not available to the parties.
- Trial court does not have the authority to issue a declaratory judgment interpreting the terms of the agreement and the trial court has no authority to order specific performance.
- However, where parties stipulated that trial court could determine obligations under the contract, trial court did not err in doing so.
- When interpreting a consent order, trial court must apply the rules of interpreting or construing contracts.

Holden v. Holden, _S.E.2d_ (N.C. App., August 2, 2011).

Parties settled claims for PSS, alimony and equitable distribution by entering into a detailed consent order. The order provided for the distribution of personal property, distributed responsibility for debt, including the mortgage on the marital residence, provided how the debt would be paid, and provided for the possession and possible eventual sale of the marital residence. When a dispute arose between the parties, defendant filed a motion for “specific performance” of the agreement, for contempt, and for an order “compelling plaintiff to comply” with terms of the consent judgment. When the matter came on for trial, the parties stipulated that the matter would proceed as a motion for interpretation of the agreement and as a request for an order of specific performance, rather than as a motion for contempt. The trial court thereafter entered an order declaring the obligations of the parties pursuant to the consent order and ordering plaintiff to specifically perform those obligations. On appeal, plaintiff argued that the trial court had no authority to interpret the agreement or to order specific performance because contempt is the only remedy for failure to comply with a court order. The court of appeals agreed that a trial court has no authority to enter either a declaratory judgment or an order of specific performance in a case involving enforcement of a consent order. Despite the fact that the order is based upon the agreement of the parties, the consent order is treated as a court order for all purposes related to enforcement. However, in this case, the court of appeals held that the stipulation of the parties gave the trial court the authority to determine the obligations of the parties under the order. The stipulation, however, did not give the trial court the authority to enter an order of specific performance. The court of appeals held that the obligations of the parties following this appeal are as set forth in the consent order and as set forth in the trial court order interpreting that original order. Contempt will be the remedy if plaintiff fails to comply with the terms as interpreted by the trial court.

The court of appeals also discussed rules for interpreting consent judgments and stated that the only time a trial court has the authority to interpret a consent judgment is when 1) the parties have stipulated, as they did in this case, that the trial court can determine the obligations

of the parties, or 2) when one party asks the court to hold the other in contempt for failure to comply with the order. The court noted that while consent orders are treated as court orders for all purposes related to enforcement, the trial court is required to apply rules relating to the interpretation of contracts when interpreting the obligations of the parties under the order. Therefore, the trial court first determines if the order is ambiguous. If it is not ambiguous, the court must interpret the order as written. It is only when the meaning of the terms cannot be determined by reading the document as a whole that the trial court can consider the intent of the parties. The court of appeals also made the interesting comment that, when a trial court determines that a consent judgment is ambiguous, it most likely will not be possible to hold a party in contempt for failure to comply.

Rescission of separation agreement based on constructive fraud

- Trial court erred in granting defendant's motion for summary judgment dismissing plaintiff's request for rescission of separation agreement based upon constructive fraud. Parties remained in a fiduciary relationship at the time defendant prepared an inventory of assets which excluded two valuable parcels of marital real estate.
- Constructive fraud requires a showing that the parties were involved in a fiduciary relationship and that one party took advantage of the position of trust to the prejudice of the other party.

Searcy v. Searcy, _S.E.2d_ (N.C. App., September 20, 2011). Parties executed a separation agreement on April 25, 2005. In February or March of 2005, while the parties continued to live together, the parties compiled a list of assets and liabilities at the request of a lawyer who agreed to mediate a settlement of property claims between the parties. Defendant's list of assets failed to include two valuable parcels of real property, and the two parcels were not addressed in the separation agreement and property settlement eventually signed by the parties. In 2008, plaintiff filed a complaint asking the court to rescind the separation agreement based on defendant's failure to disclose all assets. The trial court granted defendant's motion for summary judgment after concluding that the parties were no longer in a fiduciary relationship at the time the agreement was executed because the parties had separated by that time. The court of appeals agreed that the fiduciary relationship had ended by the time the agreement was signed, but held that the parties continued in a fiduciary relationship at the time the lists of assets and liabilities were exchanged between the parties. The court of appeals held that there was a genuine issue of material fact as to whether the defendant committed constructive fraud at the time the lists were exchanged, meaning summary judgment was not appropriate.

Equitable Distribution

Cases Decided/Legislation Enacted Between June 21, 2011 and September 30, 2011

Distributive Award: rebutting in-kind presumption and identifying liquid assets

- Trial court findings that presumption in favor of an in-kind distribution had been rebutted were sufficient to support decision to award dairy farm to husband and order husband to pay wife a distributive award.
- Trial court has authority to divide land, rather than order a distributive award, even when outcome of sale would be “economically unadvisable.”
- Findings of fact were sufficient to identify assets available to husband to pay the distributive award and to show trial court properly considered the financial consequences of the award.

Williams v. Williams, unpublished opinion, _S.E.2d_ (N.C. App., July 5, 2011).

Trial court entered equitable distribution order which awarded marital dairy farm to husband and ordered him to pay wife a significant distributive award. On appeal, wife argued that the distributive award was improper because the trial court findings were not sufficient to show that the presumption in favor of an in-kind distribution had been rebutted and were not sufficient to show how husband would pay the award and the financial impact of the award on him. The court of appeals disagreed, holding that the judgment contained findings showing that the financial viability of the dairy farm would be negatively impacted by dividing the property in-kind and that it would be “inequitable” to order the sale of the property due to the length of time the parties had used the property as a dairy farm. The court of appeals noted that an in-kind division in the form of a sale may be ordered even when it is not “economically advisable” if there are not sufficient assets from which to pay a distributive award. However, in this case, the trial court clearly identified liquid assets available to husband as well as property that could be used as collateral for loans as sources of money to pay the distributive award.

Dismissal of claim for failure to prosecute or for failure to follow local rules

- Trial court erred in dismissing equitable distribution claim prejudice for failure to prosecute and for failure to abide by local rules without first considering whether lesser sanctions would be appropriate.

McKoy v McKoy, _S.E.2d_ (N.C. App., August 16, 2011).

Trial court dismissed defendant’s complaint for equitable distribution pursuant to both Rule 41(b) of the Rules of Civil Procedure and a local rule allowing dismissal as a sanction for failing to comply with case management procedures. The trial court dismissed the claim based on the fact that defendant had done nothing in the case for 26 months. The court of appeals held that while dismissal with prejudice is an appropriate sanction for failure to prosecute, a claim may not be dismissed until the trial court considers and rejects alternative lesser sanctions. The court of appeals noted that while Rule 41 does not mention alternatives to dismissal, a trial court has the “inherent authority” to impose sanctions less severe than dismissal. The trial court order must reflect that the trial court considered and rejected alternatives. The court of appeals stated that less harsh sanctions include assessments of fines, costs, or damages against the party or the party’s counsel, attorney disciplinary actions, conditional dismissal, dismissal without prejudice, and explicit warnings. The court of appeals also held that while a local rule can provide that a

failure to abide by local requirements will result in the dismissal of a claim, the trial court cannot dismiss without making findings to show it considered less harsh sanctions.

Review of arbitration award; classification

- Arbitrator did not err in concluding that defendant had not met his burden of proving increase in value of investment account during the marriage was passive appreciation.
- Arbitrator appropriately applied the marital property presumption to determine that the entire value of the investment account on the date of separation was marital even though defendant attempted to ‘trace out’ a separate interest by showing that some of the value came from funds he acquired before marriage.
- Property purchased by defendant prior to marriage and placed in the name of himself and plaintiff as tenants in common was the separate property of both defendant and plaintiff. By taking title as tenants in common, the defendant made a gift of one-half of the value of the property to plaintiff.
- Arbitrator did not err in distributing the property held by the parties as tenants in common to defendant and ordering defendant to pay plaintiff for the value of her separate interest.
- Arbitrator did not err in calculating the fair market value of real property by calculating defendant’s total investment in the property.
- Arbitrator did not err in classifying decrease in value of car after the date of separation as divisible property because evidence did not link decrease in value to actions of one spouse.
- Arbitrator erred in including postseparation contributions and losses in determining the date of separation value of a 401K retirement plan acquired during the marriage.
- Because arbitration award required defendant to retain plaintiff as the beneficiary of his pension plan, arbitrator was not required to assign a separate value to the survivor annuity benefit.
- Supplemental portion of pension plan was appropriately valued separately from the full pension plan.

Barton v. Barton, _S.E.2d_ (N.C. App., September 6, 2011).

Parties signed agreement pursuant to the Family Law Arbitration Act, GS 50-40, wherein they agreed to arbitrate issues of equitable distribution and to preserve errors of law by the arbitrator for court review. Following the entry of the arbitrator’s decision, defendant filed a motion in the trial court to vacate or modify the award based in “evident miscalculation of figures.” The trial court affirmed the arbitrator’s award and incorporated the award into a judgment. Defendant appealed to the court of appeals and assigned as error the arbitrator’s classification of numerous assets. The court of appeals held an arbitrator’s award may be modified or corrected when “there is an evident miscalculation of figures or an evident mistake in the description of a person, thing, or property referred to in the award.” The opinion addresses numerous assets:

1. Defendant owned an investment account before marriage. It increased in value between the date of marriage and the date of separation. The arbitrator and trial judge classified the increase as marital and defendant objected, arguing that all appreciation during the marriage was passive. The court of appeals held that while passive appreciation of

separate property during the marriage remains separate property, the marital property presumption applies and all appreciation during the marriage and before the date of separation is presumed marital. Therefore, defendant had the burden of proving that no marital effort contributed to the increase in value of the account. The court of appeals held that evidence that defendant met with his broker every month or two and that he authorized every trade, and that there was frequent trading and other activity in the account throughout the marriage, was sufficient to support the arbitrator's conclusion that the increase was the result of defendant's actions during the marriage.

- a. Trial court also did not err in classifying entire account as marital even though defendant contended that a significant portion of the value was acquired as the result of contributions of separate property to the account during the marriage. He claimed he had adequately 'traced out' all deposits to separate property. The court of appeals disagreed, concluding that it was within the arbitrator's discretion to determine whether evidence established that defendant adequately traced the value to separate funds and that the arbitrator acted with his discretion when he determined that all of the value in the account on the date of separate was acquired as the result of marital effort. That effort appears to have been all of the management activities of the defendant, including trading activity and defendant's actions in consolidating other accounts (some of which existed before marriage) and transferring funds from those other accounts in and out of the investment account at issue.
2. Arbitrator determined that two lots purchased by defendant before the date of marriage were owned by both plaintiff and defendant because defendant had placed title in both as tenants in common. The arbitrator determined that taking title as tenants in common established that defendant made a gift to plaintiff of one-half of the value of the property. As both lots were still owned by the parties on the date of separation and had appreciated in value during the marriage, the arbitrator classified the lots as part separate and part marital. The arbitrator distributed both lots to defendant and ordered that he pay plaintiff for her separate interest. The court of appeals held that while generally a trial court cannot distribute separate property, the trial court can distribute a separate interest in mixed property if the trial court requires the receiving party to reimburse the other for the value of the separate property. The court rejected defendant's argument that the entire value of both lots should have been classified as marital because he provided all of the purchase money, noting that there had been no objection raised to the arbitrator's determination that he made a gift of on-half of the value to plaintiff before the date of marriage.
3. Arbitrator determined the fair market value of real property by adding together all of defendant's financial contributions to the property before the date of marriage. The court of appeals rejected defendant's contention that this was not a proper way to determine

fair market value by stating that an arbitrator has the discretion to determine the appropriate methodology to use to value an asset.

4. Decrease in value of car from \$21,000 on the date of separation to \$8,000 was appropriately classified as divisible property where evidence did not establish that decrease in value was the result of the actions of one spouse after the date of separation. Evidence showed that the car was driven an additional \$40,000 miles following separation and defendant had two minor accidents in the car after separation, both resulting in “minimal damage.”
5. Arbitrator erred in including post separation gains and losses in the valuation of the marital portion of a 401K retirement plan. Because arbitrator ordered a distributive award to “equalize the division of assets,” the case had to be remanded to the trial court to correct the valuation and refigure the distributive award.
6. Arbitrator assigned a date of separation value to the joint and survivor annuity benefit of defendant’s pension plan and ordered that defendant retain plaintiff as the beneficiary of the pension plan. Without discussion, the court of appeals held that because plaintiff remains the beneficiary of the pension, there is no need to consider separately the “valuation of the survivor annuity benefit”.
7. Defendant participated in a retirement plan through his employment from 1977 through 2000. However, he participated in a more valuable “Supplemental Executive Retirement Plan” beginning in 1989 when he was invited to join the supplemental plan and continuing until he left that employment in 2000. (The parties were married in 1997 and separated in 2006.) Evidence was that the supplemental plan was offered by the employer as a method of keeping high ranking employees and participation was awarded by the employer on a “case-by-case” basis. The arbitrator valued the marital portion of the supplemental plan by using the “fixed percentage method” required by GS 50-20.1(d) but used 123 months as the denominator of the coverture fraction (123 months being the time married and participating in the supplemental program beginning in 1989). Both the arbitrator and the court of appeals disagreed with defendant’s contention that the denominator of the fraction should include all the time defendant worked for the employer and participated in the employer-provided retirement plan (from 1977 through 2000). The court of appeals held that the arbitrator properly considered that the supplement was not awarded based only on service time but was “conferred on a case-by-case basis” in determining that it was appropriate to classify the marital portion based only on the time defendant participated in the supplemental plan.

Dismissal of claim for failure to comply with discovery requests; consideration of lesser sanctions; contempt procedure

- Before dismissing plaintiff's claim as a sanction for various discovery violations, the trial transcript showed that trial court properly considered the lengthy and contentious history of the case and considered whether a sanction less severe than dismissal would be sufficient in this case.
- Contempt order was remanded where record showed plaintiff was not given notice as required by GS 5A-23(a1) and where civil contempt order did not provide a purge provision.

Ross v. Ross, _S.E.2d_ (N.C. App., September 20, 2011).

Trial court dismissed defendant's complaint for equitable distribution as a discovery sanction pursuant to Rule 37 of the Rules of Civil Procedure. The sanction was based on plaintiff's refusal to answer discovery requests. On appeal, plaintiff argued that the trial court had failed to consider lesser sanctions before dismissing his claim. The court of appeals held that while the dismissal order did not contain finding regarding the consideration, the transcript was sufficient to show the trial court considered everything it was required to consider and that the sanction was reasonable given the very long history of the case and the numerous acts on the part of plaintiff resulting in delays and the inability to complete the litigation. However, the court of appeals did agree with plaintiff that an order finding plaintiff in contempt was inappropriate because no show cause had been issued before plaintiff was held in civil contempt and no motion for civil contempt pursuant to GS 5A-23 (a1) had been filed or notice given to plaintiff of the motion before the hearing was held wherein plaintiff was found to be in civil contempt. The contempt order simply stated that plaintiff was in contempt but did not impose a purge condition. The court of appeals held that all orders for civil contempt must include a purge provision.

Classifying postseparation increase in value of marital business; rebutting the marital gift presumption created by tenancy by the entirety

- Presumption that postseparation appreciation of a dental practice is divisible property is not overcome by showing only that the dentist continued to work at the practice after the date of separation.
- There is no rule that the marital gift presumption cannot, as a matter of law, be rebutted by the testimony of the donor spouse alone.

Romulus v. Romulus, _S.E.2d_ (N.C. App., September 20, 2011).

Trial court classified dental practice as marital property and classified the postseparation appreciation in the value of that business as divisible property. Defendant argued that because the trial court found that he continued to work and to maintain the practice after the date of separation, the trial court should have determined that the increase in value was due to his effort. The court of appeals held that while the defendant showed that he did work after separation, the trial court did not err when it determined that there was no evidence as to what caused the actual increase in value of the practice.

The court did err in classifying real property as the separate property of plaintiff without making any findings of fact as to how the property was acquired, and the case was remanded to the trial court for additional findings of fact. However, it was clear that the classification depends

on the application of the marital gift presumption arising when title to real property is placed in tenancy by the entirety and whether that presumption can be rebutted by the testimony of the donor spouse alone. As the court of appeals recognized that this legal issue would be relevant to the trial court on remand in determining whether the real property was marital or separate, the court of appeals decided to answer the question. After an extensive review of all previous case law on this point, the court of appeals determined that there is no rule that the gift presumption cannot be rebutted by the testimony of the donor spouse alone. When separate property is conveyed to tenancy by the entirety, a presumption arises that the spouse has made a gift of separate property to the marriage because of the nature of the tenancy by the entirety estate. The presumption can be rebutted by evidence showing there was not intent on the part of the donor spouse to make a gift to the other spouse at the time of the transfer. While it is very difficult to rebut the presumption and to date, no appellate case has found evidence sufficient to rebut the presumption, it is – at least theoretically – possible for a party to successfully rebut the presumption with nothing other than the testimony of the donor spouse. The court of appeals noted that the trial court must find the presumption rebutted by clear, cogent and convincing evidence, and the donor’s testimony is competent evidence on the issue.

Using execution to enforce a distributive award; jurisdiction to enforce a distributive award while ED case on appeal

- Distributive award is a judgment directing the payment of money pursuant to GS 1-289 which can be enforced through execution and is a lien on all real property owned by the party against whom it is entered pursuant to GS 1-234.
- Execution may proceed even after the ED judgment is appealed if an execution bond is not posted.
- When distributive award is ordered to be paid in installments, trial court does not have jurisdiction to determine the amount due at any point in time while the ED judgment is on appeal.

Romulus v. Romulus, _S.E.2d_ (N.C. App., September 20, 2011).

Trial court entered an ED order directing defendant to pay plaintiff a distributive award in the amount of \$629,840, payable over a period of 7 years in 84 monthly installments. The ED order was appealed and plaintiff sought to enforce the payment of the distributive award through contempt and through execution. The trial court entered an order determining that, at the time of the hearing on the enforcement motions, defendant owed \$52,486 of the distributive award and ordered the clerk of court to issue execution in that amount. Defendant appealed. The court of appeals first held that an ED judgment ordering a distributive award is a judgment directing the payment of money within the meaning of GS 1-289 and therefore is subject to enforcement through execution. And, pursuant to GS 1-234, the judgment is a lien on all real property owned by the party against whom it is entered. GS 1-289 provides that execution can proceed on a judgment directing the payment of money while the judgment is on appeal, unless an execution bond is posted. However, the court of appeals held that the trial court does not have jurisdiction to determine arrears owed at any point in time when the distributive award is payable over time. In this case, the trial court lost jurisdiction when the appeal was docketed in the court of appeals

and had no authority to determine how much of the distributive award was due and owing at the time plaintiff attempted to execute.

Spousal Support

Cases Decided/Legislation Enacted Between June 21, 2011 and September 30, 2011

When is alimony really alimony in a consent judgment

- Trial court did not err when it concluded that former wife's support payments terminated when she engaged in cohabitation.
- When alimony payments required by a consent judgment are 'true alimony,' the statutory provision terminating those payments upon cohabitation applies, regardless of whether the consent judgment so provides.
- In determining whether support provisions in a consent order are 'true alimony,' the trial court must examine the entire agreement and cannot base the determination solely on the existence of an 'integration clause.'
- Where clear intent of entire agreement was that the payments were intended to be alimony, the fact that the consent judgment also contained a provision stating that the support payments required by the consent judgment were "given in reciprocal consideration for the agreements of the parties as to Equitable Distribution and property settlement" was not sufficient to keep the payments from being treated as alimony.
- Parties cannot contract that the termination and modification provisions of the alimony statute will not apply to the alimony in their consent judgment.

Underwood v. Underwood, N.C., _S.E.2d_ (August 26, 2011), reversing _N.C. App._, 699 S.E.2d 478.

Trial court terminated alimony upon finding that former wife had engaged in cohabitation. Court of appeals agreed with former wife that payments should not terminate because the payments were not really alimony under the terms of the consent judgment. The court of appeals based that decision upon the presence of an 'integration clause' in the consent judgment. That integration clause stated that the alimony payments were to be paid as "reciprocal consideration for the agreements of the parties as to Equitable Distribution and property settlement". The court of appeals relied on Marks v. Marks, 316 NC 447 (1986) and White v. White, 296 NC 661 (1979) to conclude that the payments were not alimony even though the order designated them as such because they were in fact part of the integrated property settlement agreement between the parties. The supreme court reversed, holding that Marks and White do provide that if alimony is not really alimony, then the statutory provisions relating to the termination and modification of an alimony obligation will not apply. However, the supreme court disagreed that the integration clause was sufficient to prove that the payments were not alimony. Rather, the supreme court stated that the trial court is required to look at the entire consent order to determine whether the ordered payments are intended to be alimony or whether they are in fact a part of the integrated property settlement of the parties. The court held that the presumption is that agreements are severable, meaning the presumption is that the payment provisions are not a part of the property settlement. The party seeking to prove that the payment provisions are not subject to termination or modification must prove that the provisions were included in exchange for the property settlement provisions. In this case, the supreme court held that consent order "unambiguously demonstrates that the parties intended to support defendant with alimony payments." In support of this conclusion, the court points to the fact that 1) the consent order "methodically enumerates stipulations and findings that establish the essential elements of an alimony award set forth in section 50-16.3A," 2) the support provisions comply with the statutory definition of alimony in

that the order finds that the defendant is a dependent spouse and the plaintiff is the supporting spouse, the payments are required to be paid monthly and the payments are referred to as 'alimony' at least 16 times, and 3) the alimony payments are listed separately from the property settlement provisions, in separate sections of the consent agreement from the property provisions. The supreme court held that the reciprocal consideration clause was simply an intent by the parties to avoid the statutory termination and modification provisions that apply to alimony rather than a true indication that the agreement was in fact 'integrated.'

Illicit sexual behavior as bar to alimony

- One act of illicit sexual behavior by the dependent spouse before the date of separation will bar alimony even if the supporting spouse engaged in severe marital misconduct other than illicit sexual behavior prior to the date of separation.
- Illicit sexual behavior is defined as sexual intercourse or sexual acts as defined in GS 14-27.1(4), or deviate sexual intercourse or deviate sexual acts.
- The term "sexual relations" is not synonymous with 'sexual intercourse.' Therefore, plaintiff's admission of sexual relations did not establish illicit sexual behavior.
- The doctrine of inclination and opportunity can be applied to prove both sexual intercourse and sexual act.
- Trial court did not err in concluding parties were not separated at the time the alleged incidents of illicit sexual behavior occurred.

Romulus v. Romulus, _S.E.2d_ (N.C. App., September 20, 2011).

Trial court denied plaintiff's claim for alimony based on a finding that she had committed an act of illicit sexual behavior before the parties separated. Plaintiff's claim was barred because, although defendant committed a number of acts of marital misconduct before the date of separation, including multiple incidents of violence against plaintiff and their minor child, he had not committed an act of illicit sexual behavior. Illicit sexual behavior is defined in GS 50-16.1A(3)a) as sexual intercourse or sexual act as defined in GS 14-27.1(4), or deviate sexual intercourse or deviate sexual act. Plaintiff argued that while she admitted to one act of "sexual relations" with another man, she did not engage in sexual intercourse. The court of appeals agreed that "sexual relations" is not synonymous with sexual intercourse, and held that although it was unclear from the order whether the trial court determined that she had engaged in sexual intercourse, the facts in the order did establish plaintiff had engaged in a sexual act. Evidence showed that on two occasions the plaintiff kissed another man and allowed him to penetrate her vagina with his finger. In addition to the direct evidence of a sexual act, the court of appeals noted that the testimony of both the plaintiff and the other man established that the two had both the inclination and the opportunity to commit acts of illicit sexual behavior.

The court of appeals also rejected plaintiff's argument that she was separated from defendant at the time these actions took place. They occurred in 1999, when plaintiff was physically separate from the defendant because she was at the beach and he was at home. The final separation of the parties did not occur until 2006. The court of appeals held that separation means a physical separation "in such a way that indicates a cessation of cohabitation as husband and wife" and held there was no evidence in this case that the parties were more than temporarily physically apart at the time of the incidents.