

# FAMILY LAW UPDATE

Cheryl Howell  
June 2013

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# Alimony

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## Cohabitation

- Cohabitation terminates PSS and Alimony
  - GS 50-16.9
- Cohabitation also is a defense to a PSS or Alimony claim
  - See *Williamson v. Williamson*, 142 NC App 702 (2001)
  - See also *Smallwood v. Smallwood*, COA (May 21, 2013)

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## Alimony

- Cohabitation requires:
  - Two adults dwelling together continuously and habitually, **and**
  - A voluntary mutual assumption of those rights, duties and obligations usually manifested by married people
    - *Bird v. Bird*, 363 NC 774 (2010)




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## *Bird v. Bird*

- ▶ Evidence of 'dwelling together'
  - ▶ Nights spent together
  - ▶ Friend's vehicle regularly at W's house
  - ▶ Exchanging vehicles
  - ▶ Moving furniture into W's home
  - ▶ Meeting repairmen at W's home
- ▶ Evidence of voluntary assumption of marital rights, duties, obligations
  - ▶ "activities such as sharing in chores and participating in typical family activities such as going out to dinner"




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## Cohabitation

- Statute reflects goal of terminating alimony in relationships that probably have an economic impact
  - *Craddock*, 188 NC App 806 (2008), citing Lee's *Family Law*
- ***Bird*** doesn't mention economic impact of relationship
  - *But see Smallwood v. Smallwood* (quotes *Craddock*)

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### Subjective intent of parties

- “Where there is objective evidence, not conflicting, that the parties have held themselves out as man and wife, the court does not consider subjective intent of the parties.”
  - Also, where objective evidence is not conflicting that parties *have not* held themselves out as man and wife, court does not consider subjective intent. *Smallwood*.
- “Where the objective evidence of cohabitation is conflicting, the subjective intent of the parties can be considered.”
  - *Oakley v. Oakley*, 165 NC App 859 (2004)
  - *Bird v. Bird*, 363 NC 774 (2010)




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### Smallwood

- “the mere presence of certain, isolated factors does not automatically mandate a finding of cohabitation”
- It is within discretion of trial judge to determine whether facts support finding of cohabitation based on the “totality of the circumstances.”
- Court of appeals will not engage in de novo review

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### *Smallwood*

- “On the one hand”.....
  - He spent 5 to 7 nights per week at her house
  - He had a key to the house and occasionally used the garage door opener
  - He helped her prepare meals, has eaten at her house, and helped clean up after meals
  - They go out to eat several times a week, and sometimes he pays
  - He helped care for her dogs and once helped fix the fence
  - He has mowed her lawn on a couple of occasions, and has collected her mail and taken out the trash and recycling
  - They attend church together
  - They went on a trip together with her son
  - They kiss each other goodbye

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### Smallwood

- "On the other hand"....
- He has his own residence, and he does not keep clothes or a toothbrush at her house
- He has her house key but so does her mom and her friend
- She does not let him keep the garage door opener
- He does not pay any expenses relating to her residence
- They do not exchange gifts
- He does not shower at her house, and he often brings his own food to her house
- She does her own laundry and vacuums her house
- The trip with her and her son also involved many other people
- They are not engaged to be married and do not refer to each other as husband or wife

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### Smallwood

- Trial court determination of no cohabitation was supported by the findings of fact
- While there were some evidence of "domestic activities", no evidence of an "assumption of marital rights and duties extending beyond those found in an intimate friendship – such as, for example, joint financial obligations, sharing of a home, combining of finances, pooling of resources, or consistent merging of families."
- No need to consider subjective intent because no conflicts in the objective evidence

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### Retroactive Alimony

- Trial court has discretion to award alimony from time of separation rather than only from the time request for alimony is filed.
- *Smallwood*
  - Trial court awarded prospective alimony to begin at termination of PSS award, but also ordered alimony from date of separation until time PSS award began

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# Equitable Distribution

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## Military Retirement

- You classify husband's military retirement as 100% marital on the date of separation, value the pension as of the date of separation, and enter an ED judgment distributing 50% of the marital portion of the pension to wife, when and if he begins to receive his retirement pay.
- When he begins to receive retirement pay, she receives \$800 per month pursuant to your order
- Husband then elects disability pay
- Her payment drops to \$400 per month
- She files motion in the cause, asking you to make him pay the \$400 she is no longer receiving

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## Military Disability



- State courts cannot distribute military disability pay
- Generally speaking\*\*, a service member cannot receive disability pay and retirement pay
- Generally speaking\*\*, a service member can receive disability pay only to extent he/she waives retirement pay
- Election of disability reduces retirement dollar-for-dollar
- Election is at option of service member and can happen anytime
- Disability pay is not taxed as income but retirement pay is taxed

\*\*Concurrent pay provisions change this to some extent

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### So what can you do?

- You can enforce your order
  - *White v. White*, 152 NC App 558 (2002)
  - *Hillard v. Hillard*, 733 SE2d 176 (2012)
  - But only your order, see *Williams v. Williams, unpublished*, 167 NC App 373 (2004)
- *But cf. Halstead v. Halstead*, 164 NC App 543 (2004) and *Cunningham v. Cunningham*, 171 NC App 550 (2005)

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### Military Disability



- In original ED judgment
  - Cannot distribute disability pay
  - Can consider receipt of disability as a distribution factor
  - But no dollar-for-dollar credit in distribution
  - Cannot prohibit future elections by service member
- After ED judgment
  - Can effectuate terms of original division of assets

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### Classification The Marital Property Presumption

- GS 50-20(b)(1): "It is presumed that all property acquired during the course of the marriage and before the date of separation is marital property."
- Presumption rebutted by greater weight of evidence



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### Burden of Proof

- Party seeking marital classification must go first.
  - Property interest acquired during the marriage
  - By either or both spouses
  - Owned on DOS
  - [Value on DOS]
- If shown, entire value of property on date of separation is presumed to be marital
- Burden shifts to party seeking to show separate property interest

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### Categories of Separate property

- Property acquired before marriage
- Property acquired by a spouse by gift or bequest
- Property acquired in exchange of separate property
- Passive appreciation of separate property during marriage
- Passive income earned from separate property during marriage
- Nontransferable professional licenses

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### Classification Burden of Proof

- Burden of tracing value acquired during the marriage always on person seeking separate classification
- See *Finney v. Finney*, 736 SE2d 639 (COA 2013)
- Cf. *Congdon v. Congdon*, unpublished, 741 SE2d 514 (2013)




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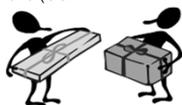
### Gift from Parents

- Marital property presumption rebutted by showing gift received from parents

- Gift received from parent presumed to be separate property of child

- Burden shifts back to person seeking marital classification to show no gift or gift to both

- *Gould v. Gould, unpublished, 736 NC App 649 (COA 2013)*



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### Classification Presumptions

- No presumptions re: debt acquired during marriage

- Party seeking marital classification must prove joint benefit

- No presumptions about property/value/debt acquired after DOS

- **Except** appreciation/depreciation of marital property after DOS and before DOD is presumed passive and therefore divisible

- *Gould v. Gould, unpublished, 736 NC App 649 (COA 2013)*

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### Valuation

- All marital property and debt must be valued as of DOS

- If DOT value offered, judgment must address divisible property

- Person seeking marital classification has burden of proving DOS value

- Only need to "reasonably approximate" value

- See *Gould v. Gould*

- Owner of property can give opinion as to value

- See *Finney v. Finney*

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## Distribution

- Judgment must list all distribution factors established by the evidence, even if ordering an equal distribution
  - *Hinkle v. Hinkle*, COA (May 21, 2013)
- Distributive awards must be payable in 6 years or less from date of divorce, unless special findings are made to keep payments from being considered income by IRS
  - *Gould v. Gould*




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## Distribution of Real Property

- Trial court can order that property be sold and proceeds divided between the parties, as long as trial court classifies and values the property as of the date of separation
  - *Troutman v. Troutman*, 193 NC App 395 (2008)
  - *Wall v. Wall*, 140 NC App 303 (2000)
- Instead of ordering a sale, trial court can divide tracts of real property between the parties without any particular findings of fact, as long as trial court classifies and values the property as of the date of separation
  - *Copeland v. Copeland*, unpublished, (COA, Dec. 2012)
  - *Edwards v. Edwards*, 152 NC App 395 (2002)

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## Custody

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### Various things.....



- In custody orders, quality of findings more important than quantity
  - Findings must resolve factual issues relevant to welfare of child
  - *Carpenter*, COA (Feb. 2013)
- "Electronic Visitation" pursuant to GS 50-13.2 is not visitation
  - *In re T.R.T.*, COA (Feb. 2013)
- New *Uniform Deployed Parents Custody and Visitation Act*, GS 50A-350 through 376, effective October 1, 2013
- Court cannot give one parent exclusive control over visitation rights of other parent
  - *Woodring*, COA (May, 2013)

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### When is order a temporary order?

- Why do we care?
  - Can't appeal a temporary order
  - Can modify a temporary order without changed circumstances
  - Party can dismiss case after entry of temporary order but not after 'final' custody order
  - In modification hearing, consider circumstances since time of last 'final' order

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### When is order temporary?



- Designation in order is not controlling
  - *Simmons v. Arriola*, 160 NC App 671 (2003)
  - *Lamond v. Mahoney*, 159 NC App 400 (2003)
  - *Brewer v. Brewer*, 139 NC App 222 (2000)
- Probably temporary if order:
  - States it is entered "without prejudice", or
  - Sets a reconvening time and the time between entry of order and next hearing is "reasonably brief", or
  - Does not resolve all issues between the parties

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### When does temporary order convert to 'final' order?

- An order that clearly is temporary when entered will convert to a final order if neither party seeks a final order within a 'reasonable' time.
  - LaValley, 151 NC App 290 (2002)
- What is reasonable will depend on the circumstances
  - *File*, 195 NC App 562 (2009), did not convert in 5 months
  - *Brewer*, did convert in 12 months
  - *LaValley*, did convert in 23 months
- If parties are engaged in the litigation process, order will not convert
  - *Senner*, 161 NC App 78 (2003)(20 months, no conversion)
  - *Anderson*, 163 NC App 246 (2004)(20 months, no conversion)
  - *Woodring*, COA (May 2013)(one year, no conversion)

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### *Woodring*

- June 2010: temporary consent order, mom custody and dad three specific visitation dates
- Custody trial set for July 2011
- July 2011 – trial court ruled June 2010 order converted to a final order with regard to mom's custody but not dad's visitation. Set visitation schedule
- August 2011 – trial court heard dad's motion to modify and used June 2010 as date of last order

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### *Woodring*

- Court of appeals held:
  - June 2010 'clearly' was temporary because it left issue of dad's visitation open
  - Temporary order did not convert because parties were engaged in litigation process; custody trial date was pending while temporary order was in existence
  - Order which does not contain visitation schedule/rights for one parent will never convert to a permanent order

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# Child Support

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**Modification**

- Obligor asking to modify support based on decrease in income has burden of proving decrease was involuntary to establish substantial change in circumstances
- Therefore, trial court could deny request to modify when trial court believed obligor had not tried hard enough to find a job
- *Young v. Young*, 736 SE 2d 538 (2012)

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***Ludham v. Miller*, 739 SE2d 555 (2013)**

- Amount of imputed income cannot be based on amount/degree of bad faith
- While trial court can include nonrecurring lump sum as income, trial court is not required to do so
- Insurance available though new spouse of parent can be considered insurance available at a reasonable cost.
- Private school expenses are included in guideline support calculation as an extraordinary expense if trial court finds them to be reasonable
  - Trial court does not need to deviate to include private school expense

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# Spousal Agreements

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**Specific Performance**



- An equitable remedy for breach of contract.
- Allowed only when the remedy at law is inadequate.
- Remedy at law is inadequate when recovery of money damages would require successive lawsuits.
- Specific Performance only ordered to extent defendant has ability to comply.
- Contempt is available when defendant fails to comply with order of specific performance.

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*Praver v. Raus, 725 SE2d 379 (COA 2012)*

- Trial court can impute income to determine defendant has ability to comply with order of specific performance if court finds defendant has deliberately depressed his income or dissipated assets.
- No findings required to show legal remedy inadequate for prospective monthly payments due under contract.
- Findings are required to show legal remedy inadequate for past due arrears.

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*Reeder v. Carter*, 740 SE2d 913 (COA 2013)

- Parties may not contract for specific performance
  - Parties may not "contract around an established legal standard"
- Defendant's failure to file answer did not relieve plaintiff of burden of establishing grounds for specific performance
  - Only factual allegations in a complaint are deemed admitted by defendant's failure to answer

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