

**Family Law Update
Cases Decided
October 2008 through June 2009**

**Cheryl Howell
School of Government
UNC Chapel Hill
howell@sog.unc.edu**

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Divorce

Cases Decided Between October 2008 and June 2009

Subject Matter Jurisdiction

- Judgment of divorce entered in case filed before the parties had been separated for one full year was void.
- Trial court erred by denying motion to set aside void judgment on the basis of laches and estoppel. A void judgment may be attacked at any time.

Caldon v. Caldton, unpublished opinion, 671 S.E.2d 72 (N.C. App., November 18, 2008).

Plaintiff husband filed pro se complaint for absolute divorce in 1993. Trial judge determined parties had not lived apart for one full year before complaint was filed and denied request for divorce. However, the trial court order stated that the order of dismissal was entered without prejudice and that plaintiff “could bring the issue of absolute divorce before the court when the parties had been separated a full year.” In 1996, a judgment of divorce was entered in the same file as the original request for divorce, on the basis of the same complaint.

In 2006 (long after death of plaintiff husband), defendant filed motion to set aside divorce judgment. Plaintiff’s new wife filed motion to intervene and argued 1) that divorce judgment was valid and, in the alternative, 2) that defendant’s motion should be denied on the basis of laches and equitable estoppel. The trial court granted intervenor’s motion for summary judgment, finding both that the divorce judgment was valid and that defendant waited too long to attack the judgment. Court of appeals reversed, holding that the trial court had no subject matter jurisdiction to grant the divorce judgment in 1996 because the judgment was entered on the basis of a complaint that had been filed before the parties had been separated a full year. Because the judgment was entered without subject matter jurisdiction, laches and estoppels could not be applied to prohibit defendant from attacking the judgment.

Pro se pleadings; failure to issue summons

- Where there was no record that a summons was issued or that the complaint and summons was served on defendant, trial court had no subject matter jurisdiction to enter divorce or equitable distribution judgment.

Broyhill v. Broyhill, unpublished opinion, 673 S.E.2d 169 (N.C. App., February 17, 2009).

Plaintiff wife filed a pro se complaint asking for absolute divorce. The record on appeal did not show that a summons was issued or that defendant was served with the summons and complaint. The defendant filed a pro se answer and counterclaim requesting equitable distribution. The trial court conducted a trial with both parties participating, and entered a judgment of absolute divorce and equitable distribution. Defendant appealed, arguing the judgment was void due to lack of subject matter jurisdiction. The court of appeals agreed, holding that if a summons is not issued within 5 days of the filing of a complaint, the action is deemed never to have been commenced.

Child Support

Cases Decided Between October 2008 and June 2009

Income

- Trial court should have made findings about evidence offered by self-employed defendant concerning his business expenses. When determining income of self-employed persons, trial court must determine net income minus reasonable and ordinary business expenses.
- Trial court made sufficient findings regarding amounts deducted from the gross income of each party for the other children residing in their homes.
- Child support guidelines require that support received for other children must be included in income of person receiving the support.

New Hanover Child Support Enforcement *on behalf of Dillon v. Rains*, 666 S.E.2d 800 (N.C. App., October 7, 2008).

Defendant appealed from order modifying his child support obligation from \$300 per month to \$591 per month. On appeal, defendant argued the trial court failed to consider his evidence of business expenses in determining his present gross income. The court of appeals remanded for additional findings after concluding that the trial court had failed to make findings about the evidence offered. According to the child support guidelines, the income of a self-employed person is determined by gross receipts minus ordinary and reasonable business expenses. While trial judges have discretion to determine whether an expense is reasonable and appropriate to deduct from gross income, the trial court must make findings to show it considered evidence offered on the issue.

NOTE: The trial court determined the total gross income of obligor in this case by considering the total amount of money deposited into his checking account during the year before the modification hearing. The court of appeals did not comment on that method of determining gross income.

The court of appeals rejected defendant's argument that the trial court order contained insufficient findings to show the trial court properly deducted from the income of both parties an amount sufficient to reflect each party's financial responsibility for other children living in their homes. The court of appeals held that the order showed that the trial court properly used the guidelines to determine the financial responsibility each party owed for the other children.

The court of appeals also rejected defendant's argument that the trial court erred by including as income the child support he received for another child in his custody. The court of appeals held that the guidelines clearly require such payments to be included in income, but the court requested that the Conference of Chief District Court Judges "closely consider the effects of including" such payments in the gross income of an obligor.

Social Security Payments

- Trial court did not have authority to order plaintiff to turn over Social Security payments he received on behalf of the children to defendant mother.

O'Connor v. Zelinske, 668 S.E.2d 615 (N.C. App., November 18, 2008).

Plaintiff father received a lump sum Social Security payment on behalf of the children. The payment was in settlement of the children's claims for benefits arising out of plaintiff father's disability. The trial court ordered plaintiff to turn over the social security money to defendant

mother, who was awarded custody in the same order. On appeal, the court of appeals held that the Social Security Administration has jurisdiction to determine who should received payments made on behalf of children, and the trial court does not have jurisdiction either to order that the Administration pay another person or to direct the person paid by the Administration to turn the money over to another person. The court of appeals pointed out that there are appellate cases in North Carolina indicating otherwise, but held those cases must be disregarded because they conflict with earlier appellate opinions.

Modification of Support Agreement

- Pataky presumption that an unincorporated child support agreement reflects a reasonable amount of child support must be rebutted before a trial court can order child support in an amount different than the agreement.
- While a court order generally increases child support, a trial court has discretion to award less support than provided in the agreement if less support is reasonable under the circumstances.
- Trial judge has discretion to determine what expenses are reasonable in light of the circumstances and the accustomed standard of living during the marriage. Absent abuse of discretion or a failure to make findings sufficient to allow review, the court of appeals will not disturb a discretionary decision made by the trial court.

Brind'Amour v. Brind'Amour, 674 S.E.2d 448 (N.C. App., April 7, 2009).

Parties entered into a separation agreement providing for child support in the amount of \$15,000 per month. The agreement was not incorporated. Both father and mother filed child support action, requesting that the court set an amount of support different than the agreement. The trial court entered a child support award in the amount of \$9,147 per month. On appeal, mother argued trial court erred by reducing the amount agreed upon by the parties. The court of appeals affirmed, finding that the trial court properly considered the reasonable needs of the children in light of the accustomed standard of living during the marriage. The court of appeals held that the Pataky presumption that the amount agreed upon in an unincorporated agreement is reasonable was rebutted by evidence showing the difference in the amount paid by father when children were with him – approximately 40% of the time – compared to the amount spent by mother when children were with her. Trial court correctly determined that while children are entitled to a high standard of living due to the income of the father, they are not entitled to expenses the court finds to be “exorbitant”. As an example, the court of appeals held that the trial court did not abuse its discretion in determining mother was not entitled to costs of a full-time nanny as well as a car for the nanny where mother was a stay-home mom with the flexibility to transport the children to their activities.

Modification; business income; deviation

- A substantial change of circumstances is presumed if party seeking modification can show that existing order is at least 3 years old and that application of the guidelines at the present time would result in at least a 15% change in the child support obligation.
- When party shows the 15% change, trial court is not required to consider needs of the children.
- Trial court is not required to consider deviation from guidelines unless specifically requested by motion of a party.

- To determine adjusted gross income for a parent who is self-employed, the trial court subtracts reasonable and necessary business expenses from gross income of self-employed parent. Trial judge has discretion to determine what constitutes a reasonable and necessary business

Head v. Mosier, __N.C. App. __, __ S.E.2d __ (June 2, 2009)

Original support case involved only mom and dad. Child support enforcement intervened to request modification, asserting order was more than 3 years old and application of guidelines would result in an increase in obligation of more than 15%. Obligor was employed as a truck driver. Trial court determined his income and set new support order. On appeal, obligor argued trial court did not allow him sufficient deductions from his gross income for business expenses. In particular, obligor argued that because the IRS allows him a \$40 per day income tax deduction from gross income without any showing of actual expenses, the trial court was required to recognize that same amount. Trial judge held that only those expenses shown to be actual business expenses could be deducted from gross income and refused any deduction not shown by the evidence to be a business expense. The court of appeals affirmed the trial court's determination of income. Obligor also argued on appeal that trial court should have considered needs of children before significantly increasing his support obligation. The court of appeals disagreed, holding that substantial change of circumstances is presumed once the 3 year/15% change is shown. Once the trial court finds substantial change, the new support order is entered in accordance with the guidelines. Guideline support does not require consideration of needs of children. Trial court also did not err in failing to consider deviation, as nothing in the record indicated obligor requested deviation.

Paternity

Cases Decided Between October 2008 and June 2009

Paternity in custody case

- Trial court erred by denying defendant mother's request for blood test. Mom requested blood test in a "motion for proof of paternity" filed two years after court entered custody order awarding plaintiff primary custody of child. Court of appeals rejected argument that finding in custody order that defendant is the biological mother of the child and that plaintiff is the biological father of the child barred mom from raising issue of paternity in this post-judgment motion. Dissent by Judge Jackson

Helms v. Landry, 671 S.E.2d 347 (N.C. App., January 6, 2009).

Both parties filed separate actions seeking custody of the minor child. Trial court consolidated both actions and entered a custody order, awarding defendant primary custody and plaintiff visitation. The trial court order contained findings that defendant is the biological mother of the child and plaintiff is the biological father, even though the issue of paternity had not been raised nor previously litigated. Approximately four years later, trial court entered an order finding a substantial change in circumstances and awarding primary custody to plaintiff and visitation to defendant. Two years later, defendant filed a motion "for proof of paternity" and requested that plaintiff be ordered to submit to blood tests. The trial court denied the motion, ruling that there was no basis for the trial court to order the tests. The court of appeals reversed, holding that because there had been no formal judicial determination of paternity, GS 8-50.1(b1) requires that the trial court grant defendant's request for blood tests. Unfortunately, the opinion of the court of appeals does not explain the relevance of paternity at this point in the custody proceeding. There is no issue relating to custody pending before the trial court.

Legitimation

- The only issue before the court in a legitimation proceeding pursuant to GS 49-10 and 49-12.2 is the biological paternity of the child. A best interest analysis is not required or relevant to the proceeding.
- Role of GAL in legitimation proceeding is "to stand in place of" the minor child and to assure that the child's interest in the determination of his or her biological father is protected.

In re: Papathanassiou, 671 S.E.2d 572 (February 3, 2009).

Child was born during marriage of respondent and mother. Following divorce, petitioner Griggs filed legitimation proceeding before clerk of superior court alleging he is the biological father of the child. Respondent was added as a necessary party and he argued that the order of legitimation should not be entered without an examination by the court of whether the order would be in the best interest of the child. The matter was appealed to superior court and the superior court entered the order of paternity upon finding that blood tests established petitioner as the biological father of the child. The trial court refused to hear evidence of best interest. The court of appeals held that the trial court correctly determined that the legitimation statutes require the trial court to enter an order legitimating a child if a petitioner proves he is the biological father. The best interest of the child is not an appropriate consideration in a legitimation proceeding.

Alimony and Postseparation Support

Cases Decided Between October 2008 and June 2009

Cohabitation

- Trial court erred by granting plaintiff's motion for summary judgment on issue of cohabitation where affidavits filed in response to motion established a genuine issue of material fact.

Bird v. Bird, 668 S.E.2d 39 (N.C. App., October 7, 2008), rev. on additional issues allowed, 672 S.E.2d 683 (N.C., 2009).

Defendant filed motion to terminate alimony on basis that plaintiff was cohabitating with Cooper. Plaintiff filed motion for summary judgment, submitting Cooper's affidavit stating that:

- he and plaintiff had been romantically involved
- he had spent the night at her home on numerous occasions
- they traveled together, and
- they frequently had dinner with each other's children.

However, Cooper stated that he and plaintiff had never held themselves out as husband and wife, had never joined finances, and had never contemplated moving in together. In response, defendant filed an affidavit prepared by a private investigator who stated she had observed Cooper:

- stay at plaintiff's house overnight for at least 11 consecutive nights,
- move furniture into plaintiff's house,
- walk plaintiff's dog,
- carry groceries into plaintiff's house, and
- let workman into plaintiff's house.

In addition, the private investigator stated that she had observed Cooper's house and that it appeared neglected and uninhabited.

The court of appeals reversed the trial court's summary judgment, holding that "it is arguable that [Cooper's affidavit] standing alone, might give rise to an issue of fact on cohabitation. Together with the affidavit of the private investigator, the court of appeals held there was clearly an issue of fact as to whether plaintiff and Cooper had voluntarily assumed "marital rights, duties, and obligations which are usually manifested by married people."

Dissent on issue of whether affidavit from private investigator was admissible due to investigator's use of the passive tense. Plaintiff argued and dissent agreed that the affidavit did not comply with Rule 56(e) in that it did not show the averments were made from personal knowledge.

Consideration of standard of living in PSS; severance pay as income

- Trial court did not err in failing to make specific finding about standard of living in PSS order.
- Trial court did not err in concluding that lump sum payment received by wife from her employer was not severance pay and therefore was not income.

Ross v. Ross, unpublished opinion, 666 S.E.2d 889 (N.C. App., October 7, 2008).

Trial court awarded defendant wife a lump sum payment of retroactive postseparation support. On appeal, plaintiff argued trial court failed to make appropriate findings to support the

conclusion defendant was a dependent spouse. Court of appeals held that findings relating to income and expenses were sufficient to support the award. The court noted that postseparation support “contemplates a rather truncated examination of the parties’ needs and assets,” and does not require a consideration of the “extensive list of factors” that apply in alimony cases.

The court of appeals also rejected plaintiff’s argument that the trial court erred in concluding defendant had no income when defendant had received a lump sum payment of \$28,000 from her employer when she retired early at the request of plaintiff. The court of appeals explained in a footnote that while severance pay is counted as income, a lump-sum payment received in exchange for the waiver of certain rights related to employment is an asset rather than income.

Supporting Spouse

- A finding by a trial court that husband and wife have roughly the same amount of monthly income is insufficient alone to support conclusion that husband is not a supporting spouse.

Pawlus v. Wise-Pawlus, unpublished opinion, 673 S.E.2d 782 (N.C. App., Feb. 3, 2009).

Trial court denied defendant wife’s request for alimony after concluding that plaintiff husband was not a supporting spouse. The only finding in support of this conclusion was a finding that both parties have about the same amount of monthly income. According to the court of appeals, a finding that a spouse’s income exceeds his or her monthly expenses is sufficient to support a finding that a spouse is a supporting spouse, but findings as to income alone are not sufficient. The case was remanded for further findings concerning the expenses of the parties.

Cohabitation

- Trial court did not need to consider the subjective intent of the parties in determining whether the dependent spouse and third party engaged in cohabitation because there was no conflicting evidence concerning the objective facts concerning cohabitation.
- Where parties spend “significant but sporadic” time together but do not live continuously and habitually together and have not voluntarily assumed the marital rights, duties and obligations usually manifested by married people, the trial court did not err in concluding the dependent spouse had not engaged in cohabitation.

Faulkenbury v. Faulkenbury, unpublished opinion, 673 S.E.2d 168 (N.C. App., Feb. 17, 2009).

Supporting spouse filed motion to terminate alimony based on the cohabitation of the dependant spouse. The trial court determined that there had been no cohabitation and the supporting spouse appealed. The court of appeals held that the factual findings by the trial court supported the conclusion that the parties did not cohabit. The findings indicated that the third party spends many nights at the residence of the dependent spouse, but does not live in her home continuously. In addition, the third party maintains his own residence and he does not contribute to the living expenses of the dependent spouse. The parties do not hold themselves out in public as a couple. The court of appeals stated that the cohabitation rule is intended to terminate alimony in circumstances where a dependent spouse is in a relationship that probably has an economic impact, but the rule is not intended to “impose some kind of sexual fidelity on the recipient as a condition of alimony.”

Interlocutory Appeal

- Appeal of alimony judgment was interlocutory where trial court had not entered order resolving attorney fee request pending at time alimony judgment was entered.

Webb v. Webb, __N.C. App. __, __S.E.2d __ (May 5, 2009)

Trial court entered judgment ordering alimony and the order granted Plaintiff's request for attorney fees. However, the judgment also ordered counsel for each party to submit affidavits regarding time spent on case and did not set the final amount of fee to be paid. Before the fee was set, defendant appealed the alimony order. The court of appeals held the appeal to be interlocutory because the request for attorney fees pending at time alimony judgment was entered had not been finally resolved. The court of appeals distinguished this situation from the situation addressed in *In re Will of Hearts*, 664 S.E. 2d 411 (N.C. App. 411 (2008)), where the court held that an unresolved claim for attorney fees did not render the appeal of a judgment interlocutory where the request for fees was filed after the entry of that judgment.

Child Custody

Cases Decided Between October 2008 through June 2009

Attorney fees

- Trial court award of attorney fees to defendant in the amount of \$66,375 was appropriately supported by findings of fact that were appropriately supported by evidence and stipulations.

Kuttner v. Kuttner, 666 S.E.2d 883 (N.C. App., October 2008).

Court of appeals rejected all arguments by plaintiff that attorney fee award for custody and child support case was not supported by appropriate findings of fact. The opinion notes that plaintiff stipulated to many important factors, including that the hourly rate charged by defendant's counsel was reasonable and that defendant was an interested party acting in good faith in connection with her claims for custody and support.

Paternity

- Trial court erred by denying defendant mother's request for blood test. Mom requested blood test in a "motion for proof of paternity" filed two years after court entered custody order awarding plaintiff primary custody of child. Court of appeals rejected argument that finding in custody order that defendant is the biological mother of the child and that plaintiff is the biological father of the child barred mom from raising issue of paternity in this post-judgment motion. Dissent by Judge Jackson

Helms v. Landry, 671 S.E.2d 347 (N.C. App., January 6, 2009).

Both parties filed separate actions seeking custody of the minor child. Trial court consolidated both actions and entered a custody order, awarding defendant primary custody and plaintiff visitation. The trial court order contained findings that defendant is the biological mother of the child and plaintiff is the biological father, even though the issue of paternity had not been raised nor previously litigated. Approximately four years later, trial court entered an order finding a substantial change in circumstances and awarding primary custody to plaintiff and visitation to defendant. Two years later, defendant filed a motion "for proof of paternity" and requested that plaintiff be ordered to submit to blood tests. The trial court denied the motion, ruling that there was no basis for the trial court to order the tests. The court of appeals reversed, holding that because plaintiff had not formally acknowledged paternity and paternity had not been determined pursuant to Chapter 49, the trial court was required to order blood tests upon request of defendant. Unfortunately, the opinion of the court of appeals does not explain the relevance of paternity at this point in the custody proceeding. There is no issue relating to custody pending before the trial court.

Relocation

- Trial court did not abuse its discretion by awarding custody to parent who intended to relocate to Minnesota.
- In deciding whether to grant primary custody to a parent who plans to relocate, the trial court must weigh the advantages to the children against the disadvantages of the move and decide best interest in light of all the circumstances of the case.

- Difficulty of visitation for the non-moving parent is a consideration for the court in determining best interest, but visitation rights are subordinate to the overall best interest of the child.

O'Connor v. Zelinske, 668 S.E.2d 615 (N.C. App., November 18, 2008).

Plaintiff father argued that trial court order granting primary custody to defendant mother who planned to relocate from North Carolina to Minnesota was an abuse of discretion. The court of appeals rejected plaintiff's argument, and held that in light of all of the circumstances relating to the best interest of the children in this case, the award of custody to defendant mother was not an abuse of discretion, even though she planned to move. The court of appeals held that trial courts must consider both the advantages and disadvantages of a move in light of all other evidence concerning the ability of each parent to meet the best interest of the child. The court of appeals also rejected plaintiff's argument that the visitation schedule created by the trial court was unreasonable. The court stated that the parent's right to visitation is "an important, natural and legal right" but it is a right that "must yield to the good of the child."

UCCJEA: subject matter jurisdiction; temporary emergency jurisdiction

- Where a New York court had entered a temporary child custody order several years before a juvenile petition was filed in North Carolina, the North Carolina trial court was required to find that North Carolina had modification jurisdiction under the UCCJEA before entering an adjudication order in a juvenile case.
- Because the mother of the child continued to live in New York at the time the North Carolina petition was filed, the New York court retained exclusive authority to determine whether New York had continuing exclusive jurisdiction.
- The North Carolina trial court erred by failing to contact court in state which had entered a "temporary" custody order before entering an adjudication order in a juvenile case.
- While the North Carolina trial court could exercise temporary emergency jurisdiction to enter a nonsecure custody order given the allegations of danger to the child at the time the petition was filed, the North Carolina trial court was required to immediately contact the state that entered the initial custody determination before proceeding to adjudication.
- When it is unclear whether an initial custody determination remains in effect, the North Carolina trial court must contact court that issued the order to make that determination.
- Adjudication orders entered by the North Carolina trial court were void for lack of subject matter jurisdiction because the trial court failed to contact the New York court that had entered the initial custody order regarding the juvenile.

In the Matter of: JWS, 669 S.E.2d 850 (N.C. App., December 16, 2009).

In a procedurally complicated case, the court of appeals held that the North Carolina trial court had no subject matter jurisdiction to enter an adjudication order in a juvenile case. Therefore, the court of appeals reversed the trial court's denial of respondent parent's motion pursuant to Rule 60(b) seeking relief from the adjudication order.

In 2000, a New York court entered what was designated as a "temporary" custody order. No further order was entered in New York. In 2002, dad and child moved to North Carolina while mom stayed in New York. In 2006, a juvenile petition was filed in North Carolina alleging the child had been abused by respondent. The trial court entered both a nonsecure order and an order adjudicating the child abused. Eight months after the entry of the adjudication order, DSS contacted the New York court and received a letter from a judge in New York stating that "it appears North Carolina has jurisdiction over the child in this case."

The respondent filed a Rule 60(b) motion seeking relief from the adjudication order, arguing that the trial court had no subject matter jurisdiction because the trial court failed to comply with the UCCJEA. The court of appeals agreed, holding that because the mother remained in New York following the initial determination in that state, New York retained exclusive authority to determine whether that state continued to have jurisdiction. While the North Carolina court had jurisdiction to enter a temporary emergency nonsecure order pursuant to GS 50A-204, that statute requires a trial judge to immediately make contact with the court in the other state to “resolve the emergency” and determine jurisdiction. The fact that DSS contacted the New York court after adjudication was insufficient to satisfy the UCCEA for two reasons; one, because the contact was made eight months after the North Carolina court entered the adjudication order and two, because DSS made the contact rather than the court. Because the North Carolina trial court failed to comply with the requirements of GS 50A-204, the court of appeals held that the subsequent adjudication order was entered without subject matter jurisdiction.

In response to petitioner’s argument that the case should not be viewed as a modification case because there was no evidence that the “temporary” order entered in New York remained an enforceable custody order, the court of appeals held that the New York court should have been allowed to make that determination.

Third party custody

- Trial court can apply lower evidentiary standard to support conclusion that a parent has not waived his or her constitutional right to custody; higher standard of clear, cogent and convincing evidence applies only to finding that a parent has waived his or her rights.
- Findings were sufficient to support conclusion that mom had not waived her constitutionally protected status.

Skerrett v. Skerrett, unpublished opinion, 671 S.E.2d 597 (N.C. App., December 16, 2009).

Plaintiff grandparents appealed trial court order awarding custody to defendant mother after concluding that the mother was fit and had not engaged in conduct inconsistent with her protected status as a parent. The grandparents argued that the trial court had used the wrong standard to evaluate the evidence regarding the mother’s conduct. The trial court made a statement on the record at the beginning of the trial that the court could not apply the best interest of the child test to determine custody unless it could find that mom had waived her constitutional right to custody of the child “by a substantial weight of evidence.” Grandparents argued on appeal that this statement showed the trial court failed to apply the “clear, cogent and convincing” standard required by the North Carolina Supreme Court. The court of appeals held that while a trial court must apply the clear, cogent and convincing standard to support a finding that a parent has waived his or her constitutional rights, a trial court can apply a lesser standard to support a finding that a parent has not waived constitutional rights.

The court of appeals also reviewed the trial court findings of fact and held that the findings support the conclusion that mother had not engaged in conduct inconsistent with her protected status. While mother had engaged in “drug use and a lifestyle of partying”, the trial court found that she engaged in those behaviors only when she was with the father of the children. The trial court made additional findings that mother had no drug addiction based on testimony of a drug addiction counselor and the negative results of random drug test of the mother. Also, while the mother had allowed the child to reside with plaintiff grandparents, the trial court found that the mother only intended to allow the child to live away from her for a short

period of time while she obtained suitable housing, employment and transportation after separating from the father of the children, and that the mother tried to take custody of the child from the grandparents as soon as she was able.

Temporary order; grandparent visitation; costs for custody evaluation; income of party

- Despite statement in order that trial court was making a “permanent” custody determination, the order was temporary where it left the issue of visitation undecided until mother completed mental health evaluation.
- There was an on-going dispute between the parents at the time grandparents filed motion to intervene because trial court had not yet addressed visitation for the mother.
- Trial court did not abuse discretion by requiring father to pay larger percentage of cost of custody evaluation where father’s failure to cooperate during the evaluation process caused an increase in the total cost of the evaluation.
- Trial court properly considered amount father pays each month for vacations and other things in determining that his income exceeds the amount listed in an affidavit submitted on the issue of attorney fees.

Smith v. Barbour, 671 S.E.2d 578 (N.C. App., February 3, 2009).

Trial court entered an order following custody trial between the parents which was designated a “permanent custody order.” The order gave father primary custody but left the issue of visitation to be determined approximately three months in the future, after mom submitted to psychological evaluations. Following entry of that order, mother filed a motion to change the custody order and grandparents filed motion to intervene requesting visitation. The trial court allowed the grandparents to intervene, awarded mom and dad joint custody of the child and awarded grandparents visitation rights. On appeal, father argued the trial court was required to find a substantial change of circumstances before changing the order because the first order was intended by the trial court to be a permanent order. The order of appeals disagreed, finding that the designation by the trial court is not determinative of whether an order is temporary or permanent. According to the court of appeals, this order was clearly temporary because it left the issue of visitation unresolved and specifically required further action by the parties and a return to court.

The trial court also appointed an expert to conduct a custody evaluation before deciding the claims by mom and grandparents. Following trial, the court ordered father to pay a larger percentage of the cost of the evaluation than either the mother or the grandparents. The court of appeals held that the trial court has discretion to determine how the cost of a court appointed expert should be allocated, and the trial court did not abuse its discretion in this case where the trial court explained that the larger share was due to father’s conduct during the evaluation process which resulted in a higher fee being charged by the evaluator. His conduct included failing to provide requested documentation and missing or arriving late for appointments with the evaluator.

Finally, the father argued on appeal that the trial court failed to make sufficient findings to show he has the ability to pay both a portion of wife’s attorney fees as well as those incurred by the grandparents. The court of appeals held that the trial court’s findings about father’s monthly expenditures showed that his income was substantially higher than the amount he admitted by affidavit.

Contempt for interference with visitation; temporary custody order

- Trial court did not err in finding defendant mother in criminal contempt for her interference with plaintiff father's visitation with the minor child.
- Order modifying custody was a temporary custody order where it was entered without prejudice to either party and required court review of custody in five months; where order states a clear reconvening time and the interval between court hearings is reasonably brief, an order is temporary even if not designated as such.
- Temporary custody order is interlocutory and does not affect a substantial right unless safety of child is implicated.

File v. File, 673 S.E.2d 405 (N.C. App., March 3, 2009).

Custody order placed primary physical custody with defendant mother but allowed father visitation. Trial court entered order finding mom in criminal contempt and imposing a sentence of 30 months unsupervised probation, and granting father's motion to modify custody to place primary physical custody with him. The trial court ordered the parties to return to court for a review of custody in five months time. On appeal, mom argued that the findings made by the trial court were not sufficient to support the conclusion that she acted in willful contempt. The court of appeals disagreed, holding that the uncontested facts established her contempt. Mom agreed that she 1) lied to father about receiving a letter announcing his intention to exercise visitation on a particular date; 2) hid the minor child when father came to exercise visitation; and 3) argued that father's health made it dangerous for him to drive and care for the child even though several statements from doctors and medical experts had been given to her to show her that father's medical condition did not make it unsafe for him to either drive or care for the child. Court of appeals dismissed mom's appeal of the modification of custody as an inappropriate interlocutory appeal. The court of appeals concluded the order was temporary because it called for a review in five months, a time period the court of appeals held to be "reasonably brief." Because all evidence established that the child is in no danger when in dad's custody, the court of appeals held that the interlocutory custody order did not affect a substantial right.

Grandparent custody

- Trial court did not err in denying grandparent motion to intervene in custody dispute between parents where grandparent's pleading failed to allege facts sufficient to support the conclusion that parents had waived their constitutional right to custody.

Perdue v. Fuqua, 673 S.E.2d 145 (N.C. App., March 3, 2009).

Custody order gave parents joint physical custody. Plaintiff father filed motion for modification when defendant failed to return child to father at appropriate time. Grandmother thereafter filed a motion to intervene, seeking custody of the minor child. Trial court denied grandparent motion to intervene on ground that grandparent did not allege facts sufficient to show there had been a substantial change in circumstances since the last custody order. The court of appeals upheld the denial of the motion to intervene but on different grounds. According to the court of appeals, because the grandparent sought custody as opposed to visitation, the grandparent was required to plead facts sufficient to show that the parents had waived their constitutionally protected status, in addition to facts sufficient to show a substantial change in circumstances. The court of appeals held that, as a matter of law, that the allegations in grandmother's complaint were insufficient. They grandmother's pleading alleged that the parents had "failed to shoulder the responsibilities attendant with the enjoyment of the constitutionally preferred status of parents in a custody case," that the father had lost his job, obtained a third-shift job, and left the child with a very

young girlfriend while he worked, and that the parents had left the child with the grandmother for a four month period of time.

Collateral estoppel; earlier 50B proceeding

- It was error for trial court to relitigate issue of whether defendant committed an act of domestic violence when trial court in earlier 50B proceeding had concluded evidence was insufficient to support a finding that defendant committed an act of domestic violence.

Simms v. Simms, 673 S.E.2d 753 (N.C. App., March 17, 2009).

In custody order, trial judge made finding that defendant father had committed an act of domestic violence against plaintiff mother. The parties had both filed earlier 50B actions alleging acts of domestic violence. The trial court in the 50B action found that plaintiff's evidence was insufficient to show defendant committed an act of domestic violence and therefore denied plaintiff's request for a protective order. In the custody order, the trial court made a finding concerning the earlier 50B proceeding and found that, while there was insufficient evidence presented at the 50B hearing, there had been sufficient evidence presented at the custody trial to support a finding of domestic violence. The court of appeals held that the doctrine of collateral estoppel bars the custody judge from relitigating an issue fully litigated in the earlier 50B proceeding. Because the consideration of domestic violence was an important factor in the custody determination, the case was remanded to the trial court for a reconsideration of custody.

Grandparent Visitation

- Where case between parents was on-going at time grandparents intervened, consent judgment resolving claims between the parents did not deprive the trial court of authority to consider visitation request of grandparent intervenors.
- Standing is determined at time case is commenced and is not affected by circumstances occurring after filing. Parents cannot deprive court of jurisdiction to hear grandparents' pending claim simply by entering into a consent judgment resolving their own dispute.

Quesinberry v. Quesinberry v. Parrish and Quesinberry, 674 S.E.2d 775 (N.C. App., April 7, 2009).

Father filed action against mother seeking custody of child born during the marriage of the parties. Subsequently, both sets of grandparents filed a motion to intervene and a pleading requesting visitation with the minor child. The trial court granted the motions to intervene. Thereafter, mother and father entered a consent judgment resolving their custody dispute. The trial court denied mother's request to dismiss the claims of grandparents and entered an order awarding extensive visitation to both sets of grandparents. Court of appeals affirmed trial court's denial of mother's motion to dismiss claims of grandparents. Court of appeals held that because there was an on-going custody dispute between the parents at the time the grandparents were allowed to intervene and assert their claims for visitation, the resolution of the dispute between the parents did not deprive the grandparents of standing. The court of appeals held that standing is determined at the time the action is commenced and cannot be affected by subsequent actions of the parties. However, the court of appeals did remand the grandparent visitation order back to the trial court for further findings to explain the trial court's reasons for the particular visitation schedule ordered.

Denial of visitation to a parent; temporary orders

- A trial court does not need to find a parent has acted inconsistent with his or her constitutionally protected status before denying visitation to that parent.
- A trial court can consider circumstances arising after the entry of a temporary order in making a final determination of best interest.

Mooney v. Mooney, unpublished opinion, _N.C. App. _, _S.E.2d_ (May 19, 2009)

After determining that mother had caused emotional harm to child by repeatedly falsely accusing father of sexually abusing the child, trial court awarded sole custody to father and denied mother visitation. On appeal, mother argued that trial court must find her unfit or that she has acted inconsistent with her protected status as a parent before denying her any contact with the child. The court of appeals disagreed, finding that GS 50-13.5(i) allows the court to deny visitation upon finding that visitation is not in the best interest of the child. The court of appeals rejected mother's argument that case law requires additional findings. The court of appeals also rejected mother's argument that the trial court was restricted to examining circumstances before the entry of a temporary custody order in determining best interest. Mom argued that because the temporary order was entered 'without prejudice', the trial judge should not consider any circumstances brought about by the entry of that order. Court of appeals held that nothing in case law restricts a judge in that way.

Equitable Distribution

Cases Decided Between October 2008 and June 2009

Distribution factors; valuation

- Trial court did not improperly consider fault of defendant when it considered defendant's willful and criminal conduct against plaintiff that resulted in significant damage to the marital home. Trial court findings made it clear court considered defendant's actions against the property and not defendant's actions against plaintiff.
- Trial court did not need to make findings about the liquidity of marital assets where defendant did not introduce evidence of liquidity or lack thereof as a distribution factor.
- Trial court did not err by dividing tract of real property into three separate parcels for purposes of valuation and distribution.

Troutman v. Troutman, 667 S.E.2d 506 (N.C. App., October 21, 2008).

Trial court entered order of equitable distribution, awarding unequal distribution in favor of plaintiff wife. On appeal, defendant argued trial court improperly considered fact that defendant was currently incarcerated on charges relating to two occasions when defendant shot at plaintiff while she was in the marital home. The shootings caused much damage to the marital home, reducing the value of the home and causing plaintiff to incur repair expenses. The court of appeals held that the trial court findings made it clear that the court considered the damage to the marital property and the repair costs paid by plaintiff as distribution factors, and that defendant failed to show the trial court was "unduly prejudiced" by the personal misconduct of defendant.

The court of appeals also rejected defendant's argument that the trial court was required to make findings about the liquidity of certain marital assets, such as an IRA, a checking account and a savings account. The court of appeals explained that while liquidity or lack thereof of marital assets is a distribution factor, a trial court is required to make findings only about those factors about which evidence is presented at trial. As defendant did not bring up the issue at trial, the trial court did not need to address the issue in the final order.

The court of appeals also rejected defendant's argument that the trial court's distribution wasted value of marital real property by separating the land into three separate tracts for purposes of valuation and distribution. The trial court divided a 58.24 acre tract of marital real property into three separate parcels; a 1.56 acre tract that included the marital residence, an adjacent 8.99 acres, and another 47.69 acre tract. Defendant argued that the real property was worth more together than separate. The court of appeals held that defendant failed to introduce evidence during the trial to support that argument and upheld the trial court's action. Regarding value, the court of appeals noted that defendant offered no evidence at trial other than his own testimony that the property was worth at least "a million and a half dollars." The court of appeals stated that his "bald, self-serving statements do not constitute a basis for concluding that the trial court abused its discretion in this valuation."

Classification

- Trial court erred when it classified house and real property as marital when evidence showed the real property upon which the house was built was owned by husband before the marriage and there was no evidence that husband had gifted his separate interest to the marriage.

Ross v. Ross, unpublished opinion, 666 S.E.2d 889 (N.C. App., October 7, 2008).

Husband did not attend equitable distribution trial and did not offer evidence. Wife offered evidence that home built during the marriage was built on land titled in husband's name. The land had been purchased by husband before marriage and there was no evidence that he gifted the property to the marriage. Wife established that the house was built during the marriage and that the mortgage was paid with marital funds. The trial court classified the entire date of separation value of the house and land as marital. Court of appeals remanded for reclassification, holding that wife's evidence clearly showed there was a separate component to the asset. On remand, the wife must establish the value of the property acquired during the marriage.

Distributive award

- Trial court findings were not sufficient to explain whether the presumption in favor of an in-kind division had been rebutted.

Smith v. Smith, unpublished opinion, 671 S.E.2d 72 (N.C. App., November 18, 2008), discretionary rev. denied, 675 S.E.2d 659 (N.C., March 19, 2009)

Trial court entered order of equitable distribution which required defendant to pay plaintiff a distributive award. The trial court order stated "[W]hile the statute favors in-kind divisions, the court also finds that a like kind distribution/exchange of property is not feasible due to the nature of the property." The court of appeals remanded for further findings to support the distributive award, holding that this finding in the trial court order was "insufficient to allow this Court to determine whether the trial court properly exercised its discretion in ordering the distributive award instead of an in-kind distribution." The court of appeals held that on remand, the trial court needed to make additional findings of fact about whether the presumption in favor of an in-kind distribution was rebutted.

Date of marriage: appeal is interlocutory

- Appeal of trial court determination of date of marriage is an interlocutory appeal that does not affect a substantial right.

Duncan v. Duncan, unpublished opinion, 671 S.E.2d 71 (N.C. App., November 18, 2008).

Plaintiff filed complaint seeking equitable distribution, alimony, custody and child support. The parties requested that the trial court decide a contested issue of fact concerning the date of marriage of the parties before trial on any of the financial issues. The trial court entered an order declaring the date of marriage and defendant appealed. The court of appeals dismissed the appeal as interlocutory and rejected defendant's argument that the decision by the trial court affected a substantial right.

Divisible Property, distributive award; sanctions for delay

- Appreciation or depreciation of marital property after the date of separation is presumed to be divisible property; party arguing that it is not divisible has burden of showing change was result of efforts of a spouse after the date of separation.

- Postseparation mortgage payments need not be considered in equitable distribution if party making the payments received credit for those payments in a postseparation support action.
- Trial court did not err in distributing businesses to wife, despite her lack of “business experience or acumen.”
- Trial court did not err in imposing sanctions on defendant for his unreasonable delay of the equitable distribution proceedings which caused plaintiff to incur additional attorney fees.

Wirth v. Wirth, 668 S.E.2d 603 (N.C. App., November 18, 2008).

Trial court found that evidence was insufficient to show reason for decrease in value of marital business after the date of separation, and concluded that the decrease was not divisible property. The court of appeals reversed, holding that GS 50-20(b)(4)(a) creates a presumption that an increase or a decrease in the value of marital property after the date of separation and before the date of distribution is divisible property. The party seeking to have the increase or decrease considered as a distribution factor has the burden of showing the change was the result of postseparation actions by a spouse. According to the court of appeals, if the trial court cannot determine the reason for the change in value, the change is presumed to be divisible property.

Defendant made mortgage payments following date of separation. Trial judge considered evidence of the payments but concluded that defendant should receive no “credit” in equitable distribution for those payments because he had been credit for the payments in the postseparation action. Court of appeals affirmed, holding trial court did not abuse its discretion in the equitable distribution matter.

Trial court distributed five businesses to wife and ordered that she pay defendant a distributive award in the amount of \$220,500.00. Defendant argued on appeal that the trial court should not have distributed the businesses to wife because she would not be able to manage the businesses due to her lack of experience. The court of appeals affirmed the trial court, holding that the trial court clearly intended for wife to liquidate the businesses and give a portion of the proceeds to husband in the form of the distributive award.

Court of appeals upheld trial court decision to order defendant to pay \$60,000 of plaintiff’s attorney fees as sanctions pursuant to GS 50-21(e) where evidence supported findings that defendant obstructed and caused unreasonable delay in the trial of the case by failing to provide responses to discovery requests and findings that the delays prejudiced plaintiff by causing her to incur additional attorney fees in the amount of \$67,000. Court of appeals rejected defendant’s argument that he received inadequate notice before the sanctions were imposed by the trial court. The court of appeals held that notice was sufficient where plaintiff requested sanctions in her written closing argument submitted to the trial court some two months before the sanction order was entered.

Business valuation; distributive award; contribution to education as distribution factor

- Obligation of trial court is to reasonably approximate value of business on the date of separation, using a sound valuation methodology.
- As long as trial court reasonably approximates the net value of a professional practice and its goodwill, if any, based on a sound valuation method or methods, the valuation will not be disturbed on appeal.
- When there are liquid assets sufficient to pay a distributive award and those liquid assets are apparent in the record, the trial court does not need to make findings concerning the financial impact of paying a distributive award.

- Trial court erred in giving defendant wife a “dollar-for-dollar credit” in distribution for amounts she contributed 20 years earlier for family living expenses while plaintiff attended medical school.

Pellom v. Pellom, 669 S.E.2d 323 (N.C. App., December 2, 2008).

Both plaintiff and defendant offered expert testimony on the value of defendant’s interest in an anesthesiology business, and the experts arrived at very different values. The trial court adopted the value of defendant’s expert and plaintiff appealed. Plaintiff argued that defendant’s expert failed to take into account postseparation changes in his earnings, improperly considered postseparation efforts, failed to consider tax consequences, and did not account for goodwill. The court of appeals rejected all arguments and upheld trial court’s value. The court of appeals also upheld the distributive award ordered by the trial court, rejecting plaintiff’s argument that the trial court did not make sufficient findings to show his ability to pay the award. While earlier opinions from the court of appeals indicate that findings are required to show the financial ramifications of a distributive award when it is not obvious there are liquid assets from which an award can be paid, such findings are not required when the record clearly shows the money can be paid from assets such as a bank account, bonuses that are regularly paid, savings and stock distributions.

The trial court found that defendant wife, during the marriage but twenty years before the date of separation, had withdrawn funds from her retirement account to pay living expenses of the family while defendant attended medical school. The trial court decided to give wife a “dollar-for-dollar” credit for this contribution and, as a result, awarded wife 54% of the marital estate. The court of appeals agreed with defendant’s argument that the trial court did abuse its discretion in allowing so much weight to be assigned to wife’s contribution to family expenses during the marriage, both because her payment contributed to family living expenses and because she benefited from husband’s medical degree for 20 years following her contribution. The court of appeals held that the facts of this case did not support the “present day dollar-for-dollar reimbursement.”

Pro se pleadings; failure to issue summons

- Where there was no record that a summons was issued or that the complaint and summons was served on defendant, trial court had no subject matter jurisdiction to enter divorce or equitable distribution judgment.

Broyhill v. Broyhill, unpublished opinion, 673 S.E.2d 169 (N.C. App., February 17, 2009).

Plaintiff wife filed a pro se complaint asking for absolute divorce. The record on appeal did not show that a summons was issued or that defendant was served with the summons and complaint. The defendant filed a pro se answer and counterclaim requesting equitable distribution. The trial court conducted a trial with both parties participating, and entered a judgment of absolute divorce and equitable distribution. Defendant appealed, arguing the judgment was void due to lack of subject matter jurisdiction. The court of appeals agreed, holding that if a summons is not issued within 5 days of the filing of a complaint, the action is deemed never to have been commenced.

Divisible property; distribution factor

- Debt was marital debt where it was incurred before the date of separation to acquire property held as tenants by the entirety.

- Where husband paid mortgage on marital property with his separate funds after the date of separation, trial court properly classified that payment as divisible property because it was a decrease in marital debt after the date of separation but before the date of distribution.
- Trial court did not err by considering fact that wife loaned the marital business separate funds during the marriage as a distribution factor.

McNeely v. McNeely, 673 S.E.2d 778 (N.C. App., March 17, 2009).

The parties purchased property titled as tenants by the entirety two months prior to separation. The property had a value of \$76,000 on the date of separation but was encumbered with a mortgage of about the same amount. Following separation, husband paid off the entire debt. The trial court classified the postseparation payment as divisible property (divisible debt) and distributed that debt to husband (as a negative asset). The trial court also found that wife had made a loan to the marital business during the marriage from her separate property in the amount of \$178,000 and that the payment should be treated as a distribution factor. Following an unequal distribution in favor of wife, husband appealed. Court of appeals held first that the mortgage debt was marital because it was incurred before the date of separation and it was incurred to acquire property held as tenants by the entirety. The court of appeals seems to suggest that the tenancy by the entirety alone was sufficient to establish that the debt was incurred for the joint benefit of the parties. The court of appeals then rejected husband's argument that the trial court should have given him "credit" for the postseparation mortgage reduction. The court of appeals held that the payments were divisible property and the trial court did distribute that divisible debt to husband in a way that gave him appropriate "credit." The court of appeals held that the distribution factor relating to the wife's loan of separate property to the marital business was sufficient to justify the unequal award in her favor.

Spousal Agreements

October 2008 and June 2009

Breach; statute of limitation

- Statute of limitation for breach of spousal agreement under seal is 10 years
- Statute begins to run at first breach.

Greene v. Colby, unpublished decision, 667 S.E.2d 340 (N.C. App., October 21, 2008).

Trial court dismissed plaintiff's complaint for breach of separation agreement and property settlement after concluding that ten-year statute of limitations barred the claim. The court of appeals affirmed, holding that the ten-year statute applies to sealed instruments. The court of appeals also rejected plaintiff's argument that separation agreements and property settlements create 'continuing obligations' and therefore are not subject to a statute of limitation. Rather, the court of appeals held that the statute begins to run whenever the first breach of the agreement occurs.

Domestic Violence

Cases Decided Between October 2008 and June 2009

Return of Surrendered Weapons

- The only substantive issue raised by a motion for return of weapons in the possession of the Sheriff as the result of the entry of a domestic violence protective order is whether the defendant is subject to any state or federal law precluding defendant from owning or possessing a firearm.
- Where defendant had been committed to a mental institution in 2004, trial court erred in ordering Sheriff to return weapons to defendant.

Gainey v. Gainey, 669 S.E.2d 22 (N.C. App., December 2, 2008).

As part of an ex parte domestic violence protective order, trial court ordered defendant not to possess firearms. The order did not require defendant to surrender firearms in his possession to the Sheriff. However, when the protective order was served on defendant by the Sheriff, the Sheriff took possession of defendant's firearms. The ex parte order was dissolved and defendant filed a motion seeking return of the weapons. The Sheriff objected, arguing that defendant is not entitled to possess weapons because he was committed to a mental institution several years prior to this action. The trial court decided that the weapons had been wrongfully seized by the Sheriff because the ex parte order did not require surrender and the trial court ordered the Sheriff to return the weapons to defendant. The Sheriff appealed and the court of appeals reversed the trial court. According to the court of appeals, there was no evidence that the Sheriff actually seized the weapons from defendant. However, there was sufficient evidence to show defendant had been committed to a mental institution in 2004 and therefore was prohibited from possessing weapons pursuant to 18 USC sec. 922(g)(4).

Insufficient evidence to support finding of domestic violence

- Trial court finding that defendant committed an act of domestic violence was not supported by the evidence offered by plaintiff at trial.

Burress v. Burress, 672 S.E.2d 732 (N.C. App., February 17, 2009).

Trial court entered a domestic violence protective order, checking boxes on the AOC form finding defendant had placed a member of plaintiff's family in fear of serious bodily injury and in fear of continued harassment. Defendant argued on appeal that the evidence presented at trial did not support these findings, and the court of appeals agreed. Plaintiff testified at trial that DSS was investigating allegations that defendant had sexually abused plaintiff's son, and she testified that her son told her that defendant had touched him in an inappropriate way. According to the court of appeals, evidence that DSS had undertaken an investigation was insufficient to support a finding of domestic violence, and the trial court had admitted the hearsay statement of plaintiff's son only for the limited purpose of showing why plaintiff had left the residence of defendant. With no substantive evidence of an act of domestic violence, the court of appeals held the trial court erred in entering the protective order.

Interestingly, the court of appeals states that GS 50B-3 now provides that if the court finds that an act of domestic violence, the trial court shall enter an order restraining future acts of violence. However, at the end of the opinion, the court of appeals states that even if there had been evidence presented at trial to support the finding that defendant committed an act of domestic violence, the order could not be upheld without the additional finding that the order

was necessary to bring about the cessation of domestic violence. The court references the case of Brandon v. Brandon, 132 NC App 646 (1999), a case decided before GS 50B-3 was amended.

Criminal sentence enhancement; definition of protective order

- Rule 65 TRO is not a domestic violence protective order
- Violation of a protective order entered ex parte cannot be used to enhance criminal punishment

State v. Byrd, N.C., 675 S.E.2d 323 (May 1, 2009), reversing 185 N.C. App. 597 (2007).

Defendant's wife filed a complaint for Divorce from Bed and Board. After filing, wife requested a TRO and an injunction pursuant to Rule 65 of the NC Rules of Civil Procedure and the trial court entered an ex parte TRO ordering that defendant husband not "go about, assault, threaten, molest, harass, interfere with, or bother the Plaintiff and the minor children in any way whatsoever." After the TRO was entered ex parte, defendant shot wife. Defendant later was convicted of assault with a deadly weapon, and the felony sentence was enhanced based upon GS 50B-4.1(d) after the jury concluded that defendant acted in knowing violation of a domestic violence protective order. The court of appeals rejected defendant's contention that the Rule 65 order was not a protective order within the meaning of 50B, but the supreme court reversed the court of appeals. The supreme court held that the clear legislative intent of GS 50B-4.1(d) is that the statute applies only to violations of protective orders entered in actions brought pursuant to Chapter 50B and not to violations of any order prohibiting or restraining acts which meet the definition of domestic violence. In addition, the supreme court held that the ex parte order was not an order entered "upon hearing by the court or by consent of the parties" as required by GS 50B-1(c)(definition of protective order). The court rejected the contention of the state that the ex parte order was entered "upon hearing by the court" because the defendant received notice after the order was entered and given the opportunity to be heard within 10 days.

Miscellaneous Family Related Cases

Cases Decided Between October 2008 through June 2009

Doctrine of Necessaries

- Trial court was correct in entering summary judgment requiring wife to pay medical bills of deceased husband. Common law doctrine of necessaries provides that a person is responsible for the necessary medical expenses of his or her spouse even if the person does not voluntarily assume responsibility for the expenses of that spouse.

Moses Cone Hospital v. Hawley, 672 S.E.2d 742 (N.C. App., February 17, 2009).

Following the death of her husband, defendant wife was sued by plaintiff hospital to recover unpaid medical expenses associated with husband's cancer treatment. Wife argued that she should not be responsible because the bills were incurred in her husband's name alone. The trial court granted summary judgment in favor of plaintiff hospital, finding that under the common law doctrine of necessaries, a spouse is responsible for the necessary medical expenses of the other spouse. On appeal, defendant wife argued that the common law doctrine is antiquated and should be abolished. The court of appeals affirmed the trial court, holding that the court of appeals does not have the authority to abolish common law doctrines and noting that the North Carolina Supreme Court upheld the doctrine as recently as 1996, in the case of Forsyth Memorial v. Chisholm, 342 NC 616 (1996).

Alienation of Affection; Criminal Conversation

- Alienation of affection is a transitory tort, and the substantive law applicable to a transitory tort is the law of the state where the act giving rise to the action occurred.
- Trial court erred in granting summary judgment for defendant on basis that substantive law of South Carolina should apply to this case and South Carolina does not recognize the tort of alienation of affection. Genuine issue of material fact exists in this case as to whether the alienation occurred in North Carolina or in South Carolina.
- Trial court should have granted summary judgment in favor of plaintiff on claim of criminal conversation where defendant admitted to sexual intercourse with plaintiff's husband in North Carolina, after plaintiff and her husband separated but before they divorced.

Jones v. Skelley, 673 S.E.2d 385 (N.C. App., March 3, 2009).

Opinion contains good review of law relating to alienation of affection and criminal conversation. Plaintiff filed action against defendant in North Carolina even though both parties were residents of South Carolina. However, some of the acts alleged by plaintiff as the basis of her claims occurred in North Carolina. The trial court granted summary judgment in favor of defendant after concluding that the actions resulting in the alienation occurred in South Carolina, and South Carolina does not recognize the tort. The court of appeals reversed, holding that because there was conflicting evidence as to when and why the alienation occurred, summary judgment on this issue was not appropriate. If the jury finds the alienation occurred as the result of conduct occurring in North Carolina, the substantive law of North Carolina will apply. The trial court also entered summary judgment for defendant on the claim of criminal conversation, accepting defendant's argument that any injury resulting from the actions of defendant occurred in South Carolina where all parties reside. The court of appeals reversed and remanded for entry of summary judgment in favor of plaintiff on the issue of criminal conversation. The court held

that a plaintiff only needs to show one act of sexual intercourse between defendant and plaintiff's spouse in North Carolina in order to prove a claim of criminal conversation. Because there was no dispute that such an act did occur in North Carolina following the separation of plaintiff and her spouse but before their divorce, plaintiff was entitled to judgment as a matter of law.