

Family Law Update
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Child Support Guidelines

New guidelines apply to cases heard on or after
January 1, 2011

Retroactive Support

- ▶ *Carson v. Carson*, 680 SE2d 885 (NC App 2009)
 - ▶ Trial court cannot order retroactive support in an amount different than amount provided in an unincorporated agreement.



New Guidelines: Retroactive Support

- ▶ “In cases involving a parent’s obligation to support his or her child for a period before a child support action was filed (i.e., cases involving claims for “retroactive child support” or “prior maintenance”), a court may determine the amount of the parent’s obligation (a) by determining the amount of support that would have been required had the guidelines been applied at the beginning of the time period for which support is being sought, or (b) based on the parent’s fair share of actual expenditures for the child’s care.”



New Guidelines: Self Support Reserve

- ▶ Updates based on 09 Federal Poverty Level
 - ▶ \$902.50 net (was \$816)
 - ▶ \$999 gross (was \$950)
- ▶ Child care, insurance or other extraordinary expenses may be reason to deviate when income falls within shaded area



Definition of Income

- ▶ Present guidelines exclude:
 - ▶ ‘means-tested public assistance programs’
 - ▶ Including SSI, TANF and Food Stamps
- ▶ New guidelines also exclude:
 - ▶ Child support received for other children
 - ▶ Amounts paid by employer for some insurance premiums and for retirement that are not withheld from salary
 - ▶ See also *Caskey v. Caskey*, NC App (September 2010)
 - ▶ Social security and Medicare taxes are not income



Responsibility for Other Children

- ▶ Only include on-going support
 - ▶ Do not count arrears payments



- ▶ Consider deviation when have multiple families
 - ▶ There simply is no good answer
 - ▶ Try to hear all cases involving one obligor at the same time

- ▶ Use only the parent's income to determine support obligation for other children
 - ▶ No longer include income of spouse



Custody Modification

- ▶ GS 50-13.7(a):
 - ▶ "an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested."



2-step process



- ▶ First: Moving party must show substantial change of circumstances affecting the welfare of the minor child[ren]
- ▶ Second: If changed circumstances, trial court must determine that modification is in the best interest of the child[ren]

Establishing Nexus

- ▶ **Shipman** – 357 NC 471 (2003)
 - ▶ Some effects of circumstances are “self-evident”
- ▶ **West v. Marko** – 141 NC App 688 (2001)
 - ▶ Identified factors “naturally affecting” a child’s welfare



Establishing Nexus

- ▶ **Circumstances where effect is not self-evident include:**
 - ▶ Cohabitation, relocation, change in sexual orientation, improved finances
- ▶ **Need “direct” evidence of effect**
 - ▶ By professionals, parents or testimony of children

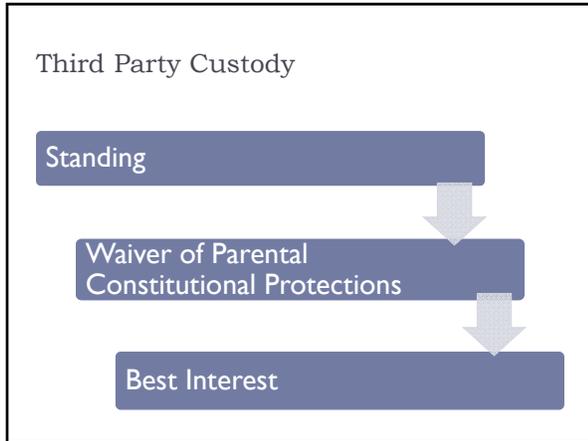
‘Self-Evident’ Effect?

Not Enough

- ▶ **Cherry v. Thomas**
 - ▶ Mom moved 23 miles
 - ▶ Mom said travel time interfered with homework and extracurricular activities
 - ▶ Significant change in work schedules of parents
 - ▶ Mom said child was confused by joint physical custody

Of Course Enough

- ▶ **Patten v. Werner**
 - ▶ Child witnessed domestic violence between mother and her husband
 - ▶ Child frequently tardy and absent from school
 - ▶ Mother’s husband’s significant problem with alcohol
 - ▶ Mother’s husband transporting child in family car even though he did not have a valid driver’s license due to alcohol issues



Standing

- ▶ GS 50-13.1(a)
 - ▶ “any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided.”
- ▶ *Petersen v. Rogers*, 337 NC 397 (1994)
 - ▶ “GS 50-13.1 was not intended to confer upon strangers the right to bring custody or visitation actions against parents of children unrelated to such strangers.”

Third Party Standing

- ▶ Only parties who allege and prove a sufficient relationship with the child have the right to file a claim alleging that a parent has lost his or her constitutionally protected status.
 - ▶ Relationship “in the nature of a parent and child” is sufficient
 - ▶ Determination made on case-by-case basis
 - ▶ *Ellison v. Ramos*, 130 NC App 389 (1998)(caretaker)
 - ▶ *Seyboth v. Seyboth*, 147 NC App 63 (2001)(step-parent)

TPR and Standing

- ▶ Natural parent whose rights have been terminated has no standing to bring custody or visitation action
 - ▶ *Krauss v. Wayne County DSS*, 347 NC 371 (1997)
 - ▶ *Quets v. Needham*, 682 SE2d 214 (NC App 2009)

Standing

- ▶ Relatives [always?] have standing
 - ▶ *Yurek v. Shaffer*, 678 SE2d 738 (NC App 09)
 - ▶ Sister and brother-in-law of father had standing to bring custody action against parents
- ▶ *Myers v. Baldwin and Baker*, NC App (July 2010)
 - ▶ Non-relatives who kept child for 2 months do not have standing
- ▶ *Tilley v. Diamond*, unpublished, 184 NC App 758 (2007)
 - ▶ Grandfather's neighbors did not have standing

Waiver: *Price v. Howard*

- ▶ When parents enjoy constitutionally-protected status, "application of the 'best interest of the child standard' in a custody dispute with a non-parent would offend the Due Process Clause."
- ▶ But parent's protected interest "is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child."
- ▶ So "the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to raising a child."

Third Party Pleading

- ▶ Complaint must show standing and must allege facts sufficient to support a finding that parent has waived constitutional protection.
 - ▶ *McDuffie v. Mitchell*, 155 N.C.App. 587 (2002)
- ▶ If pleading does not allege facts sufficient to support the finding, complaint is subject to dismissal pursuant to Rule 12(b)(6)
 - ▶ See *McDuffie and Perdue v. Fuqua*, 195 NC App 583 (2009)
 - ▶ See Rule 24 re: Intervention ????

Waiver

- ▶ Parents have constitutional right to *exclusive* care, custody and control of their children as well as *exclusive* decision-making authority.
- ▶ Intentionally sharing these exclusive rights with another person may amount to conduct inconsistent with the parent's protected status sufficient to support a finding of waiver.
- ▶ Where parties jointly decide to create a child and intentionally take steps to identify the third party as a parent, trial court may find waiver and apply best interest.
 - ▶ *Mason v. Dwinell*, 190 NC App 209 (2008)(parties executed parenting agreement)
 - ▶ *Davis v. Swan*, NC App (August 2010)(parties had no written agreement)
 - ▶ *Cf. Estroff v. Chatterjee*, 190 NC App 61 (2008)(mom did not identify third party as a parent)

Grandparents



- Visitation
 - Grandparents can intervene in on-going custody dispute between parents; visitation as meets best interest of the child
 - *Smith v. Barbour*, 195 NC App 244(2009)
 - *Quesinberry v. Parrish*, 196 NC App 118 (2009)
 - See also *Hill v. Hill*, 131 NC App 793 (1998)(grandparent had right pursuant to GS 50-13.2A to bring visitation claim after a relative adoption)
- "Custody"
 - Grandparents can intervene in on-going dispute between parents only if allege facts sufficient to prove parents have waived constitutional right to custody
 - *Perdue v. Fuqua*, 195 NC App 583 (2009)
 - Held allegations insufficient as a matter of law

Divorce



- ▶ Divorce judgment cannot be amended
- ▶ Rule 60(b) allows court to set aside divorce but not to amend judgment
- ▶ *Magaro v. Magaro* N.C.App. (September 2010)
 - ▶ Amended divorce judgment incorporating separation agreement was void



Alimony

- ▶ **GS 50-16.4 before amendment:**
 - ▶ "At any time a dependent spouse would be entitled to alimony pursuant to GS 50-16.3A, or postseparation support pursuant to GS 50-16.2A, the court may, upon application of such spouse, enter an order for reasonable counsel fees **for the benefit of such spouse**, to be paid and secured by the supporting spouse in the same manner as alimony."
- ▶ Statute does not allow attorney fees for pro bono service
 - ▶ *Patronelli*, 360 N.C. 628 (2006)



S.L. 2010-14

- ▶ **New GS 50-16.4**
 - ▶ "At any time a dependent spouse would be entitled to alimony pursuant to GS 50-16.3A, or postseparation support pursuant to GS 50-16.2A, the court may, upon application of such spouse, enter an order for reasonable counsel fees ~~for the benefit of such spouse~~, to be paid and secured by the supporting spouse in the same manner as alimony."
- ▶ Applies to fees for services rendered on or after October 1, 2010



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)



Cohabitation?

- ▶ Friend stayed 11 consecutive nights at W's home
- ▶ Vehicle of friend seen 'often' at W's home
- ▶ The two exchanged vehicles frequently
- ▶ Friend owned his own home but it appeared abandoned
- ▶ Friend was seen moving furniture and boxes into home of W
- ▶ Friend walked the dog, carried groceries and luggage into house and met repairman at W's home

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"



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



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.”
- ▶ “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)



Agreements: *Martin v. Martin*



- ▶ When language is clear, consider only the document itself
 - ▶ Do not hear testimony about intent of parties
- ▶ Provisions of contract are deemed separable rather than dependent
 - ▶ So breach of one provision by one party will not excuse performance by the other
- ▶ Specific performance allowed as a remedy only when remedy at law is determined to be inadequate
 - ▶ Order needs to contain findings about why money judgment is not an adequate remedy
