Family Law Update
Cases Decided Between
October 6, 2015 and May 31, 2016

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Custody

Cases Decided Between October 6, 2015 and May 31, 2016

Visitation outside U.S.; findings required to support visitation; future change in visitation when child starts school

- Trial court was not required to specifically find that travel to foreign country was in the child's best interest before allowing father the discretion to exercise his visitation by taking the child out of the country.
- To support an award of visitation rights, a custody order must contain sufficient findings of fact to support the conclusion that the party is a fit person to visit the child and that visitation rights for that person are in the best interest of the child.
- Visitation schedule providing for 18 month-old child to be with father one month and then with mother for two months, with this alternating schedule continuing until child starts kindergarten, was within discretion of trial court and adequately supported by findings of fact showing both parents to be fit and proper persons to exercise custody.
- Trial court acted within its discretion when it ordered that alternating visitation schedule change when child starts kindergarten in order to accommodate child's school schedule.

Burger v. Smith, 776 S.E.2d 886 (N.C. App., October 6, 2015). Defendant father is a Canadian citizen who works for extended periods of time in the African country of Malawi. The parties met in Malawi and married there. Their child was born there and resided there for approximately 6 months before plaintiff mother brought him to North Carolina. After plaintiff decided to end the marriage to defendant, she filed for custody. The child was approximately 18 months old at the time the custody order was entered.

The trial court concluded that both parties are excellent parents with strong family support. In addition, the court found that defendant father was deeply committed to his work in Malawi for religious and moral reasons. After determining that it was in the child's best interest to have a strong relationship with both parents, the trial court awarded joint custody with the child residing with mother for two months and then with father for one month. This alternating schedule will continue until the child starts school. When the child starts kindergarten, the child will reside primarily with mother. However, every Christmas, spring and summer break, the child will be with father. The court order specifically stated that dad has the discretion to take the child with him to Malawi and that he is to take all necessary precautions to protect the health of the child while in that country, the same precautions the parties took to protect the child when the family was in that country together.

On appeal, the mother did not contest the trial court's decision to award joint custody or the immediate time sharing schedule, but she did argue that the trial court erred by allowing the father to take the child to Malawi without concluding that travel to that county would be in the best interest of the child. The court of appeals disagreed, holding that the trial court was not required to make such a finding. Rather, the court adequately supported the custody schedule with findings of fact that father was a fit and proper custodian for the child and that time with him was in the best interest of the child.

Mother also argued that the custody schedule that will take effect when the child starts school is so obviously "harsh and arbitrary" that it amounted to an abuse of discretion because it removes the child from home, family and friends every school break. The court of appeals disagreed and pointed out that the trial court was dealing with an unusual and difficult situation

caused by the fact that the parents reside in different countries. The court of appeals held that the trial court order demonstrates "an intention to fashion a custody plan that would foster the development of a close and meaningful relationship between the minor child and both of his parents." In rejecting mom's argument that the future custody schedule would remove the child from home and friends, the court stated that mom failed to consider "that the child could benefit from having a home and friends with both plaintiff and defendant."

Findings of fact must resolve contested issues relating to welfare of children

- Case was remanded to trial court for additional findings of fact where evidence of children's extraordinary medical needs had been introduced at trial and parties strongly disagreed over the needs of the children and the ability of both parties to care for those needs but custody order contained no findings of fact as to those issues.

Faircloth v. Faircloth, *unpublished opinion*, 779 S.E.2d 528 (N.C. App., October 6, 2015). Both of the children of the parties were born prematurely. Mother testified about permanent disabilities and medical and psychological needs of both children that had resulted from the premature births. Mom testified that she always had cared for the needs of the children and that father could not provide for their welfare. Father disagreed that the children had significant medical and psychological needs.

Based primarily on concerns regarding mother's living environment, the trial court ordered primary physical custody to father. The order contained no findings of fact about the medical and psychological needs of the children or the ability of each parent to provide for those needs. The court of appeals remanded the case for additional findings of fact, holding that the trial court is required to address and resolve all "material, disputed issues" relating to the welfare of the children.

Attorney fees

- Defendant mother was acting in good faith and had insufficient means to defray expenses of custody case so trial court did not err in awarding attorney fees to her.
- Presence of a genuine dispute over custody establishes that a party is acting in good faith.
- It is not appropriate to find a parent is acting in bad faith because the parent's past conduct or problems make it unlikely the parent will gain additional custody rights.

Setzler v. Setzler, 781 S.E.2d 64 (N.C. App., December 15, 2016). Father filed action for custody and mother counterclaimed for custody as well. The trial court granted primary custody to dad but allowed mother's motion for attorney fees after concluding she was acting in good faith in defending dad's claim for custody and that she had insufficient means to defray the costs of the case. On appeal, father argued that mother was not acting in good faith because she knew that due to her problems with drugs and alcohol in the past, she was "a poor parent" and should not have primary custody of the child. The court of appeals rejected his argument, stating that a party can establish good faith simply by demonstrating that she "seeks custody in a genuine dispute with the other party." The court held that the fact father filed a complaint for custody and mom filed a counterclaim for custody shows there was a genuine dispute.

The court of appeals strongly rejected father's argument that mom was acting in bad faith because she should know she is a bad parent. The court stated:

> "In order to accept plaintiff's position, this Court would have to find that some parents should simply know that, because they are unfit parents or have made mistakes in

> the past, they will lose any attempts to modify custody arrangements, and therefore any attempts to do so could not be made in good faith. To support such an outcome would be to negate the efforts made by parents, such as defendant, to correct previous mistakes and become better parents and would serve to bar such parents from bringing custody actions. This position espoused by plaintiff is unsupportable and contrary to settled law. This portion of plaintiff's argument is overruled."

No authority to award travel expenses; attorney fees

- Trial court had no authority to order defendant to pay plaintiff for expenses plaintiff incurred in traveling to NC for trial after trial was continued because defendant was arrested the day before custody trial was set to begin.
- Trial court order for attorney fees was reversed where court failed to make finding that plaintiff was a party acting in good faith and failed to make findings to support reasonableness of attorney fee awarded.
- Trial court finding that plaintiff had insufficient means to defray the cost of litigation was reversed where there was no evidence in the record regarding plaintiff's financial means.

Davignon v. Davignon, 782 S.E.2d 391 (N.C. App., February 16, 2016). After defendant was granted a continuance of a custody trial on the day of trial because defendant had been arrested the day before and was incarcerated in Pennsylvania on the day of the trial, plaintiff filed a motion requesting an order requiring defendant to reimburse her for the expenses she and her witnesses incurred in traveling to NC for the trial. The trial court ordered defendant to pay plaintiff $4,640 for expenses such as air travel and hotel costs for plaintiff and her witnesses. In addition, the court entered an order requiring defendant to pay attorney fees to plaintiff after finding she had insufficient means to defray the cost of the appeal.

Defendant appealed and the court of appeals reversed on both issues. The court held that costs only are allowed to be awarded if authorized by statute and travel expenses such as those claimed by plaintiff are not recoverable pursuant to any statute or by common law. While a court has authority to award attorney fees in custody cases pursuant to GS 50-13.6, the trial court must support the award with adequate findings of fact. In this case, the trial court did not make a finding that plaintiff was a party acting in good faith and also did not make findings to support the reasonableness of the amount awarded. The trial court did find that plaintiff had insufficient means to defray the costs of litigation as required by the statute, but the record contained no evidence at all about the plaintiff's financial circumstances that could support such a finding of fact.

Significant restrictions on visitation of parent

- GS 50-13.2 provides that visitation shall not be denied to a parent unless the court finds the parent is unfit or that visitation is not in the best interest of the child.
- Significant restrictions on visitation, including limiting a parent to supervised visitation, requires the same findings of fact.
- However, where father refused to participate in custody trial, trial court did not err in allowing father only supervised visitation without making the required findings because trial court had no evidence at all about father's circumstances or fitness.

Meadows v. Meadows, 782 S.E.2d 561(N.C. App., March 15, 2016). On appeal of final custody order, father argued that the trial court erred by allowing him only supervised visitation

for two hours every other Sunday without finding either that he was unfit or that reasonable visitation was not in the best interest of the child. Acknowledging that the trial court did not make those findings and that such findings generally are required, the court of appeals nevertheless upheld the trial court order because father had refused to participate in the custody trial and to provide information to the court as to his fitness to parent the child. The trial court order contained findings of fact indicating that the court had no evidence at all about father's fitness or current circumstances that would support a conclusion that visitation between father and the children would be in the best interest of the children. Due to this lack of information, the custody order simply continued the supervised visitation schedule originally set in a temporary custody order because there was no evidence indicating this visitation had not worked to the benefit of the child in the past.

In upholding the trial court order, the court relied upon *Qurneh v. Colie*, 122 NC App 553 (1996), wherein the court of appeals upheld a trial court's dismissal of a father's claim for custody after he invoked his Fifth Amendment right to avoid answering questions about his participation in illegal drug-related activities. According to *Meadows*, the *Qurneh* holding means that the "refusal by a parent to provide information that is necessary for a trial court to make custody-related determinations can serve as a basis to deny that parent certain rights."

Rule 60 motion; custody jurisdiction

- Although NC no longer had jurisdiction to modify the custody determination because all parties and the child had left the state, NC retained subject matter jurisdiction to consider and grant mother's motion to set aside the judgment pursuant to Rule 60(b).

Williamson v. Whitfield, *unpublished opinion*, 781 S.E.2d 532 (N.C. App., January 5, 2016). A custody order and a subsequent modification of the initial order were entered in NC while NC was the home state of the child. After all parties and the child had moved out of the state, mom filed a motion asking the court to set aside the modification order pursuant to Rule 60(b). The trial court granted the motion after finding mother had not received notice of the second custody proceeding. Father appealed but the court of appeals affirmed the trial court. While the trial court lost jurisdiction under Chapter 50A (the UCCJEA) to make any further custody determination, relief pursuant to Rule 60(b) of the Rules of Civil Procedure is not a custody determination and therefore is not subject to the jurisdiction rules in Chapter 50A.

Waiver of Attorney/Client Privilege

- Defendant wife did not waive her attorney-client privilege by having her friend who was acting as her agent participate in discussions with wife's attorneys and review attorney work product.

Berens v. Berens, _ NC App _, _ S.E.2d _ (April 19, 2016). Plaintiff husband issued a subpoena duces tecum to Ms. Adams requesting information and documents Ms. Adams received as a result of participating in discussions between wife and wife's attorneys. Ms. Adams is an attorney who is not licensed to practice in NC and is a personal friend of defendant mother.

Ms. Adams and mother signed an agreement providing that Ms. Adams would consult with mom throughout the litigation and would act as mom's agent.

Ms. Adams filed a motion for a protective order and a motion to quash the subpoena, arguing the information requested was protected by the attorney/client privilege. The trial court denied her request, finding that wife had waived her privilege by allowing Ms. Adams to participate in the discussions with her attorney.

The court of appeals reversed the trial court's determination that mom had waived her attorney client privilege. While the law provides that a person does waive the privilege by allowing third parties to participate in attorney/client meetings and conversations, this rule does not apply when the third person is acting as an agent for the client. In this case, Ms. Adams clearly was acting as an agent of mother. The court of appeals held that there is no rule that a person who is a personal friend cannot also be an agent. Because Ms. Adams was acting as mom's agent, mother did not waive her attorney/client privilege.

Temporary orders

- Trial court properly determined order was a temporary order rather than a permanent order even though it had been in place 3 years and 9 months.

Dancy v. Dancy, _ NC App_, _ S.E.2d _ (April 19, 2016). Trial court entered an order designated as "Order: Temporary and Permanent Custody" in September 2011. Following a hearing on permanent custody held in June 2015, the trial court entered a permanent order. The trial court ruled that the 2011 order was temporary and entered the final custody order using only the best interest of the child standard with no finding of substantial change.

The court of appeals agreed with the trial court that the 2011 order was temporary because it did not resolve all of the issues between the parties. It provided dad with visitation but only through summer 2012. The court of appeals held that an order is temporary when it does not resolve a party's "on-going visitation." In addition, the court of appeals held that the order did not convert to a permanent order even though it was in effect for almost 4 years because the parties continued throughout that time to negotiate visitation beyond the 2012 ending date contained in the 2011 order. The court of appeals held that "the passage of time alone will not convert a temporary order into a permanent order" and held that "because the parties continued to agree beyond the trial court's 2011 order," the temporary order did not convert.

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Legislation

S.L. 2015-278 (H 519). An Act to Promote the Encouragement of Parenting Time with Children with Both Parents. Effective October 20, 2015.

Adds new section GS 50-13.01 to state:

"It is the policy of the State of North Carolina to:

(1) Encourage focused, good faith, and child-centered parenting agreements to reduce needless litigation over child custody matters and to promote the best interest of the child.

(2) Encourage parents to take responsibility for their child by setting the expectation that parenthood will be a significant and ongoing responsibility.

(3) Encourage programs and court practices that reflect the active and ongoing participation of both parents in the child's life and contact with both parents when such is in the child's best interest, regardless of the parents' present marital status, subject to laws regarding abuse, neglect, and dependency.

(4) Encourage both parents to share equitably in the rights and responsibilities of raising their child, even after dissolution of marriage or unwed relationship.

(5) Encourage each parent to establish and maintain a healthy relationship with the other parent when such is determined to be in the best interest of the child, taking into account mental illness, substance abuse, domestic violence, or any other factor the court deems appropriate."

Also amends GS 50-13.2(a) to change provision that "between *the mother and father*, no presumption shall apply as to who will better promote the interest and welfare of the child" to "between *the parents*"" no presumption shall apply as to who will better promote the interest and welfare of the child."

Child Support
Cases Decided Between October 6, 2015 and May 31, 2016

Contempt; ability to pay; purge conditions; entry of order

- Trial court erred in finding defendant had ability to pay amounts due for child support, alimony and attorney fees that exceeded his monthly disposable income.
- Trial court erred in finding defendant could take reasonable steps to enable him to comply where property trial court identified as an asset available to defendant was owned by defendant as tenants by the entirety with his wife.
- Fact that defendant remarried quickly and had additional children to support did not establish he was acting in "disregard of his familial and legal obligations."
- While a defendant can be held in contempt for not paying what he has the ability to pay even if he does not have the ability to pay all he owes, the purge must be an amount he has the actual ability to pay and not in the amount of the total owed.
- Purge condition that defendant pay an additional amount each month in addition to the amount due pursuant to the order being enforced was impermissibly vague because it did not specify when the obligation to pay the additional amount would end.
- Trial court erred by finding defendant failed to comply with purge conditions in contempt order on the same day the contempt order was entered. Defendant was not bound by purge requirements until the contempt order was reduced to writing, signed by the court and filed with the clerk of court.

Spears v. Spears, 784 SE2d 485 (N.C. App., February 2, 2016). Defendant was ordered to pay child support, alimony, credit card debt and attorney fees totaling $5,880 per month. After subtracting amounts for defendant's living expenses and taxes, including expenses related to his second wife and the four children born during the second marriage, defendant's disposable income was $2,288.37 per month. The trial court found him in civil contempt when he failed to pay all amounts due, concluding he had the ability to pay more than he had paid even though he did not have the ability to pay all, or that he had the ability to take reasonable steps that would allow him to comply by reducing amounts withheld from his pay for taxes or selling property he presently owned with his second wife as tenants by the entirety. In addition, the trial court found that defendant showed disregard for his familial and legal obligations by remarrying so quickly after divorcing plaintiff and have an additional four children when he had insufficient resources to pay for the children from his first marriage.

The court of appeals reversed the contempt order, finding the evidence was insufficient to support the finding that defendant had the ability to pay more or to take reasonable steps that would allow him to pay. After stating that "simple math" established defendant did not have the actual ability to pay all that was owed, the court held that there was no evidence to support the finding that defendant could take reasonable steps to comply. Reducing the tax withheld would not leave defendant with enough income to pay the amounts owed and defendant could not sell the entirety property without the consent of his wife. In addition, evidence showed the parties had very little equity in that property that could be used to pay defendant's obligations even if the property was sold. The court of appeals strongly rejected the court's contention that defendant showed a disregard for his familial and legal obligations by remarrying and having

additional children, stating that "North Carolina's law does not impose limitations on an individual's right to marry and procreate."

The trial court also found that even if defendant could not pay all he owed, he had the ability to pay more than he had paid. The court of appeals held that it is appropriate to hold a defendant in contempt upon such a finding but the purge must reflect the defendant's actual ability to pay. The trial court erred in this case by ordering as a purge that defendant pay $900 more each month in addition to the $5,880 he already was required to pay to satisfy the accrued arrears under the order. In addition, the court of appeals held that this purge condition was impermissible vague because it did not specify how many payments of $900 more each month defendant had to pay. The court of appeals stated it is not permissible for a trial court to hold a party "indefinitely in contempt."

Finally, the court of appeals held that the trial court erred in entering an order finding defendant "in noncompliance" with the purge conditions of the contempt order when the contempt order was not actually entered before the hearing on the noncompliance. The trial court announced the purge conditions in open court at the conclusion of the contempt hearing but the contempt order had not been reduced to writing, signed and filed with the clerk by the time the court held the hearing to determine if defendant had complied with the purge conditions. The court of appeals held that defendant was not bound by the purge conditions until such time as the trial court actually entered the contempt order.

Earning capacity; imputing income; specific performance

- Trial court erred in concluding that amount of support provided in separation agreement was reasonable after considering father's earning capacity at the time of hearing rather than his actual present income without first concluding father was deliberately depressing his income in bad faith.
- Trial court erred in ordering specific performance of support obligations contained in separation agreement based on obligor's earning capacity rather than his actual present income without finding defendant was acting in bad faith.
- Trial court did not err in entering money judgments for past due arrears under the separation agreement even though mother's complaint requested only specific performance of the contract.

Lasecki v. Lasecki, _ NC App _, _ SE2d _ (April 5, 2016). The parties executed a separation agreement providing father would pay child support and alimony. A year later, father filed a complaint requesting an order of guideline child support, alleging his income had decreased significantly since he executed the separation agreement. Mother counterclaimed for specific performance of the contract. The trial court entered judgment for arrears, found that the amount provided for child support in the agreement was reasonable in light of the circumstances of the parties at the time of the hearing, and ordered specific performance of the child support provisions. The trial court order stated that the court was not imputing income to father and specifically concluded he was not acting in bad faith. However, the trial court order repeatedly referred to father's capacity to earn both when determining the support in the agreement was reasonable and when determining he had the ability to comply with the order of specific performance.

The court of appeals held that the trial court clearly imputed income when it considered father's earning capacity rather than his actual present income. When determining the amount of

support in the contract was reasonable, the trial court held that it was basing the decision on all of the factors in GS 50-13.4(c) and concluded that the father should continue to pay the same percentage of the children's reasonable needs as he covered at the time the contract was executed. According to the court of appeals, the factors in GS 50-13.4(c) require that the trial court consider the parties actual earnings in making the determination that the contract amount of support in the agreement is reasonable. The trial court erred by considering only father's past contributions and present capacity to find employment without first concluding father was acting in bad faith.

Similarly, in concluding father had the ability to comply with the order of specific performance, the trial court erred when it supported the conclusion with findings that defendant has "experience, contacts in the industry, and prior job performance" that "enable him to quickly find employment earning at least $150,000 a year" without first concluding father was acting in bad faith disregard of his child support obligations.

The trial court rejected father's argument that the trial court should not have entered money judgments for the child support arrears because wife's counterclaim only mentioned the remedy of specific performance. According to the court of appeals, mother's claim specifically requested that plaintiff be ordered to pay arrearages and even though she did not specifically request a money judgment, she did request "such other and further relief as to the court may seem just, fit and proper."

Child Support Enforcement Office; right to intervene in existing action

- Chapter 110 of the General Statutes give the State Child Support Enforcement Agency the unconditional right to intervene in a child support case whenever a person has accepted public assistance on behalf of a dependent child, has applied for and paid a fee for child support collection services, or requested assistance for collection of spousal support while also receiving child support services.
- Intervention request was timely even though it was filed more than 3 years after support order was entered where request was filed very shortly after mother requested child support collection services.

Hunt v. Hunt, 784 SE2d 219 (N.C. App., April 5, 2016). In 2011, parents entered into a consent order requiring father to pay child support and alimony. The case also involved claims for equitable distribution and custody. In 2014, mother applied for child support services from the child support enforcement agency. Shortly thereafter, the child support enforcement agency moved to intervene in the action and requested an order of wage withholding and an order directing all payments be made to Centralized Collection. The trial court allowed intervention and father appealed.

The court of appeals affirmed the trial court, holding that Chapter 110 clearly vests in the child support enforcement agency the unconditional statutory right to intervene in an existing child support case whenever a party is receiving child support services from the agency. Child support enforcement obtains the right to intervene whenever a person has accepted public benefits on behalf of a child, has requested child support collection services from the agency and paid the $25 fee, or has requested help with enforcement of a spousal support order when the agency also is providing assistance with child support.

The court of appeals also rejected father's allegation that the motion to intervene was not made in a timely manner because the motion was filed more than three years after the child support order was entered. Acknowledging that motions to intervene must be made in a "timely

manner," the court of appeals held that the agency cannot move to intervene until services are offered or requested. In this case, the motion to intervene was filed within one month of mom requesting assistance and was therefore, timely made.

Termination of support; incorporated agreements

- Trial court erred in terminating support based on provisions in incorporated separation agreement when contract provisions provided that support would terminate before support would terminate under the provisions in GS 50-13.4.
- Parties can contract that support will be paid longer than required by statute but if the contract duration is "less generous" than the statutory provisions, the oblige can recover support for duration provided by the statute.

Malone v. Hutchincon-Malone, 784 SE2d 206 (N.C. App., April 5, 2016). The parents of a child with special education needs executed a separation agreement providing that father would pay support until the child turned 18 or, if the child remained enrolled in high school "full time" at age 18, support would continue as long as he was attending school full time up to age 20. The separation agreement was incorporated into the parties' divorce judgment.

Father filed motion to terminate his support obligation, alleging the child had turned 18 and was no longer attending school full time. The trial court terminated support after finding the child was continuing his education but was no longer attending school full time.

The court of appeals reversed, holding that the trial court erred in applying the terms of the incorporated agreement to determine the date child support should terminate when the provisions of the incorporated agreement were "less generous" for the child than those in GS 50-13.4. While the termination events in GS 50-13.4 are similar to those in the agreement, the statutory provisions allow support to continue until age 20 if the child is making reasonable progress towards graduation, even if the child is not attending school full time. According to the court of appeals, parents can contract to pay longer than the statutory provisions, but agreements to pay for a shorter period of time are not binding.

Modification requires motion

- GS 50-13.7 requires a "motion in the cause and a showing of changed circumstances" before trial court can modify a child support or custody order.
- Because a modification order entered when a motion has not been filed is void, it is "immaterial whether the judgment was or was not entered by consent."

Rackley v. Loggins, 784 S.E.2d 620 (N.C. App., April 5, 2016)

[*NOTE*: NC Supreme Court issued a temporary stay of this opinion on 4/25/16].

In 1999, Shawna Rackly and Jason Loggins signed a Voluntary Support Agreement and the court approved the agreement, making it a court order for support. The agreement provided that Loggins would pay $0 monthly child support, assign all unemployment benefits to the child support agency, reimburse the State $1,996 for public assistance paid on behalf of his children, and provide health insurance for the children whenever it became available to him through his employment.

In 2000, a motion to show cause for contempt was filed, alleging defendant had failed to reimburse the public assistance as ordered in the 1999 order. As a result of the contempt proceedings, defendant paid a portion of the amount owed and agreed to a modification of the

1999 order. In June 2001, the court entered a "Modified Voluntary Support Agreement and Order" with the consent of all parties providing that defendant would pay $419 per month in child support starting July 1, 2001 and reimburse the State $422 for assistance provided to his children. No motion to modify was filed before the modified order was entered by the court.

In the years that followed, a number of show cause orders were issued and a number of modification orders were entered, only one of which was preceded by the filing of a motion to modify. In April 2011, defendant filed a motion to modify the most recent support order, alleging that he was unemployed and the children had become emancipated. The trial court entered an order in September 2011, reducing defendant's support obligation and setting his arrears at $6,640.75.

In 2014, defendant filed a motion pursuant to Rule 60 of the Rules of Civil Procedure alleging that the 2001 "Modified Voluntary Support Agreement and Order" was void because no motion to modify had been filed. As a result, he contended that the only valid order was the original 1999 order setting his monthly support obligation at $0. The trial court agreed and set aside the 2001 order. On appeal, the court of appeals agreed with the trial court that the 2001 order was void.

According to the court of appeals, the clear language of GS 50-13.7 requires that a motion in the cause be filed before the court enters a child support order that modifies an existing permanent order. The same statute applies to permanent custody orders. Orders entered without the motion being filed are entered without subject matter jurisdiction and are void. Because the motion is required to invoke the subject matter jurisdiction of the court, the fact that the order was entered by consent is 'irrelevant'. Subject matter jurisdiction cannot be conferred upon the court by consent of the parties.

Enforcement of Child Support Order During Appeal

- Trial court did not err in denying father's motion to stay execution and enforcement of a child support order requiring him to pay private school tuition.
- Order requiring father to pay private school tuition was an order for the periodic payment of child support that can be enforced by contempt during an appeal pursuant to GS 50-13.4(f)(9).
- Mother's cross-appeal did not divest trial court of authority to enforce the order by contempt pursuant to GS 50-13.4(f)(9).
- Trial court order contained sufficient findings of fact to support conclusion that father was in contempt for failing to pay private school tuition as required by child support order.

Smith v. Smith, _ NC App_, _ S.E.2d _ (April 19, 2016). Trial court entered a child support order than included a requirement that father pay private school tuition. While the child support order was on appeal, mom filed motion for contempt alleging father had failed to pay the tuition. Trial court denied father's motion to stay enforcement of the order during the appeal, found that he had the ability to comply with the order and held him in contempt.

On appeal of the contempt order, father first argued that the trial court lost jurisdiction to enforce the provisions of the child support order relating to the private school tuition when the child support order was appealed. He contended that the provision in GS 50-13.4(f)(9) that allows support orders to be enforced by contempt while on appeal did not apply to this order because it was not an order for the periodic payment of child support. The court of appeals

disagreed, holding that the order to pay tuition was an order for child support that required father to make periodic payments, even though the payments were not made every month.

Father then argued that the trial court should have refused to enforce the order because mom had cross-appealed, arguing that she should not be able to enforce an order that she herself was arguing about on appeal. Acknowledging that federal courts have a rule that litigants who have cross-appealed cannot seek to enforce the order during an appeal, the court of appeals held that such a rule would be inappropriate in this case given the very narrow scope of mom's cross-appeal.

Next father argued that the trial court erred in refusing to set a bond to stay enforcement of the tuition provisions in the support order pursuant to GS 1-289. The court of appeals held that the decision not to set a bond and stay execution is a matter within the discretion of the trial court. In this case, the trial court did not abuse its discretion when it ruled that orders for child support should not be stayed pending appeal. There is a dissent on this issue. The majority noted that following a finding of contempt, GS 50-13.4(f)(9) allows the litigant to seek a stay of the contempt order from the appellate court.

Finally, father argued that the trial court's findings of fact were not sufficient to show he had the present ability to comply with the order to pay the tuition. He contended that his monthly income had decreased since the entry of the order and he no longer had the ability to pay. The court of appeals disagreed, holding that the trial court findings about defendant's assets were sufficient to show he had the ability to pay. These findings showed he owed stocks, bonds and securities, as well as rental property and retirement accounts. The trial court also found that his listed monthly expenses were unreasonable and could have been reduced to pay the tuition

Rule 60 granted on court's own motion

- Trial court abused its discretion when it raised and granted a Rule 60(b) setting aside a child support order sua sponte after concluding the order had been entered through fraud.
- Finding that father agreed to deviate from the guidelines when setting original support order only because mother threatened to keep child away from him was insufficient to support conclusion that support order had been entered as the result of fraud.

St. Peter v. Lyon, _ NC App_, _ S.E.2d _ (April 19, 2016). Defendant father filed a motion to modify based on a reduction in his income. At the hearing, the trial court determined that the original support order which required defendant to pay an amount of support in excess of the guidelines was entered only because mother had threatened to keep the child away from defendant unless he agreed to a deviation from the guidelines. Over objection of mother's counsel, the trial court sua sponte amended father's motion to modify to include a motion to set aside the order pursuant to Rule 60(b). The trial court then set aside the support order after concluding it had been entered as the result of fraud.

The court of appeals reversed, holding that the trial court erred by amending father's pleading sua sponte and setting aside the order because mother had no notice that she would be expected to address fraud allegations at the modification hearing. Pointing out that father's motion to modify mentioned only financial issues, the court of appeals held that the trial court had entered "judgment by ambush" against mother.

The court of appeals also held that the trial court's findings were insufficient to support a conclusion that the original order had been entered by fraud. According to the court, a statement of future intention, such as threatening the keep the child away from father, is not a fraudulent misrepresentation. In addition, the court held that if mother did deny father his visitation rights, she would subject to contempt of court. Therefore, on remand, the court of appeals instructed the

trial court to proceed on father's original motion to modify based on his allegation that his income had substantially decreased since entry of the original order.

Military BAH as income; deviation needs findings regarding needs of children

- Father's Basic Allowance for Housing (BAH) paid as part of his military salary should have been included in his income for the purpose of determining child support.
- Trial court erred in deviating from the guidelines without making findings of fact regarding the needs of the children.

Cumberland County ex. rel. State of Washington, OBO Clark v. Cheeks, *unpublished opinion*, _ NC App _, _ S.E.2d _ (May 3, 2016). Defendant father is a member of the military. In addition to his base pay, he receives a monthly Basic Allowance for Housing (BAH). When calculating his income to set child support, the trial court did not include the BAH amount. The court of appeals reversed, holding that because the BAH is a form of 'maintenance' received from a third party that reduces father's personal living expenses, it is included within the definition of income found in the Child Support Guidelines.

The court of appeals also held that the trial court erred in deviating from the guidelines without making appropriate findings of fact regarding the needs of the children. The trial court has broad discretion to deviate whenever the court determines that application of the guidelines is unjust, but that determination requires more detailed findings of fact than those required for guideline support.

Domestic Violence

Cases Decided Between October 6, 2015 and May 31, 2016

5th Amendment rights; waiver of rights by testifying

- A witness does not automatically waive all 5th Amendment rights by taking the stand in a civil case.
- Voluntary testimony in a civil case waives a party's privilege only with regard to matters covered by her direct examination.
- Trial court threat to jail defendant if she invoked her 5th amendment rights while testifying violated defendant's 5th amendment rights.

Herndon v. Herndon, 777 S.E.2d 141 (N.C. App., October 6, 2015). Plaintiff husband filed for a 50B protective order alleging defendant wife put sleep-inducing drugs in his food so she could sneak out of the house to conduct an affair. When defendant's counsel called her to the stand, the trial court stated that "somebody might be going to jail" if defendant attempted to invoke the 5th amendment after voluntarily taking the stand to testify. The court of appeals held that the trial court erred by concluding that defendant waived all right to invoke her 5th amendment rights simply by voluntarily testifying in the civil case. According to the court of appeals, the privilege is waived only with regard to matters covered by a witnesses' direct examination.

Return of weapons; misdemeanor crime of domestic violence

- Convictions for communicating threats and misdemeanor stalking are not convictions for misdemeanor crimes of domestic violence pursuant to 18 USCA 921(a)(33)(A).

Underwood v. Hudson, 781 SE2d 295 (N.C. App., December 15, 2015).
After finding that defendant had, among other things, threatened to kill plaintiff and to commit suicide, the trial court ordered defendant to surrender all firearms as part of the relief granted plaintiff in an ex parte DVPO. Following the hearing on the final DVPO, the trial court dismissed plaintiff's claim after concluding plaintiff failed to prove an act of domestic violence.

However, defendant was convicted of communicating threats to and misdemeanor stalking of the plaintiff and was sentenced to 12 months of probation. After completing his probation, defendant filed a motion requesting return of his firearms. The trial court denied the request after concluding that defendant's convictions for communicating threats and stalking were convictions of misdemeanor crimes of domestic violence, resulting in a lifetime ban on possession of weapons by defendant pursuant to federal law.

The court of appeals held that defendant's convictions were not convictions of misdemeanor crimes of domestic violence, which federal law defines as:

- A misdemeanor under state, federal or tribal law; and
- Has, as an element, the use of has, as an element, the use or attempted use of physical

> force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 USC 921(a)(33)(A)

The court explained that federal courts apply either the "categorical approach" or the "modified categorical approach" to determine if a conviction meets this definition. The categorical approach requires that the court look only at the statutory elements of the crime rather than on the conduct underlying the conviction. The modified categorical approach allows the court to look at the statutory elements as well as other documents describing the conduct underlying the conviction, such as the charging documents, jury instructions and plea documents, but only if the statute creating the crime is "divisible," meaning the statute "comprises multiple, alternative versions of the crime." However, at least one of the "versions" of the crime must include the elements of a misdemeanor crime of domestic violence. The other documentation is allowed to establish that the defendant's conviction was for the "version" of the crime involving the required elements.

The court of appeals held that neither of defendant's convictions involved crimes with an element of either the use of physical force, attempted use of physical force or threatened use of a deadly weapon, even though the actual conduct of defendant during the incidents that lead to the convictions also included the use of physical force. Because communicating threats requires only the threat to physically injure another, s*ee* GS 14-277.1, and misdemeanor stalking requires only harassment that would cause a reasonable person to fear bodily injury, *see* 14-277.3A(c), neither contains the elements required for a misdemeanor crime of domestic violence.

The case was remanded to the trial court rather than reversed. While the court of appeals concluded defendant was not disqualified from a return of his weapons at the time of the original hearing, the trial court on remand must "determine if the parties' circumstances have changed since the prior hearing in such a way that defendant would not be disqualified from return of weapons for any reason." Order renewing DVPO for additional two years was reversed where order contained no findings of fact to support trial court's conclusion there was good cause to renew.

Improper Dismissal of 50B Complaint

- Trial court erred in dismissing plaintiff's complaint for a DVPO without giving her a hearing.
- A dismissal based only upon a finding that the claim was a "dueling 50B" request to another 50B complaint was improper.

Holder v. Kunath, 781 S.E.2d 806 (N.C. App., January 5, 2016). Defendant in the present action filed a request for a DVPO pursuant to Chapter 50B. Plaintiff subsequently filed this

proceeding based on the same incidents that caused Defendant to file the first complaint. Both cases came on for hearing on the return of the ex parte orders on the same day and the trial judge called defendant's case for trial first. As part of defendant's evidence, plaintiff testified. At the end of the evidence, the trial court stated that because he found both parties credible, he did not know which one to believe. Ruling that defendant therefore failed to meet his burden of proof, he dismissed defendant's complaint. The trial judge never mentioned the plaintiff's case on the day of the hearing but subsequently entered an order dismissing her case as well and simply writing "Dueling 50B" to another file.

Plaintiff appealed, arguing that the trial court erred by not specifically considering her case and dismissing it without giving her a hearing. The court of appeals agreed, concluding that the trial court said nothing on the record indicating the judge even realized plaintiff's case also was on the calendar to be heard the day defendant's case was tried. Stating that all requests for 50B relief must be given a hearing, the court of appeals also held that simply finding that a request for a DVPO was filed in response to another request for a DVPO, i.e. a "dueling DVPO", is an insufficient basis for an involuntary dismissal. GS 50B-3(b) allows mutual orders to be entered under appropriate circumstances.

Renewal Order needs findings of fact; 'Supplemental Order' after appeal is void

- Order renewing DVPO for additional two years was reversed where order contained no findings of fact to support trial court's conclusion there was good cause to renew.
- Supplemental order to renew containing detailed findings of fact to support renewal of DVPO and order granting attorney fees to plaintiff were void because they were entered after defendant appealed original renewal order.

Ponder v. Ponder, _N.C. App. _ , S.E.2d (May 3, 2016). Following lengthy hearing on plaintiff's motion to renew a DVPO, the trial court signed the AOC form Renewal Order but made no findings of fact. Instead, the trial court announced on the record that a more detailed order would be prepared to supplement the original renewal order. Following entry of the renewal order on the AOC form, defendant appealed. Several months later, the supplemental order containing detailed findings of fact was entered by the trial court. Defendant also appealed the supplemental order.

The court of appeals held that both the supplemental order renewing the DVPO and the order for attorney fees were void because they were entered after defendant appealed the initial order renewing the DVPO. Noting the rule that the trial court is divested of jurisdiction when an appeal is docketed in the court of appeals, the court held that the trial court had no subject matter jurisdiction to act when it signed both of those orders.

The court of appeals also reversed the initial order of renewal because it did not contain any findings of fact to support the trial court's conclusion that good cause existed to renew the DVPO. Noting that no new act of domestic violence is required to support renewal and also noting that the facts supporting the original DVPO may support a conclusion of good cause, the

court of appeals held that a renewal order without findings of fact to establish good cause for renewal violates GS 50B-3(b). While the ultimate holding of the court states that it "reversed" the renewal order, the opinion also contains the statement that the renewal order without findings of fact was "void ab initio."

Rule 60(b) to set aside DVPO

- Rule 60(b) allows a judge to set aside a DVPO based on one of the grounds set forth in that rule.
- Judge granting a Rule 60(b) motion does not violate the rule that one judge cannot overrule another.
- A judge can set aside an order or judgment pursuant to Rule 60(b) *sua sponte*.
- Trial court properly exercised his discretion under Rule 60(b) when he set aside the DVPO based on Rule 60(b)(5) after concluding "it is no longer equitable that the judgment should have prospective application."
- Finding that husband no longer was afraid of wife was sufficient to support conclusion that DVPO should be set aside pursuant to Rule 60(b)(5).

Pope v. Pope, _N.C. App. _ , S.E.2d (May 17, 2016). District court judge granted husband's request for a DVPO against wife after concluding husband was in fear of imminent serious bodily injury and continued harassment from wife. Approximately six months later, wife filed a Rule 60 motion requesting that the DVPO be set aside. Citing Rule 60(b)(6), wife alleged that the DVPO had been entered at a hearing when she was not present and she was not present because husband told her he was going to dismiss his complaint. In addition, she alleged that husband clearly was no longer afraid of her because he regularly comes to her home and calls her on the phone. A different district court judge set aside the DVPO pursuant to Rule 60(b)(5) after concluding it was "no longer equitable that the DVPO have future application" and that there was "good reason justifying relief from the DVPO because the harassment had been on both sides" and husband was not afraid of wife.

On appeal, husband first argued that the trial court in effect revisited the findings of fact made by the judge in the initial DVPO hearing and violated the rule that prohibits one judge from overruling another judge. The court of appeals held that Rule 60 does not allow a judge to 'revisit' an earlier order but does allow a judge to grant relief from an order when the court finds one of the listed grounds. A Rule 60 motion is not required to be considered by the judge who entered the original order; any judge can consider the request.

Husband next argued that the trial court erred in granting the 60(b) motion for the reasons in subsection (5) of the Rule when wife requested relief pursuant to subsection (6). The court of appeals rejected this argument as well, pointing out that a judge can grant relief pursuant to Rule 60(b) even *sua sponte*, with no request from a party, so the court is not limited by the specific pleading request of the party. The court stated that "a Rule 60(b) movant need not specify under which subpart of Rule 60(b) relief is sought," and because it is a discretionary ruling, the trial court is free to exercise the authority on the basis of any of the listed grounds.

Finally, the court of appeals rejected husband's argument that there was no evidence supporting the trial court's determination that it was no longer equitable for the DVPO to have prospective application. The court held that evidence established that husband continued to regularly call wife and to show up at her house "almost every day," clearly establishing that he was no longer afraid of wife. These findings were sufficient to support the trial court's conclusion that it was no longer equitable for the DVPO to have prospective application.

Divorce

Cases Decided Between October 6, 2015 and May 31, 2016

Lack of service of process; Rule 60(b) for void judgment; service by publication

- Trial court properly granted defendant's motion pursuant to Rule 60(b) to set aside divorce judgment based on lack of proper service of process.
- Rule 60(b) motion was not required to be filed within one year when basis for motion is that judgment is void for lack of service of process.
- Rule 60(b) motion based on judgment being void was brought within a reasonable time when defendant filed motion shortly after receiving notice of the judgment.
- Service of process by publication was improper when plaintiff had actual knowledge of where defendant resided but made no attempt to accomplish personal service.
- Due diligence requires that a plaintiff use all reasonable resources available to locate the defendant before resorting to service by publication.

Chen v. Zou, 780 S.E.2d 571 (N.C. App., November 17, 2015). Plaintiff filed for absolute divorce and served defendant by publication. Shortly after defendant learned of the divorce, she filed a motion pursuant to Rule 60(b) alleging that the judgment has been entered without appropriate service of process. Plaintiff claimed that he had no knowledge of where defendant lived when the divorce complaint was filed and accomplished service through publication in the county in which the divorce action was filed. At the Rule 60(b) hearing, the trial court determined that plaintiff had been in contact with defendant before he filed for divorce and she told plaintiff she was residing in New York City, but plaintiff made no attempt to locate defendant in New York before using publication for service. According to the court of appeals, a plaintiff is required to exercise due diligence in locating a defendant before using publication and due diligence requires using all reasonable resources available to locate a defendant. In this case, the trial court properly determined plaintiff failed to use due diligence after finding that plaintiff made no attempt at all to locate defendant in New York.

The court of appeals rejected plaintiff's argument that defendant was required to file the Rule 60(b) motion within one year of entry of the divorce judgment. In this case, although defendant claimed that plaintiff committed fraud by representing to the court that he had no knowledge of plaintiff's location and a Rule 60(b) motion based on fraud must be filed within one year, defendant's claim in this case actually was that the judgment was void for lack of service of process. A request to set aside a void judgment under rule 60(b) must be filed within a 'reasonable time' rather than within one year. While the motion in this case was filed 17 months after the divorce judgment was entered, it was filed within a reasonable time because defendant filed the motion shortly after learning about the judgment.

Alimony

Cases Decided Between October 6, 2015 and May 31, 2016

Law of the case; findings not binding in subsequent proceedings in same court file; judicial notice

- Trial court erred in relying on date of separation contained in summary judgment divorce as the date of separation for the purpose of determining alimony.
- Trial court erred in relying on findings of fact regarding marital misconduct made in an order granting a preliminary injunction and imposing sanctions for failure to comply with discovery.
- Trial court erred in determining wife's earning capacity by taking judicial notice of the Department of Labor statistics with regard to salaries for people in wife's profession. Earning capacity generally is not a fact proper for judicial notice.

Khaja v. Husna, 777 S.E.2d 781(N.C. App., October 6, 2015). Parties had a number of claims against each other and the trial court held multiple hearings. When the alimony claim came on for trial, the court ruled that it was bound by findings of fact made in other proceedings between the parties, stating on the record that the trial court considered the findings to be "the law of the case." The court of appeals held that the trial court erred in concluding that it was bound by the findings in the earlier proceedings.

The date of separation listed in the summary judgment divorce. Although the parties contested the date of separation, the summary judgment divorce contained a finding of fact stating a date. At the alimony hearing, the court used the date of separation in the divorce judgement for the purpose of determining whether conduct amounted to marital misconduct because it occurred before the date of separation. The court of appeals held that the findings in the divorce judgment "went beyond the facts needed to address the limited issues before it," and were not therefore "law of the case" and binding upon the judge at the alimony hearing. All a trial court is required to find for divorce is that the parties had been separated for at least one year before the action was filed. Because the specific date of separation is not required, any such finding made in the divorce judgment is not binding on the parties or the court.

Findings of fact regarding marital fault made in a preliminary injunction and order for sanctions imposed due to wife's failure to comply with discovery. Because a preliminary injunction and an order for sanctions are interlocutory orders, the findings contained in the order are not conclusive and binding in subsequent hearings in the matter unrelated to discovery matters.

Judicial notice. Wife's earning capacity was a contested issue during the alimony trial. The trial court took judicial notice of Department of Labor Statistics indicating that people in wife's field earn an average of $99,000 annually and used that to support the conclusion that wife had a capacity to earn that amount. The court of appeals held that "earning capacity is not the type of undisputed fact of which a trial court can take judicial notice under Rule 201 of the NC Rules of Evidence." The court explained that facts "open to reasonable debate" cannot be found based on judicial notice. Stating that even if the Department of Labor statistics may not be subject to debate, the applicability of those statistics to wife's earning capacity definitely is open to debate.

PSS; findings required re accustomed standard of living; alimony; actual present income; required findings

- Trial court was not required to make "a specifically articulated finding on the subject of accustomed standard of living" during the marriage to support PSS order.
- Alimony must be determined using the parties' actual income at the time of the order is entered.
- Trial court erred in determining alimony using evidence of the income of the parties from five to seven years before the entry of the alimony order.
- Trial court may consider a history of making contributions to a savings plan when determining accustomed standard of living but may not order alimony in an amount sufficient to cover savings if such saving was not a part of the parties' accustomed standard of living during the marriage.
- Alimony cannot be ordered simply to provide for a "parity of income" between the parties. Trial court must consider all statutory factors in determining whether an award of alimony is equitable under the circumstances.
- Trial court erred in failing to explain the reasons for ordering permanent alimony to terminate only upon death, remarriage or cohabitation.

Collins v. Collins, 778 S.E.2d 854 (N.C. App., November 3, 2015). Defendant appealed trial court's order for PSS and alimony.

PSS Order:

Court of appeals rejected defendant's contention that the trial court was required to make specific finding of fact regarding the accustomed standard of living during the parties in order to support the conclusion that plaintiff is a dependent spouse. Court of appeals held that PSS order included a finding that plaintiff was in need of $4000 per month "to continue the lifestyle to which she had become accustomed during the marriage" was sufficient.

Alimony Order:

The trial court conducted the alimony hearing in 2012 but did not enter the order until 2014. The court used evidence of income from 2007 through 2009. The court of appeals vacated the alimony order after concluding that the trial court must base the award on the actual income of the parties at the time the order is entered.

Trial court also erred in ordering alimony in an amount sufficient to allow plaintiff to make regular contributions to a savings plan where there was no evidence that the parties engaged in such savings during the marriage. Instead, the trial court found that plaintiff would have saved if defendant had not spent marital funds in other ways. The court of appeals held that alimony cannot be ordered to fund a savings account. A pattern of savings can be considered in determining reasonable needs of a dependent spouse only if such saving actually was a part of the parties' accustomed standard of living during the marriage.

The court of appeals agreed with defendant's argument on appeal that the trial court erred in awarding alimony for the sole purpose of achieving a "parity of income" between the parties. According to the court of appeals, the trial court erred by making findings of fact only concerning the income and expenses of the parties. In order to support a determination that an award of alimony is equitable under the circumstances, and to determine the appropriate amount and duration of an award, the trial court must consider all factors listed in GS 50-16.3A about which evidence is offered.

Finally, the trial court erred in making the alimony award permanent in duration without explaining why permanent alimony is appropriate under the circumstances. GS 50-16.3A(c) requires that the trial court must "set forth the reasons for its amount, duration and manner of payment" when entering an alimony order.

Cohabitation

- Trial court did not err in concluding wife did not engage in cohabitation where she and her male companion did not assume those rights and duties usually manifested by married people.
- Trial court determines whether parties have assumed the rights and duties manifested by married people by examining the totality of the circumstances.
- The primary legislative intent in making cohabitation grounds for termination of alimony was to evaluate the economic impact of a relationship on a dependent spouse and, consequently, avoid bad faith receipts of alimony.

Setzler v. Setzler, 781 S.E.2d 64 (N.C. App., December 15, 2016). Former husband filed motion to terminate alimony awarded to former wife based on wife's cohabitation. Trial court denied the motion after concluding that while wife and other man spent almost every night together, they did not assume those rights and responsibilities usually manifested by married people. The two maintained separate houses and neither kept clothes or personal items at the house of the other. The man did regularly pay living expenses and other bills of the wife, but wife repaid him entirely when she received her property settlement from husband.

The court of appeals affirmed the trial court decision. Significantly, the court of appeals stated that "the primary intent in making cohabitation grounds for termination of alimony was to evaluate the economic impact of a relationship on a dependent spouse and, consequently, avoid bad faith receipts of alimony;" bad faith meaning a dependent spouse avoiding remarriage for the sole purpose of continuing to receive alimony. So if the relationship is such that one would expect the parties to be married, the assumption is the only reason they are not married is the desire to avoid the termination of alimony that results upon remarriage.

The court held that there are two prongs to the definition of cohabitation found in GS 50-16.9(b). First the trial court must determine there is "a dwelling together continuously and habitually." According to the court, this first prong reflects the goals of "live-in-lover statutes" that terminate alimony in relationships that probably have an economic impact but are not intended to impose "some kind of sexual fidelity on the recipient as a condition of continued alimony." In other words, the statute is not intended to allow a court to terminate alimony simply because a recipient of alimony engages in a sexual relationship but recognizes that a continuous, habitual, monogamous and exclusive relationship usually results in an economic impact on the dependent spouse. In this case, the court concluded that wife and the man did dwell together continuously and habitually, had a monogamous and exclusive relationship, and the relationship had a financial impact on wife because man paid for all of their expenses when they traveled, had dinner out or cooked for both of them at home.

The second prong requires that the court find that the couple "voluntarily assumes those marital rights, duties, and obligations usually manifested by married people" based upon the totality of the circumstances. In this case, the trial court supported its conclusion that the parties did not meet this prong with findings that the two maintained separate residences, did not combine their finances, did not maintain each other's homes, and did not refer to themselves as married. While the regular payment of living expenses by one for the other would support a

conclusion that this prong exists, the payments do not establish this type of relationship if they are loans only.

The court of appeals agreed with the trial court's finding that these circumstances were insufficient to establish that "defendant's motivation in not marrying [the man] is to continue receiving alimony."

Determining dependency; using earning capacity rather than actual income

- Trial court findings of fact were insufficient to support determination that wife was not a dependent spouse where trial court found that in general monthly wife's expensive were "excessive" but did not identify which of plaintiff's expenditures were reasonable in light of her accustomed standard of living.
- Trial court erred in finding wife's annual income exceeded $130,000 where evidence showed she actually earned only $40,000 to $50,000 each year.
- PSS payments are not counted as income when determining entitlement to alimony
- Equitable distribution should be determined before alimony.

Carpenter v. Carpenter, 781 SE2d 828 (N.C. App., January 19, 2016). Plaintiff was a nurse anesthetist who did not work at all during the marriage. When the parties separated, she returned to working on a contract basis, usually working 3 days a week. Evidence showed she earned between $40,000 and $50,000 per year. She filed this action for alimony and attorney fees but the trial court concluded she was not a dependent spouse and denied her claims. Despite the evidence of wife's actual income at the time of trial, the trial court found that she earned $130,000 per year. In addition, the trial court concluded that wife had been a spendthrift during the marriage and that her current expenses were "excessive." Wife appealed and the court of appeals vacated the order and remanded to the trial court for additional findings of fact. Specifically, the appellate court held that the trial court erred in finding wife's income to be in excess of the evidence. According to the court of appeals, the trial court must have either imputed income to wife based upon a conclusion that she should be working more than part time or the trial court included PSS wife was receiving as part of her income. The court of appeals held that either would be error because the trial court did not find wife was acting in bad faith to support imputing income and because PSS is not included as income in an alimony determination because the PSS will end when the alimony begins. In addition, the court of appeals held that in determining whether a spouse is dependent, the trial court must make specific findings regarding the reasonableness of that spouse's current expenses based upon the accustomed standard of living during the marriage. By simply stating wife's current expenses were "excessive," the trial court failed to determine which, if any, of wife's current expenses were reasonable. The court of appeals concluded that the determination wife was not a dependent spouse had to be vacated because the trial court "failed to engage in the necessary comparison of those reasonable expenses to a correct calculation of wife's income."

The court of appeals also noted, "as a practical matter" on remand, the trial court should determine equitable distribution before setting alimony because equitable distribution "could potentially change the financial circumstances of the parties including the need for or ability to pay alimony." Acknowledging that GS 50-16.3A allows the court to set alimony before or after ED, the court of appeals pointed out that the statute also provides that alimony set before ED may be revisited after ED. Because GS 50-20(f) requires that ED be determined without regard to alimony, the court of appeals held that, at least when the court tries alimony and ED together, as the court did in this case, ED should be completed before the court addresses alimony.

Equitable Distribution

Cases decided between October 6, 2015 and May 31, 2016

Consideration of payments made in excess of PSS obligation

- While trial court may not consider payments made as part of an order for spousal support when determining equitable distribution, voluntary payments made by a spouse after separation in excess of that spouse's obligation for spousal support can be considered as a distribution factor in ED.
- Trial court did not err in subtracting from distributive award amount judge determined had been paid by plaintiff in excess of his PSS obligation to defendant.
- Trial court did not err in refusing to allow introduction of valuation expert's report after expert admitted the report contained material errors.
- Trial court did not abuse its discretion by refusing to allow expert to correct report on the eve of trial.

Miller v. Miller, 778 S.E.2d 451 (N.C. App., October 20, 2015). Following separation, plaintiff voluntarily made support payments to defendant totaling $335,032.00. The trial court subsequently determined that an appropriate amount of PSS was $178,600. The trial court also concluded that plaintiff should receive a credit either in alimony or in ED for the amount by which he overpaid his support obligation. The trial court subsequently heard the ED claim and determined defendant should receive a distributive award. However, the court subtracted from that award an amount reflecting part of the overpayment of PSS.

On appeal, defendant argued that the trial court erred in crediting the overpayment of support in the ED case because the ED statute requires that ED be determined without regard to alimony or child support. The court of appeals agreed that the trial court is prohibited from considering any amount plaintiff paid as PSS, but the ED court is not required from considering other voluntary payments made by a spouse following separation that are beyond that party's support obligation.

On the Friday prior to the ED trial on Monday, defendant's valuation expert discovered a mistake in his valuation report and sent a corrected report to plaintiff's attorney. The trial court refused to allow the corrected report to be introduced into evidence because it had been created on the eve of trial. In addition, the trial court refused to admit the original report into evidence because the expert admitted that it contained a material error. The court of appeals rejected defendant's contention on appeal that the trial court abused its discretion by refusing to admit the corrected report.

Venue; trial de novo following appeal

- Trial court erred in denying defendant's motion to change venue pursuant to GS 50-3 when plaintiff moved out of North Carolina while the ED claim was pending.
- While GS 50-3 explicitly applies to divorce and alimony actions, all claims properly joined in the same action with a claim for divorce or alimony also are subject to the venue provisions in that statute.

- When court of appeals vacated ED judgment on appeal, the ED claim must be tried de novo on remand.

Dechkovskaia v. Dechkovskaia, 780 S.E.2d 175 (N.C. App., November 17, 2015). Plaintiff filed action for alimony, divorce, custody and ED in Orange County when plaintiff lived in Orange County and defendant lived in Durham County. All claims were litigated and judgments were entered. The ED and alimony orders were appealed. While the claims were on appeal, plaintiff moved to Florida and defendant remained in Durham County. The court of appeals vacated the ED judgment and affirmed part of the alimony order but remanded for reconsideration of amount and duration.

When the case was remanded, defendant filed a motion for change of venue pursuant to GS 50-3. According to the court of appeals, that statute provides that if while a claim for alimony or divorce is pending, the plaintiff leaves the state, the remaining party has a right to change venue to his county of residence. After concluding that the statute did not apply to this case, the trial court denied the motion.

The court of appeals reversed, holding that GS 50-3 applies to claims for divorce and alimony but also to any other properly joined claim in the same action. So if one claim must be moved to another venue, the rule applies to all other claims in the same action. The court of appeals also held that the statute applies even after the case has been appealed and remanded to the trial court. The court of appeals instructed that because the ED judgment had been vacated, the ED claim must be tried de novo in Durham County. However, because the court of appeals affirmed portions of the alimony order, the judge in Durham County must accept the affirmed portions as law of the case and use the transcript and record from the original trial to enter a new alimony order in accordance with the mandate from the court of appeals.

Pension valuation and distribution; marital debt

- Expert testifying as to value of wife's pension could rely upon information not admitted into evidence to support his opinion.
- Rule 703 of the Rules of Evidence allows an expert to give an opinion based on evidence not otherwise admissible if the information is of the type reasonably relied upon by experts in the particular field.
- Expert was allowed to rely upon Affidavit provided by the Retirement Systems Division of the Department of State Treasury for information needed to perform the valuation methodology required by *Bishop v. Bishop*.
- Fact that Affidavit contained date regarding wife's pension that was one month past the date of separation rather than on the date of separation went to weight of expert's opinion and not to admissibility.
- Trial court did not err by using both types of distribution methodologies authorized by GS 50-20.1 rather than using only the fixed percentage method.
- Debt in husband's name was marital debt because it was incurred for his construction business and the business was classified as a marital asset; tax debt was marital where it was for federal taxes that accrued the year before separation; and credit card debt was marital where it was incurred to buy marital property and to pay debts associated with the marital business.
- Any increase or decrease in the value of marital property between the date of separation and the date of distribution is presumed to be passive and therefore divisible property.

- Trial court erred in finding there was "no evidence" of a change in the value of the marital residence between date of separation and date of trial when wife testified that in her opinion the marital home had increased in value.
- Rental income generated by the marital home after the date of separation was passive income and therefore was divisible property.
- Amendment to GS 50-20(b)(4)(d) to provide that only passive increases and decreases in marital debt following separation are divisible debt applies only to changes in marital debt occurring after the effective date of that amendment, October 1, 2013.
- Trial court did not abuse its discretion in ordering an equal division of marital property even though wife offered much evidence to support her request for an unequal division where judgment showed trial court considered all distribution factors established by the evidence.

Lund v. Lund, 779 S.E.2d 175 (N.C. App., December 1, 2015). Following entry of an equitable distribution judgment dividing the marital estate equally between the parties, wife appealed.

Pension: Wife first argued that the trial court erred in valuing and distributing her NC State Employees' pension. Her first contention was that the trial court committed error when it allowed husband's expert to testify as to the value of the pension because the opinion of the expert was based in part on information received by the expert in the form of an affidavit from the Retirement Division of the Treasury Department. That affidavit contained information about wife's pay scale and retirement dates and was not introduced into evidence. The court of appeals rejected wife's position, holding that Rule 703 of the Rules of Evidence allows an expert to rely on any information of the type normally relied upon by experts in the particular field, even if that information is not in evidence and could not be introduced into evidence. Because the information in the affidavit was information any pension valuator needs to value the pension in accordance with the *Bishop* valuation methodology, the expert could use it as part of the basis for his opinion. Wife also argued that the expert opinion was inadmissible because the Affidavit contained information about her pension as of 27 days after the date of separation rather than on the specific date of separation. The court of appeals held that the expert's opinion as to the value of the pension on the date of separation was not rendered incompetent merely because he relied on the Affidavit. The 27 day difference went to the weight of the expert opinion rather than to admissibility.

Wife next argued that the trial court erred in distributing the pension. The trial court awarded husband 10% of the marital portion of the pension by ordering that a percentage of future payments be made to him – the fixed percentage method of distribution. However, because the trial court determined that the marital estate should be divided equally, the trial court also used the offset method authorized by GS 50-20.1 and awarded husband a larger percentage of other assets to offset the fact that wife received more than half of the marital portion of the pension. The court of appeals held that the trial court has the discretion to use one or both methods authorized by GS 50-20.1 to distribute the marital portion of a defined benefit plan. The court rejected wife's contention that the trial court should use the fixed percentage method rather than the immediate offset provision because pension benefits are 'speculative' and that giving husband more existing assets in exchange for her larger share of the speculative future retirement benefits was not equitable. The court of appeals held that the trial court can consider the fact that the pension benefits are not available until the future and may be speculative but has the discretion to use the offset method if it deems it appropriate to do so.

Debt: Court of appeals also rejected wife's contention that the trial court erred in classifying certain debt as marital. The first was a debt in husband's name that was incurred for his construction business. The court of appeals held that because the construction business was marital property, the debt incurred for the business by the husband was marital debt. Similarly, the court upheld the trial court's classification of a federal tax debt paid by husband the year following separation. Evidence showed that the amount paid was owed for the year before separation and the court of appeals held that evidence sufficient to support the marital classification. Finally, the court upheld the trial court decision that husband's credit card debt was marital where it was incurred to pay for a refrigerator that was marital property and used to pay debts associated with the marital construction business.

Divisible Property: Trial court made a finding that there was no evidence of an increase or decrease in the value of the marital home between the date of separation and the date of trial, therefore concluding there was no divisible property relating to the home. The court of appeals remanded this issue because the record showed wife testified that in her opinion, the house increased in value by approximately $35,000 by the time of trial. The court of appeals held that the opinion of an owner of real property is competent evidence of the value of the property, so the trial court erred in finding there was no evidence of a change in value. The wife was not required to testify whether the change was passive or active to meet her burden of showing divisible property because all change in value of marital property following the date of separation is presumed to be divisible property; burden was on husband to show the change was active rather than passive. If the trial court did not find wife's testimony credible, the order should have found there was "no credible evidence" of a change in value rather than stating that there was no evidence of change.

Wife also argued that the trial court erred in not classifying rental income generated by the marital home after the date of separation as divisible property. The court of appeals held that rental income is divisible property pursuant to GS 50-20(d)(4)(c) because it is 'passive' income received from marital property but found that the trial court did in fact classify and distribute the divisible income when it concluded that husband's postseparation payment of the mortgage and refinancing costs associated with the marital home "more than offset any divisible credit that might be due to wife by virtue of the rental income received by husband."

Divisible Debt and Postseparation Payments: Wife argued that the trial court erred in classifying as divisible debt interest payments made by husband during separation on marital debts because the October 2013 amendment to GS 50-20(b)(4)(d) changed the definition of divisible debt to include only passive decreases in debt, meaning decreases in debt caused by the action of paying the debt is no longer divisible debt. The court of appeals agreed that the amendment does mean that postseparation debt payments no longer constitute divisible debt but held that the amendment applies only to payments made on or after the effective date of the amendment, October 1, 2013. The court held that despite the fact that the trial court classified the reduction as divisible debt and distributed the reduction to husband, there was no reversible error because the court still had the authority to order that husband be 'reimbursed' for the postseparation payment of marital debt, so wife was not prejudiced by the error.

Distibution: Finally, wife argued that the trial court erred in ordering an equal division of the marital and divisible estate when she offered extensive evidence of distribution factors to support her contention that the award should be unequal in her favor. The court of appeals affirmed the trial court, holding that as long as the findings of fact show the trial judge considered the distribution factors raised by the evidence, the decision regarding distribution will be reversed

only upon a showing of an abuse of discretion. The extensive findings in this case established that the trial court did not abuse its discretion in deciding equal was equitable.

Extension of time to comply with consent judgment; modification of consent judgment

- Trial court had no authority to extend time defendant had to comply with terms of consent judgment. Rule 6(b) only allows the court to extend time periods imposed by the Rules of Civil Procedure.
- Trial court has no authority to modify property settlement provisions of a consent judgment.

Gandhi v. Gandhi, 779 S.E.2d 185 (N.C. App., December 1, 2015). Parties entered into a consent order for equitable distribution that provided husband would make lump sum payments to wife within prescribed time limits. When wife filed motion requesting husband be held in contempt for failure to pay in accordance with the time limits, the trial court found that it was "equitable and appropriate for the Court, in its discretion, to extend the deadline" contained in the consent judgment and refused to hold husband in contempt. On appeal, wife argued that the trial court had no authority to extend the time limits in the order and the court of appeal agreed. While Rule 6(b) of the Rules of Civil Procedure allows the court to grant extensions of time, such extensions only can be granted for time limits imposed by the Rules of Civil Procedure. Rule 6 does not allow a trial court to extend time limits imposed by court orders or judgments. The court of appeals also held that the trial court could not modify the terms of the consent order to give husband more time to pay. Consent judgments in domestic cases are treated the same as orders entered by the court without consent of the parties. While some statutes allow some orders to be modified – such as alimony, child support and custody – there is no authority to for a court to amend a property settlement agreement.

Classification of equity line; postseparation income from marital LLC

- Trial court erred in classifying balance owed on an equity line of credit as partially husband's separate debt where evidence established that amount borrowed before marriage had been paid off during the marriage.
- Where the amounts reflected on wife's tax returns of as "nonpassive income" from a Subchapter S corporation were retained earnings of the corporation and had not been distributed to her as a shareholder of the corporation, the trial court did not err in refusing to classify and distribute that income as divisible property.
- An owner of real property is competent to testify as to the market value of the property unless it affirmatively appears that the owner does not know the value.
- Divisible loss in value of real property must be distributed in ED judgment.
- Real property acquired after the date of separation is not marital property or divisible property unless it was acquired in exchange for marital property or if the right to receive the property was acquired before separation.
- Entire proceeds from sale of real property should not have been distributed between the parties where the parties owned only a one-half interest in the real property on the date of separation.
- There is a presumption that an in-kind division of assets is equitable and court must find the presumption has been rebutted by the greater weight of the evidence before ordering a distributive award.

- Trial court properly supported distributive award with findings of fact regarding distribution factors listed in GS 50-20(c).

Hill v. Sanderson, 781 S.E.2d 29 (N.C. App., December 1, 2015). Plaintiff husband appealed from ED judgment ordering an unequal division of the marital estate.

Equity Line of Credit. Husband first argued that the trial court erred in classifying a $100,000 equity line of credit with a $42,000 balance on the date of separation as part marital and part his separate debt. While evidence established that the line was opened before marriage for $25,000 used to buy husband's car, the $25,000 was paid in full during the marriage. The court of appeals held that the trial court erred when it concluded that $25,000 of the date of separation value of the debt was husband's separate debt because that amount had been satisfied before separation.

Income from Marital Corporation. The trial court found that after separation, wife earned salary from the marital corporation but did not receive non- salary dividends. Husband argued on appeal that wife did receive distributions as established by amounts listed on her tax returns as nonpassive income. The court of appeals held that the retained earnings of a Subchapter S corporation must be reported by shareholders as income on their individual tax returns but are not counted as property of the shareholder until the earnings are distributed to shareholders by the corporation. Because there was no evidence that the corporation had made a distribution to wife as a shareholder during separation, the trial court did not err in concluding the income was not divisible property. Instead, the amount reflected on the tax returns was retained earnings of the corporation.

Valuation of Lot. Trial court found that value of marital real property was $45,000 on the date of separation and stated that the value was based on wife's testimony. The court of appeals held that the trial court had no evidence upon which to base this finding where wife testified that she "really didn't have knowledge of that kind of stuff" when asked for her opinion on value. A court can depend on an owner's opinion as to value of real property, unless it affirmatively appears the owner does not know the market value of the property. In this case, wife's testimony established that she had no knowledge of the value.

Passive Loss of Value of Real Property. Where the evidence showed that marital real property decreased in value between the date of separation and the date of distribution due to passive market forces, trial court erred in not distributing the divisible loss when it distributed the marital and divisible estate in the final ED judgment.

Proceeds from Sale of Real Property. Trial court classified all of the proceeds from the sale of a track of real property after the date of separation as marital property and distributed them to wife. Husband argued on appeal that this was error because the parties owned only a one-half interest in the land on the date of separation. The other half of the property had been acquired by the parties following the date of separation. The court of appeals remanded for further findings by the trial court, holding that property acquired after the date of separation will not be marital property unless it is acquired in exchange for marital property and it will not be divisible property unless the right to receive the property was acquired by the parties before the date of separation.

Distributive Award. The trial court ordered a distributive award and husband argued on appeal that there were insufficient findings to show the basis for the award. The court of appeals held that while there is a presumption that an in-kind distribution is equitable and the trial court must find that this presumption has been rebutted by the greater weight of the evidence before ordering a distributive award, the trial court order was sufficient in this case where it showed the

trial court considered at least nine of the twelve distribution factors listed in GS 50-20(c) when determining how to distribute the marital and divisible estate.

Consideration of payments made after separation

- Trial court was not required to consider evidence of distribution factors when parties admitted on the court record that they agreed to an equal distribution of the marital estate.
- Trial court did not err by not classifying amounts husband paid on marital debts after separation as divisible debt where husband did not allege that he made the payments with separate funds.

Cushman v. Cushman, 781 S.E.2d 499 (N.C. App., January 5, 2016). For the first nineteen months of the parties' separation, husband's retirement benefits continued to be deposited into a marital joint checking account. The funds were used to pay the mortgage on the marital home and to pay a loan obligation of the parties' adult daughter. The parties had a separation agreement that resolved all issues arising out of the marriage except equitable distribution. However, the agreement did state that the parties agreed there should be an equal division of marital property by the court. During the ED trial, husband stated several times that he believed there should be an equal division.

The trial court entered an equitable distribution judgment dividing the marital estate equally and husband appealed. He first argued that the trial court erred when it refused to consider his payment of marital debt after separation as a distribution factor pursuant to GS 50-20(c)(11a)(acts to maintain , preserve, etc. marital property after separation) and to give him 'credit' for the payments made from his retirement funds for the mortgage and the daughter's loan. The court of appeals rejected his argument, holding that the trial court only considers distribution factors to determine whether an equal division of the marital estate is equitable. When the parties agree equal is equitable, distribution factors are not relevant and cannot be considered by the court.

Husband also argued that the payments made on the mortgage and to maintain the marital home following separation should be classified as divisible debt and that he should be credited for making the payments with his retirement funds. The court of appeals rejected this contention as well, holding that a party is entitled to "some consideration in an equitable distribution proceeding" for separate or nonmarital funds expended during separation for the benefit of the marital estate. In this case, husband's retirement benefits were marital property. When postseparation payments are made from marital property, the party making the payments is not entitled to "credit" in distribution for those payments.

Uniform Transfers to Minors Account; mixed investment account; unequal distribution

- Trial court order classifying and distributing account created pursuant to the Uniform Transfers to Minors Act in favor of minor child of the parties was void for lack of subject matter jurisdiction because minor child is owner of that account and child was not made a party to the ED action.
- Trial court did not err in classifying an investment account as mixed property and in identifying the marital and separate components of the account based on evidence presented by husband.

- There is no 'presumption" that an equal distribution is equitable. Rather, an equal distribution is mandatory unless the court determines that an equal division is not equitable.

Carpenter v. Carpenter, 781 S.E.2d 828 (January 19, 2016). Plaintiff appealed trial court judgment of equitable distribution granting an unequal distribution in favor of defendant.

UTMA Account. Plaintiff first argued that the trial court was without jurisdiction to classify and distribute an account created for the minor son of the parties during the marriage pursuant to the Uniform Transfers to Minors Act because that account actually is owned by the minor child rather than by one of the parents. The court of appeals agreed and held that because the minor child was not joined as a party to the ED case, the trial court had no jurisdiction to distribute that account.

Investment Account. Plaintiff also argued that the trial court erred in classifying an investment account as mixed property rather than entirely marital property. The trial court found that both marital and separate funds were added to the account and that the account had experienced both gains and losses during the marriage. The court concluded that defendant had shown the amount of his actual contributions of separate property but had not established the amount of the gains and losses attributable to his separate contributions, and classified the account as separate to the extent of defendant's actual contributions with the rest of the balance being classified as marital. The court of appeals affirmed the classification of the account, holding that the trial court properly classified the account based on the evidence presented by defendant.

Unequal distribution. The court of appeals agreed with plaintiff's assertion that the trial court erred in ordering an unequal distribution without specifically concluding that an equal distribution was not equitable even though the trial court specifically concluded "defendant has rebutted the presumption in favor of an equal distribution." According to the court of appeals, there is no "presumption" that equal is equitable. Rather it is the public policy of our state that an equal division must be ordered unless the court determines that an equal division is not equitable and explains why. In this case, the trial court identified distribution factors relating to defendant's disability and plaintiff's ability to work full time as the basis for the unequal distribution. However, the court of appeals had decided in another part of this opinion addressing alimony that the trial court had improperly imputed a full time salary to plaintiff without making findings of fact sufficient to support imputing income. Because the trial court used an incorrect amount of income for plaintiff when it considered the distribution factors listed in GS 50-20(c), the unequal division was not properly supported.

Dismissal for failure to settle was inappropriate; attorney fees

- Trial court erred in dismissing ED claim after concluding plaintiff "could have settled the case."
- Trial court must classify, value and distribute the marital estate even if the marital property no longer exists at the time of trial and even if the estate contains nothing but debt.
- Trial court has no authority to order attorney fees in an ED case unless the fees are ordered as sanctions for a party's wrongful removal of separate property as authorized by GS 50-20(i) or for willfully obstructing or unreasonably delaying the ED proceeding as authorized by GS 50-21(e).

Eason v. Taylor, 784 S.E.2d 200 (January 19, 2016). Despite concluding plaintiff established there was marital property and marital debt, the trial court refused to enter an ED judgment after

concluding the matter could have been settled. In addition, the trial court ordered plaintiff to pay attorney fees to defendant without any findings of fact to support why the fees were being ordered. On appeal, the court of appeals held that the trial court had a duty to classify, value and distribute the marital property and marital debt after plaintiff proved that marital property and marital debt existed. The court held that the trial court has this duty even if marital property is no longer in existence at the time of trial – in this case the marital home had been foreclosed – and the court must distribute the estate even if it is all marital debt. It was inappropriate for the court to dismiss the ED claim based on the fact that plaintiff did not attempt to negotiate with defendant. According to the court of appeals, a party has no obligation to engage in negotiation or to respond to offers to settle. In addition, the court has no authority to order attorney fees in an ED case unless fees are ordered pursuant to GS 50-20(i)(one party has removed the other's separate property and the owner incurred fees to recover the property) or pursuant to GS 50-21(e)(one party had caused unreasonable delay or has obstructed the proceedings and the other incurred additional fees because of that action).