

**Family Law Update
Cases Decided Between
October 7, 2014 and June 2, 2015**

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Custody

Cases Decided Between October 7, 2014 and June 2, 2015

Predetermined substantial change in circumstances

- Trial court entering custody order cannot designate factors or circumstances that will be deemed a substantial change in circumstances allowing future modification of custody.

Cox v. Cox v. Layne, 768 S.E.2d 308 (N.C. App., Dec. 16, 2014). Due to father's history of mental illness and threats of suicide, the trial court entered a custody order requiring that father's visitation with the children occur only if he continued to reside with his mother who would help care for the children when they were in father's custody. The court also included a provision in the custody order stating that if father's psychologist determined at any point in the future that father's condition had improved to the point where it would be safe to allow him to spend time with the children alone "it is hereby deemed to be a substantial change in circumstances affecting the welfare of the minor children and warranting lifting of the residency requirement." The court of appeals held that a trial court has no authority to include such a provision in a custody order. According to the court of appeals, a trial court cannot predetermine what will be a substantial change in circumstances in the future because "to predetermine that any future event will amount to a substantial change in circumstances warranting modification of custody is to predetermine a legal conclusion absent any findings of fact."

UCCJEA; modification jurisdiction

- Where New York juvenile court entered order "relinquishing jurisdiction to North Carolina," North Carolina had jurisdiction to adjudicate the children neglected and to enter order granting guardianship of the children to third parties.

In the Matter of: N.B., L.B., 771 S.E.2d 562 (N.C. App., April 7, 2015). Juvenile court in New York adjudicated children neglected and entered order granting dad custody in 2006. Children and dad moved to NC in 2010 and at that time, New York court entered an order "relinquishing jurisdiction" to NC. In 2013, DSS in NC filed petition alleging children were abused, neglected and dependent. Following adjudication, the NC court entered order granting guardianship of the children to third parties.

Mom argued on appeal that NC had no jurisdiction to modify the NY order. The court of appeals disagreed, holding that the NC court had modification jurisdiction because children had lived in NC at least 6 months when juvenile proceeding was initiated in this state and the New York court had concluded it no longer had jurisdiction when it entered the order "relinquishing jurisdiction" to NC.

Dismissal for failure to prosecute

- An involuntary dismissal for failure to prosecute operates as an adjudication on the merits of the claim (a dismissal with prejudice) unless the court specifies otherwise.

- Contempt and request for emergency custody were not barred by earlier dismissal of contempt and modification claims for failure to prosecute because the second set of claims contained different allegations and requested different relief than the dismissed claims.

Hebenstreit v. Hebenstreit, 769 S.E.2d 649 (N.C. App., March 17, 2015). Defendant filed a motion for contempt alleging plaintiff violated a custody order by taking the child out of state. In addition, defendant asked that the custody order be modified. When the matter came on for hearing, defendant did not appear and the trial court dismissed the claims for failure to prosecute. Later, defendant filed a second motion for contempt, alleging plaintiff continued to keep the child out of state and that plaintiff had refused to allow him to visit with child when he traveled to the other state to see the child. In addition, defendant filed a request for ex parte emergency custody along with a motion to modify. The trial court dismissed the second contempt claim and the request for ex parte custody after concluding that the earlier dismissal for failure to prosecute was a dismissal with prejudice because the trial judge did not specify it was without prejudice.

The court of appeals reversed. Acknowledging that a dismissal for failure to prosecute is a dismissal with prejudice unless the court specifies it is without prejudice, the court held that the same claims that were dismissed could not be filed again. However, the court of appeals held that the second contempt claim contained new allegations not included in the first claim for contempt and that the first motion to modify did not request emergency custody. Because the second claims were not the same claims as the first, they were not barred by the involuntary dismissal.

Legal Custody

- Trial court did not err in awarding primary legal custody to mom even though court made findings that both parents were fit and proper and that both parents were very active in the lives of the children. Findings regarding parents' inability to make joint decisions were sufficient to justify the trial court decision not to award joint legal custody.
- Trial court did not err in refusing to grant each parent a "parenting-time right of first refusal" after concluding such a provision was not in the best interest of the children.

Oltmanns v. Oltmanns, S.E.2d (N.C. App., June 2, 2015). Trial court granted primary legal custody to defendant mother and secondary legal custody to plaintiff father despite making findings that both parents are fit and proper parents and findings that both parents had played a significant role in the lives of the children. The court of appeals upheld the trial court order, holding that the findings made by the trial court were sufficient to support the conclusion that joint legal custody was not in the best interest of the children. Those findings included finding that because the parents:

"have some differing belief systems, values and priorities, there are numerous areas where they might disagree on what is best for the children. Ongoing tension between them over decisions about the children's upbringing would have a more damaging effect on the children than the unilateral decisions of either parent. ...[After reviewing testimony of family counselor, the court finds] due to the lack of trust between the parents, the differing values and the parenting styles between them, and the fact that both parents are extremely intelligent, the court finds that the

parties are unable to make decisions of significance for the children together and that the power struggles between them is more detrimental to the children than unilateral decision making authority to one parent would be. As a result, joint decision-making authority is not in the children's best interest."

The trial court supported the decision to give defendant mother primary legal custody with findings that she had demonstrated more willingness than had plaintiff father to support and foster the relationship between the children and the other parent and to consider father's opinions when making decisions about the children.

The court of appeals also rejected husband's argument that the trial court erred in refusing to give each parent a "parenting-time right of first refusal." Without explaining exactly what that means, the court of appeals held that the trial court sufficiently supported the refusal by concluding that such a provision in the custody order would not be in the best interest of the children.

Child Support

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Modification jurisdiction; UIFSA's 'play-away' rule

- Trial court had no jurisdiction to modify child support order entered in Russia when motion was filed in North Carolina by parent living in NC against other parent living in Canada.
- Modification jurisdiction rules in UIFSA require party seeking modification to go to place of other parent's residence if no state has continuing exclusive jurisdiction over the support order and parties live in different states.

Barclay v. Makarov, unpublished opinion, 767 S.E.2d 152 (N.C. App., Nov. 18, 2014). Parties were married and child was born in Russia. When parties divorced in Russia, Russian court entered order requiring father to pay child support. Thereafter, dad moved to Canada and mom and child moved to NC. After mom and child had lived in NC 9 years, mom registered the Russian support order in NC and filed a motion to modify. The NC court modified the order and father appealed. Court of appeals held that while NC court had personal jurisdiction over defendant father because he made a general appearance in the modification proceeding, the NC court had no subject matter jurisdiction to modify the Russian order due to GS 52C-6-611. According to the Uniform Interstate Family Support Act (UIFSA) – found in Chapter 52C - the court entering the support order retains continuing exclusive jurisdiction to modify the order as long as one party continues to reside in the state or country that entered the order. If there is no state or country with continuing exclusive jurisdiction, a state where both parties reside can modify the order. If the parties reside in different states and there is no state or country with continuing exclusive jurisdiction, then the party seeking modification must register the order in the state where the other parent resides and only that state has jurisdiction to modify. Unlike child custody jurisdiction, the parties to a support action can consent to jurisdiction in another state, as long as they do so in writing. In this case, however, there was no consent by father to jurisdiction in NC, so the NC court had no authority to modify the Russian support order.

Modification

- Trial court had no authority to modify portion of uninsured medical expenses to be paid by defendant when neither party requested modification of that provision in the motions they filed requesting modification of child support.

Moore v. Moore, 768 S.E.2d 4 (N.C. App., December 2, 2014). Consent order provided that defendant pay \$1,000 per month for child support, pay for children's educational expenses and pay one-half of all medical expenses. Both parties filed motions requesting modification of child support. After concluding plaintiff no longer received monthly income and defendant's income had increased, the trial court maintained the child support obligation of \$1,000 per month but ordered that defendant pay all uninsured medical expenses. Explaining that "a trial court may not, on its own motion, modify an existing child support order; its jurisdiction is limited to the specific issues properly raised by a party or interested person," the court of appeals reversed the

trial court order because neither party had specifically requested in their motions to modify that the trial court reapportion the responsibility for uninsured medical expenses.

Temporary order; imputing income; ordering payment of arrears

- Order was a permanent order rather than a temporary one even though it stated it was a temporary “non-prejudicial” order where it did not set a reconvening time and all parties treated it as a permanent order in subsequent pleadings and hearing.
- Trial court erred by imputing income to father without evidence of his earning capacity to support the amount imputed.
- Trial court erred in ordering payment of arrears when there was no evidence offered to support amount ordered to be paid.

Harnett County, obo De la Rosa v. De la Rosa, 770 S.E.2d 106 (N.C. App., March 17, 2015).

An order was entered in September 2011 ordering father to pay \$1878 per month in child support. The order stated “this is a temporary, non-prejudicial order that does not preclude either party from presenting any evidence they now could, or hereinafter acquire at any further hearings on this matter.”

In August of 2012, father filed a motion to modify the support order, alleging in his motion that there had been a substantial change in circumstances based on the fact he had been discharged from the Army and had become unemployed. In March, 2013, the court entered an order concluding there had been a change in circumstances and setting prospective support as \$222. That order also stated that it was a “temporary, non-prejudicial order” and stated that the total arrears due under the September 2011 order would be determined at a later date but in the meantime ordered father to pay \$100 per month on the arrears.

In February 2014, an order was entered that:

- 1) Concluded father was deliberately depressing income by failing to look for a job and by incurring significant debt;
- 2) Imputed income to father in an amount equal to the amount of his monthly expenses;
- 3) Set prospective support at \$774 per month;
- 4) Determined father’s arrears amounted to \$7,728; and
- 5) Ordered father to pay \$77 per month on the arrearage debt.

The court of appeals first held that the September 2011 order was a final child support order rather than a temporary order. In doing so, the court cited case law addressing child custody orders and held that the analysis in those cases applies to support orders as well as custody orders. The court held that while the order stated that it was temporary and non-prejudicial, the order did not set a clear reconvening time. In addition, the court held that both parties and the trial court treated the order as a final order rather than a temporary order by focusing on changed circumstances before modifying the support obligation. Because it was a final order, the trial court correctly required father to show a substantial change before modifying support. Father met

the burden by showing the substantial decrease in his income when he was discharged from the military.

However, the court of appeals held that the trial court erred when it imputed income to father. While agreeing the trial court could conclude father was acting in deliberate disregard of his child support obligation by refusing to look for work and by incurring substantial debt, the court erred in imputing income in the amount of father's monthly expenses. Imputed income must be based on a parent's earning capacity. As there was no evidence offered as to father's earning capacity, the court of appeals reversed the support order. The court of appeals also refused to remand the issue to the trial court because the child support enforcement agency had not attempted to show earning capacity during the original hearing.

Finally, the court of appeals reversed the trial court's judgment setting the amount of arrears owned by father under the 2011 order because the child support enforcement agency failed to produce evidence to support the trial court's finding as to the amount owed. The record on appeal showed that the trial court based the amount only on statements made in court by the child support attorney. The court of appeals stated that "the findings of fact regarding arrears are not based on any evidence and are therefore erroneous; thus, the trial court's determination of the arrears amount and payment schedule must be reversed."

Prospective vs. retroactive support; date of commencement of action; determining income

- Prospective support begins at date action for support is commenced.
- Action is usually commenced when complaint is filed.
- If action discontinues because summons expires but later is revived by alias and pluries or endorsement, date of commencement of action is date summons is revived.
- Trial court erred by determining income by averaging father's last several years of income.

Moore v. McLaughlin, unpublished opinion, S.E.2d (N.C. App., March 17, 2015). Action for support was originally commenced with the filing of the complaint on July 23, 2010. However, defendant was not served until February 24, 2012. During the time after the complaint was filed, the action discontinued twice because the summons expired due to the fact plaintiff failed to secure an endorsement or an alias and pluries summons within 90 days of the issuance of the summons.

Trial court entered a child support order on May 1, 2014 in which defendant was ordered to pay prospective support from the date the complaint was filed. The trial court determined father's income for the purpose of determining support by averaging his pay from the several years immediately prior to the hearing.

On appeal, father argued that the trial court erred by starting prospective support on the date of the filing of the complaint and the court of appeals agreed. Rule 3 of the Rules of Civil procedure provides that a civil action is commenced when the complaint is filed. However, Rule 4 provides that if a summons is not served within 60 days of issuance, the action may be continued in effect by having the summons endorsed or an alias and pluries issued within 90 days of issuance. If the

summons is not 'extended' within the 90 day period by endorsement or by the issuance of an alias and pluries summons, the action is discontinued. An action that has discontinued may be revived at any time by securing an endorsement or an alias and pluries summons. However, Rule 4 provides that the action will be deemed to have commenced on the date the action is revived.

In this case, the child support action had discontinued twice. The second time it was revived by the issuance of an alias and pluries on February 14, 2012. Defendant was served on February 24, 2012. Therefore, the court of appeals held that the trial court should have ordered prospective support from February 14, 2012 rather than from the date the complaint was originally filed on July 23, 2010. For the time period between July 23, 2010 and February 14, 2012, the trial court should have ordered retroactive support based on actual expenditures by plaintiff for the child (court of appeals noted that the statutory change allowing the guidelines to be used to determine retroactive support did not apply to this case.)

Defendant also argued the trial court erred in determining his income at the time of trial by averaging the income he earned in the several years immediately preceding the child support hearing and the court of appeals agreed. The court of appeals pointed to evidence in the record that defendant's employment had changed significantly in those years and that at the time of trial, he was not earning the same amount of compensation from his present employment as he did in those previous years. The court of appeals held that child support cannot be based on a parent's average income over the past several years because support must be based on actual present income at the time the child support order is entered. However, the court of appeals cites the case of *Holland v. Holland*, 169 NC App 564 (2005), wherein the court of appeals indicates that a trial court may use evidence of income over the past several years to determine a parent's actual present income.

Domestic Violence

Cases Decided Between October 7, 2014 and June , 2015

Act of Domestic Violence

- Evidence was insufficient to support trial court conclusion that defendant committed an act of domestic violence.
- Where alleged act is threat of imminent serious bodily injury, plaintiff must show that threat is imminent. Threat that was not the reason plaintiff requested the DVPO but was intended to show history of violence between the parties was not sufficient to support conclusion that plaintiff feared imminent serious bodily harm.
- Where act alleged is continued harassment, plaintiff must establish that harassment rises to such a level as to inflict substantial emotional distress.

Jackson v. Jackson, unpublished opinion, 768 S.E.2d 63 (N.C. App., Dec. 16, 2014).

Plaintiff's evidence showed:

Feb. 13, 2013: defendant threatened to kill plaintiff

April 13, 2013: the parties separated

November 3, 2013: defendant hacked plaintiff's computer

November 13, 2013: plaintiff filed for DVPO

Trial court granted DVPO after concluding defendant had committed acts of domestic violence by placing plaintiff in fear of imminent serious bodily injury (the threat) and by placing plaintiff in fear of continued harassment that rises to such a level as to inflict substantial emotional distress (the hacking of her computer). The court of appeals reversed, holding that neither conclusion was supported by evidence in the record. According to the court of appeals, while defendant admitted to saying to plaintiff "I ought to kill you" on Feb. 13, 2013, there was no evidence that this threat caused plaintiff to fear "imminent" serious bodily injury at the time she filed for the DVPO. Plaintiff testified that she did not fear defendant and had attempted to reconcile with him before the computer incident. While the evidence of the threat illustrated the history of abuse between the parties, the primary motivation for plaintiff's request for the DVPO was the hacking of her computer. The court of appeals stated that the DVPO must be based on "the specific event that gives rise to plaintiff's complaint, rather than the history between the parties." In addition, the court of appeals held that while plaintiff's testimony established that the hacking of the computer probably amounted to harassment within the meaning of the DVPO statute, plaintiff testified that she had suffered no substantial emotional distress as a result of the incident.

Equitable Distribution

Cases Decided Between October 7, 2014 and June 2, 2015

Consideration of tax consequences; Kelley Blue Book as evidence of value; classification of joint accounts

- A trial court cannot consider the tax consequences of a distribution if no evidence is presented about the consequences.
- Trial court erred in not admitting copy of Kelley Blue Book offered to prove value of marital cars but the error was not prejudicial because trial court considered owner's opinion of value based on the Blue Book.
- Funds gifted to spouse from a parent during the marriage cannot be classified as separate property when spouse seeking separate classification does not show the funds existed on the date of separation.

Power v. Power, 763 S.E.2d 565 (N.C. App., October 7, 2014). Court of appeals affirmed trial court's equitable distribution judgment, rejecting all three of defendant's arguments on appeal.

First, defendant argued that the trial court was required to consider the tax consequences of the distribution. The court of appeals held that consideration of tax consequences is a distribution factor and the trial court can consider only those distribution factors about which evidence is presented during the trial.

Second, defendant argued that the trial court erred when it denied his request to introduce copies of the Kelley Blue Book to prove the value of marital cars. The court of appeals agreed that the trial court erred in concluding that the Blue Book was inadmissible hearsay, noting that the Kelley Blue Book falls within the exception to the hearsay rule found in Rule 803(17). However, because the trial court allowed both parties to testify as to their opinions as to the value of the cars, defendant was not prejudiced by the failure of the trial court to admit the Blue Book.

Third, defendant argued that funds given to him and plaintiff during the marriage were gifts from his father to him and should be classified as his separate property. The court of appeals held that to establish that the funds were separate property defendant first was required to show that the funds were in existence on the date of separation. The only evidence introduced concerning the funds showed they were deposited into a joint account during the marriage. The joint account was acquired during the marriage, so the entire value of the account on the date of separation was presumed to be marital. Defendant had the burden of tracing out any separate funds in the account remaining on the date of separation, but he offered no evidence other than evidence that his father had given money to the parties sometime during the marriage.

Sanctions

- Where defendant did not receive adequate notice that trial court was going to consider imposing sanctions based on defendant's failure to file an inventory affidavit, the sanction order entered by the trial court must be reversed.

Green v. Green, 763 S.E.2d 540 (N.C. App., October 7, 2014). Trial court imposed sanctions against defendant for failure to file inventory affidavits in accordance with GS 50-21. The

sanction imposed was the court's acceptance of the classification, valuation and distribution contentions contained in the inventory affidavit filed by plaintiff. The court of appeals reversed the ED judgment after concluding defendant received no notice that sanctions were being considered by the court before the sanctions order was entered. The record showed plaintiff filed no motion requesting sanctions and the record contained no certificate of service showing that a court order entered directing defendant to file the affidavit by a specific day or face sanctions actually was served upon defendant.

Divisible property; distributions from LLC after date of separation; distribution factors

- Trial court erred in concluding payments made to husband from marital LLC after the date of separation were management fees that belonged to husband rather than divisible property where couple filed tax returns indicating that the payments were shareholder distributions from the LLC.
- Trial court did not err in concluding that the postseparation increase in value of marital LLC was the result of husband's actions after the date of separation and therefore was not divisible property.
- Trial court properly considered as a distribution factor that assets owned by the marital LLC had been transferred to the LLC by husband's parents as part of their estate planning.

Montague v. Montague, 761 S.E.2d 71 (N.C. App., December 16, 2014). Trial court classified LLC created during the marriage as marital property but concluded that payments made to husband during separation from the LLC were paid for his management services following separation and therefore were not divisible property. The court of appeals reversed, holding that evidence in the record showed the parties had represented on their tax returns that the payments made to husband were shareholder distributions rather than compensation to husband in order to receive more favorable tax treatment. The court of appeals held that the parties "are bound by their established methods of operating the business" and cannot not ask that the payments be treated differently for purposes of equitable distribution. Because shareholder distributions from an LLC generally are passive income from marital property earned during separation and before the date of distribution, they should have been classified as divisible property.

The LLC increased in value after the date of separation. The trial court concluded that the increase was the result of husband's efforts during separation and therefore did not classify the increase in value as divisible property. Wife argued on appeal that because husband was paid a management fee for his work after separation, his efforts could not be considered as the cause of the increase in value and the appreciation should have been classified as divisible property. The court of appeals agreed that if husband had been paid for his efforts, the increase in value of the LLC would be divisible property. However, as the court of appeals already had concluded that the payments made to husband by the LLC were shareholder distributions rather than management fees, the court held husband was not compensated for his efforts.

Finally, wife argued that the trial court erred in considering as a distribution factor the fact that property owned by the LLC had been transferred to the LLC by the parents of husband as part of their estate planning. The court of appeals upheld the trial court, concluding that consideration of the parents' intent at the time of the transfer was appropriate pursuant to both GS 50-20(c)(10) ("the economic desirability of retaining an asset free from any claim by the other party) and (12) (the catch-all).

Classification of investment account; stipulation; marital debt

- Where party seeking separate classification of an investment account opened during the marriage and owned on the date of separation fails to establish how much of the account balance on the date of separation can be traced to deposits of his separate funds, the entire account balance must be classified as marital.
- Trial court erred in classifying insurance policy as marital after finding the parties had stipulated that it was marital where record showed the parties actually had not so stipulated.
- Trial court did not err in classifying line of credit as separate debt of defendant where defendant failed to show the debt was incurred for joint benefit of the parties even though funds from the line of credit were used for family household expenses. Party seeking marital classification of debt has burden to prove debt was incurred for the joint benefit of the parties.
- Trial court is not required to consider postseparation debt payments made on marital debt if the payments were made from marital funds.
- Defendant was not entitled to credit for the payment of homeowners' dues on marital residence where defendant showed the dues were a marital debt.
- Amounts charged to credit card during the marriage for "women, alcohol, cigars and gambling" were not debts incurred for the joint benefit of the parties.
- Trial court did not err in ordering that defendant's IRA be used to pay a distributive award in an amount in excess of 50% of the amount in the IRA.
- Funds gifted to spouse from a parent during the marriage cannot be classified as separate property when spouse seeking separate classification does not show the funds existed on the date of separation.

Comstock v. Comstock, 771 S.E.2d 602 (N.C. App., April 7, 2015). Court of appeals affirmed most of the trial court's order for equitable distribution but remanded on one issue.

Investment account: court of appeals rejected defendant's argument that trial court erred in classifying investment account as entirely marital property where both parties agreed he had deposited separate funds into the account during the marriage. The court of appeals held that when the account is opened during the marriage, the entire date of separation value is presumed to be marital and the burden is on the party seeking the separate classification to show how much of the date of separation value is separate. In this case, the trial court held, and the court of appeal agreed, defendant failed to meet his burden.

Whole Life Insurance Policy: court of appeals remanded case to trial court because final order classified the policy as marital and stated that the classification was based upon stipulation of the parties but record showed parties actually disagreed as to classification.

Home Equity Line of Credit: defendant testified that line of credit was used to pay for household expenses. Plaintiff did not dispute the use of the funds but testified she did not know about the line of credit and did not sign anything when it was incurred. Court of appeals upheld trial court classification of the debt as defendant's separate debt, holding trial court acted within its discretion when it determined defendant failed to meet his burden of showing the debt was incurred for the joint benefit of the parties. Rather than focusing on the use of the funds, the court of appeals held that because plaintiff had no knowledge of the debt when it was incurred or when

the funds were being used to pay expenses, the trial court did not err in refusing to classify the debt as marital.

Postseparation Debt Payments: trial court did not err in refusing to give defendant ‘credit’ in distribution for the payments he made on marital debt during separation. The court appeals held that the record showed the payments all were made from funds in the marital investment account. The court also held that it is up to the party requesting credit to show the postseparation payments were made with separate funds. In addition, the trial court did not err in failing to give defendant credit for payments made to the home owners association for dues becoming due following separation. The court of appeals held defendant offered no evidence that the dues were a marital debt.

Marital debt: where record showed charges to defendant’s credit card during the marriage were made for “women, alcohol, cigars and gambling,” trial court properly concluded debt was not incurred for joint benefit of the parties.

Distributive award: trial court did not err in ordering payment of distributive award from defendant’s separate IRA even though amount of award exceeded 50% of the value in the account. The court of appeals rejected argument that because the ED statute generally does not allow the court to distribute more than 50% of a pension or other retirement account, the court erred in this case. The court of appeals explained that while GS 50-20.1 does restrict the trial court from distributing more than 50% of an account absent the few exceptions in the statute, the limitation does not apply when the court is not distributing a marital asset. In this case, the trial court was not and could not have ‘distributed’ the IRA because it was not marital. However, the court could use it as a source of payment for a distributive award and such a use would not be subject to the 50% limited found in GS 50-20.1.

Interlocutory order: while the new GS 50-19.1 allows for the immediate appeal of an equitable distribution judgment even when other claims remain pending in the trial court, that provision does not cover the entry of injunctions and ‘domestic relations orders’. Therefore, those orders could not be appealed even though the final order of ED was appealed because other claims remained pending in the trial court.

Jurisdiction over an LLC

- An LLC is a legal entity and trial court must have jurisdiction over the corporation before the court can order the LLC to do anything or to make any orders affecting property belonging to the LLC.
- Trial court in equitable distribution proceeding may not order that a party transfer assets of an LLC – even if the LLC is marital property – unless the LLC is made a party to the equitable distribution proceeding.

Campbell v. Campbell, S.E.2d (N.C. App., June 2, 2015). The parties to the equitable distribution action were the sole shareholders and officers of an LLC that was marital property. The trial court entered a preliminary injunction:

- 1) Ordering that defendant transfer back to the LLC \$350,000 she had taken out of the LLC's operating fund after the date of separation;
- 2) Declaring that defendant was not a manager of the LLC even though corporate filings indicated she was a manager; and
- 3) Ordering that the LLC be operated by an interim controlling manager during the litigation and ordering the LLC to indemnify the interim manager.

The trial court denied defendant's request to join the LLC as a party to the action.

The court of appeals held that the trial court had no jurisdiction to issue the preliminary injunction due to a lack of jurisdiction over the LLC. Because the LLC is a legal entity, the trial court cannot order the transfer of property belonging to the LLC or order the LLC to act or affect the LLC's corporate structure by appointing a controlling manager without first making the LLC a party to the case.

Alimony

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Illicit sexual behavior

- Trial court erred in denying alimony to wife after concluding she was a dependent spouse, husband was the supporting spouse, and husband had engaged in illicit sexual behavior before the date of separation.

Fleming v. Fleming, unpublished opinion, 765 S.E.2d 553 (N.C. App., October 7, 2014). Trial court denied wife’s request for alimony after concluding that she was a dependent spouse, husband was supporting spouse, and husband had committed acts of illicit sexual behavior before the date of separation. The trial court order explained the denial by stating that wife had received sufficient postseparation support while the alimony case was pending. The court of appeals reversed, holding that the alimony statute requires an award of alimony when the supporting spouse has committed illicit sexual behavior before the date of separation and the trial court has no discretion to deny alimony in that circumstance. The court of appeals held that the trial court could consider postseparation support payments when determining whether to award retroactive alimony, but could not deny prospective support.

Imputing income

- Alimony award must be based on actual income at the time of trial unless trial court concludes party is suppressing income in bad faith.
- In the context of alimony, bad faith is when party’s actions to reduce or suppress income are motivated by a desire to avoid his/her reasonable support obligation.
- Voluntary reduction in income alone is not sufficient to support conclusion of bad faith.

Upchurch v. Upchurch, unpublished opinion, 767 S.E.2d 704 (N.C. App., December 2, 2014). Trial court ordered defendant to pay support to plaintiff after concluding that income should be imputed to him. The trial court based the decision to use earning capacity rather than actual income on findings that defendant “exercised bad faith by selling his lawn care business, stopping his employment in the lawn care business, and choosing to live off of his inheritance in light of his potential obligation to support plaintiff.” While the trial court’s findings of fact showed defendant voluntarily sold his business, thereby significantly reducing his income, there were no additional findings to support the conclusion that his actions were motivated by his desire to “avoid or frustrate his support obligation.” Simply finding he voluntarily reduced his income was insufficient.

Spousal Agreements

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Summary Judgment on Claim of Duress

- Defendant's pleadings were sufficient to plead duress both as an affirmative defense to plaintiff's claim for enforcement of a separation agreement and as a counterclaim for rescission of a separation agreement.
- Defendant's affidavit in response to plaintiff's motion for summary judgment was sufficient; there is no requirement that an affidavit filed in response to a motion for summary judgment show new information from that contained in the party's original pleading when the party moving for summary judgment has not established that he/she is entitled to judgment as a matter of law.
- Defendant did not ratify the separation agreement as a matter of law by operating under the agreement for over one year where the alleged duress continued throughout that period of time.
- Because defendant raised genuine issues of material fact, trial court erred in granting summary judgment for plaintiff.

Pilos-Narron v. Narron, unpublished opinion, 771 S.E.2d 633 (N.C. App., March 3, 2015).

Plaintiff filed action for breach of separation agreement. Defendant filed Answer alleging duress as an affirmative defense to the enforcement claim and counterclaiming for rescission of the contract based on duress. The trial court granted summary judgment for plaintiff. On appeal, defendant argued summary judgment was not appropriate because he raised material issues of fact as to whether he entered into the Agreement under duress and whether Plaintiff's "continual threats" compelled him to continue to comply with the contract. Plaintiff argued in response that summary judgment was appropriate because 1) defendant did not sufficiently plead duress in his Answer; 2) he did not "adequately forecast new evidence" in the affidavit he filed in response to plaintiff's motion for summary judgment; and 3) defendant ratified the agreement as a matter of law by continuing to operate under the agreement for well over one year before raising the duress issue.

The court of appeals disagreed with Plaintiff's contentions and held that summary judgment for plaintiff was improperly granted because defendant raised genuine issues of material fact.

Sufficiency of pleading: Defendant's Answer pled duress as a defense to plaintiff's claim for breach of contract but did not include facts to support the claim of duress. Defendant's counterclaim stated the facts in support of the duress claim but did not actually use the word 'duress'. The facts alleged defendant signed the separation agreement only because plaintiff told defendant she had proof defendant was a homosexual, she would produce this evidence to their children and to his workplace, and that she would spread rumors about his sexuality if he did not comply with her demands.

Plaintiff argued the pleadings were insufficient because they did not specifically state that the facts alleged implicated defendant's "free will" and because the counterclaim did not include the word "duress". The court of appeals held that, given the rule of notice pleadings, defendant's facts were sufficient both to state the affirmative defense of duress and the counterclaim for rescission.

Defendant's affidavit in response to plaintiff's motion for summary judgment. Plaintiff argued that Rule 56 required defendant to produce an affidavit in response to her motion for summary judgment that contained "new information" from that contained in his pleadings. She argued that because his affidavit simply restated the facts alleged in his Answer, she was entitled to summary judgment as a matter of law. The court of appeals disagreed, holding that the affidavit needs new information only when plaintiff's pleading clearly shows plaintiff is entitled to judgment as a matter of law, which plaintiff's pleading did not do in this case.

Ratification. Plaintiff also argued summary judgment was property because defendant ratified the agreement as a matter of law by living under the agreement without alleging duress for well over one year. The court of appeals held that ratification cannot occur while the duress continues. Because plaintiff's threat continued throughout the time after the agreement was executed and defendant asserted his claim of duress, ratification did not occur.

Breach of contract claim and claim for rescission of contract; compulsory counterclaims

- Breach of contract claim was not a compulsory counterclaim to an action seeking to have separation agreement set aside due to duress, coercion and undue influence at the time of formation.

Jones v. Jones, unpublished opinion, S.E.2d (N.C. App., March 17, 2015). Former husband filed action seeking to void separation agreement based on allegations of duress, undue influence and coercion that allegedly occurred at the time the contract was executed. Former wife filed an Answer denying the allegations and alleging ratification as a defense. Former wife then filed this separate action alleging former husband breached the contract. Defendant former husband filed a Rule 12(b)(6) motion to dismiss, arguing lack of subject matter jurisdiction because plaintiff's claims were compulsory counterclaims to the action he filed seeking to void the contract.

The trial court denied the motion to dismiss and the court of appeals affirmed. First, the court of appeals held that because many of occurrences that formed the basis for wife's claim for breach of contract occurred after her Answer was filed in husband's case, the breach of contract claim could not be compulsory counterclaim to his action. Second, the court of appeals held that to be a compulsory counterclaim pursuant to Rule 13 of the Rules of Procedure, the claim must arise out of the same transactions or occurrences as the claim in the complaint. Husband's claims and wife's claims for breach both arose out of the same contract but otherwise their claims raised different issues of law and fact.

Claim for rescission of contract; ratification

- Trial court properly granted summary judgment for defendant on plaintiff's claim seeking to rescind separation agreement based on duress, undue influence and unconscionability where plaintiff clearly ratified the agreement by accepting benefits under the contract after the duress and coercion ended.

Jones v. Jones, unpublished opinion, S.E.2d (N.C. App., March 17, 2015). Former husband filed action seeking to void separation agreement based on allegations of duress, coercion and unconscionability. Former wife answered by denying the allegations and asserting ratification as a defense. The trial court granted defendant former wife's motion for summary judgment, concluding plaintiff had ratified the contract as a matter of law. The court of appeal agreed. For more than a year after the contract was signed, plaintiff performed the contract by paying alimony to defendant as required by the contract and by accepting the property distributed to him by the agreement. The court of appeals rejected his argument that because he did not receive as much property as he should have, he could not be found to have accepted 'benefits' under the contract. The court of appeals held that by performing the agreement after all duress and coercion had ended clearly constituted ratification as a matter of law.

50C Civil No-Contact Orders

Cases Decided and Legislation Enacted Between October 7, 2014 and June 2, 2015

Legislation

S.L. 2015-25 (H 79). AN ACT AMENDING THE LAWS PERTAINING TO CIVIL NO-CONTACT ORDERS TO CLARIFY THAT A KNOWING VIOLATION OF A CIVIL NO-CONTACT ORDER IS PUNISHABLE BY CIVIL OR CRIMINAL CONTEMPT AND CLARIFYING THE SCOPE OF STAY ON PROCEEDINGS WHEN A CASE IS ON APPEAL.

Effective October 1, 2015 and applies to orders entered on or after that date. The legislation amends GS 50C-10 to clarify that a violation of a Chapter 50C civil protective order is enforceable by civil or criminal contempt (to reverse a court of appeals opinion holding that only civil contempt is available under Chapter 50C).