Family Law Update
Cases Decided and Legislation Enacted Between June 1, 2016 and September 20, 2016

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Custody

Cases Decided/Legislation Enacted Between June 1, 2016 and September 20, 2016

Third party custody; conduct inconsistent with protected status

- Determination of whether a parent has acted inconsistent with protected status must be made on a case-by-case basis.
- Ceding physical custody or decision-making authority to third party is not conduct inconsistent with protected status if the grant of custody and authority is intended to be temporary.
- The fact that parent signed consent order granting custody to grandmother did not mean she waived her protected status in a custody matter initiated by a different non-parent third party.

Weideman v. Shelton, _N.C. App._, 787 S.E.2d 412 (June 7, 2016). The court of appeals upheld the trial court's decision to dismiss the non-parent claim for custody after concluding that the mother of the child had not waived her constitutional right to exclusive custody when she entered into a consent order granting another non-parent sole custody of the child.

The mother of child, Erin Shelton, signed a consent custody order giving her mother, Dawn Weideman, exclusive custody of the child. Following the entry of that consent order, Wise requested to intervene in the custody proceeding and requested custody. Wise claimed that the mother's act of signing the consent order granting exclusive custody to Weideman was conduct inconsistent with her protected status. Wise argued that because mom had signed the consent order, the trial court could apply the best interest of the child test to determine whether to grant Wise's request for custody rights to the child.

Findings of fact made by the trial court indicated that Shelton had a history of untreated mental health issues that had caused her to "self-medicate" with drugs and alcohol. As a result, she had experienced times when she was unable to care for her minor child. During those times, she had relied on both Weideman and Wise to care for the child. At one point, Shelton signed a "Guardianship Agreement" purporting to grant guardianship rights to both Weideman and Wise. That agreement specified that the parties all intended for the guardianship be temporary. Following the execution of the Guardianship agreement, further problems arose and Wise refused to allow Shelton access to the child when the child was in Wise's care. Weideman, however, encouraged interaction between Shelton and the child. In 2012, Wiedeman filed a Chapter 50 custody proceeding and a consent order was entered between Wiedeman and Shelton granting Wiedeman sole custody of the child. Both testified that this consent custody order was intended to be a "temporary arrangement" and that Shelton believed Weideman would return custody to her when she was ready to parent her child. Shelton believed the custody order would

keep the child in the care of Wiedeman who, unlike Wise, would allow Shelton to have access to her child.

According to the court of appeals, a parent who cedes all or a portion of her custody rights to a third party without intending that the arrangement be temporary has acted inconsistent with her protected status and has waived her constitutional right to custody. However, a temporary relinquishment alone is insufficient to establish that a parent has acted inconsistent with her protected status. Because the trial court found that Shelton did not intend for the custody order to grant permanent custody to Wiedeman and that she believed the custody order was the only way to be sure she had the opportunity "to assume her role as [the child's] mother in the future," the court of appeals held that the trial court acted properly when it dismissed Wise's claim for custody.

Parenting Coordinator; authority to alter visitation details; no authority to reduce/offset amounts owed for past due child support

- Trial court did not err by allowing parenting coordinator to "make minor changes to the custody/visitation order" to resolve disputes surrounding pickup time, delivery and transportation to and from visitation.
- Trial court did err by ordering that amounts paid by father to cover mother's responsibility for the fee of the parenting coordinator reduce the amount he owed for child support arrears.

Nguyen v. Heller-Nguyen, _N.C. App._, 788 S.E.2d 601 (July 5, 2016). The court of appeals stated that the trial court was properly exercising discretion pursuant to GS 50-92(b) when it authorized a PC to "make minor changes to the custody/visitation order," rejecting mother's argument that the trial court impermissibly modified the custody order when it authorized the PC to change the pick-up times for visitation provided in the custody order when the PC determined such changes were necessary to "resolve disputes surrounding transition time, pickup, delivery, and transportation to and from visitation."

However, the trial court did err when it ruled that if father paid mother's share of the PC fees, dad would be entitled to offset the amount paid from the amount he owed as past due child support. According to the court of appeals, GS 50-10(a) provides that support payments vest when they become due and cannot be modified or 'offset' by the court "for any reason."

Parenting Coordinator; ability of court to address issues raised by PC following entry of final custody order

- Trial court did not improperly modify the existing custody order by granting request made by Parenting Coordinator that parents be ordered to attend 'divorce camp' as recommended by reunification therapist and by ordering that father's visitation granted in custody order be exercised at homes of father's relatives.

- Order that parties pay for therapeutic 'divorce camp' was not a child support order.

Tankala v. Pithavadian, _N.C. App._, 789 S.E.2d 31 (July 19, 2016). The first custody order in this case was entered when the child was 5 years old. Mom was awarded primary physical custody with dad having visitation every other weekend. When the child was 10 years old, dad filed a motion requesting mom be held in contempt for violating the visitation provisions in the order and requesting that custody be modified because mom had been "actively alienating" the child from father. The trial court modified the initial custody order. Findings of fact to support modification included findings that the child was not visiting the father and "did not appreciate the need to have a relationship with his father." In addition, the court found mother had "overly nurtured" the child and had "stunted his social and emotional development." The modified custody order granted the parents joint custody with mom continuing to have primary physical custody and dad having weekend and holiday visitation. The court also ordered reunification therapy for dad and son and specified that the "timing and methods of the therapy shall be at the discretion of the therapist." Mom and dad were ordered to "follow all recommendations" of the reunification therapist and a PC was appointed.

After almost one year of working with the parties, the reunification therapist concluded that "a more intensive treatment approach" was necessary. The therapist recommended that the parents and the child attend a four-day "divorce camp" for high-conflict cases. The camp is in California and costs $9,000 per week.

The PC agreed with the therapist and instructed the parties to attend the camp but the parties did not go. Approximately one year later, the PC filed a motion pursuant to GS 50-97 requesting that the court order the parties to follow the recommendation and attend camp.

Following the hearing, the court modified provisions of the custody order addressing father's visitation to provide that father would visit with the child in the home of his relatives. The goal was to increase the child's comfort level with the father gradually and away from the influence of the mother. In addition, the amended order required that dad's visitation alternate between the D.C./Maryland area (closer to father's residence) and North Carolina. The order required that the child's visits with the paternal relatives and his father "take priority over any other activity" of the child and provided that if reunification did not "progress" as a result of the new visitation plan, the parties were ordered to attend the divorce camp.

Mom appealed the modified order, arguing in part that the court erred by modifying the order when neither party had filed a motion to modify and the court had not concluded there had been a substantial change in circumstances.

The court of appeals rejected mom's contention that the trial court modified the custody order. Instead, the court held that the new order simply implemented the original order. The court stated:

> Disputes over variations in custody arrangements including timing, location, and treatment often lead to costly and time-consuming litigation that can hinder progress in child custody cases and cause delays which are detrimental to the best interests of the children involved. To avoid such delays, trial courts prepare comprehensive child custody orders, like the North Carolina Custody Order governing the parties in this case, and appoint parenting coordinators authorized to facilitate the parties' compliance with court orders without having to seek additional orders from the court in every instance. In cases involving minor children requiring mental health treatment, trial courts often delegate to therapists control over treatment and visitation, but remain available to assert the court's authority if
> needed.
>
> The Order does not modify the terms of custody, but rather provides specific requirements within the scope of the North Carolina Custody Order. The Order does not modify the earlier award of primary custody to Mother and visitation to Father. The requirement that the parties and [the child] attend the high-conflict divorce camp as recommended by the reunification therapist and the parenting coordinator is consistent with the requirement in the earlier order that the parties abide by those professionals' recommendations for treatment and visitation scheduling. Although the North Carolina Custody Order did not mention an out-of-state therapeutic camp for the family, it specifically ordered reunification therapy and provided that the timing and methods of therapy were left to the reunification therapist to decide. Similarly, specific provisions for [the child's] visitation with Father and Father's family in the Order do not conflict with provisions in the North Carolina Custody Order. Accordingly, no motion for custody modification was required… ."

The court of appeals also rejected mom's contention that the trial court improperly modified the existing child support order in the case when it ordered that the parents pay the cost of the divorce camp. The court held that the cost of travel for visitation and the cost for therapy was ordered to be paid by the parties as part of the original custody order and that such expenses are not child support.

Modification of Virginia custody order

- Trial court erred by modifying Virginia custody order without first concluding there had been a substantial change in circumstances.
- Virginia custody order was a permanent custody order where it was not entered without prejudice, it did not set a clear reconvening date, and it resolved all issues pending before the court at the time the custody order was entered.

Hatcher v. Matthews, _N.C. App._, 789 S.E.2d 499 (August 2, 2016). Virginia custody order granted sole legal custody and primary physical custody to mother and visitation to father. The Virginia order was registered in North Carolina and father filed a motion for custody. Following the entry of an ex parte order and a temporary order, the court held a custody hearing and awarded joint legal custody to mother and father, keeping primary physical with mother and visitation with father. On appeal, father argued that the trial court erred by granting primary physical custody to mother, but the court of appeals did not reach that issue. Instead, the court of appeals reversed and remanded the case to the trial court after concluding that the trial court erred in modifying custody without first concluding there had been a substantial change in circumstances since the entry of the Virginia order. The court held that the Virginia order clearly was a final custody order because 1) it was not entered without prejudice to the parties, 2) it did not set a clear time for another court hearing – a "clear reconvening time", and 3) it resolved all issues pending at the time the custody order was entered. The North Carolina order was a modification even though physical custody did not change because the new order granted joint legal custody instead of sole legal to mother as provided in the Virginia order.

Venue

- Trial court has no authority to change venue when defendant has not objected to venue.
- Venue for custody is where the child resides or is physically present or where either parent resides.

Zetino-Cruz v. Benitz-Zetino, _N.C. App._, _S.E.2d_ (August 16, 2016). Grandmother filed custody action in Durham County, alleging that she and the children resided in Lee County and that the location of the parents was unknown. During a pretrial hearing, the court inquired as to whether any party or the children lived in Durham. In response, plaintiff's counsel informed the court that the children currently were present in Durham County but lived in Lee County. The location of the parents still was unknown and neither parent had filed an Answer or made an objection to venue. On its own motion and over objection of plaintiff's counsel, the court transferred the case to Lee County after concluding that "the convenience of the parties, the convenience of the court, the ties of the minor children and plaintiff to the County in which they reside, and in the interest of justice Durham County is not the appropriate forum."

The court of appeals held that "the trial court had no authority to enter an order *sua sponte* changing venue where no defendant had answered or objected to venue." Noting that GS 50-13.5(f) specifies that venue for custody is proper in the county where the child or the parents reside or in the county where the child is physically present, the court of appeals held that even if venue is improper, a court cannot change venue on its own motion. The court noted that – in dicta – earlier opinions indicate that a *sua sponte* change of venue may be appropriate when the court concludes that a "fair and impartial trial cannot be held in the county in which the action is pending."

Required review hearings mean order is a temporary order; ordering mental health treatment

- Where custody order required review hearings 30, 60 and 90 days following entry of the order to assess mother's progress with therapist, the order was a temporary order.
- Trial court has authority to order a parent to receive mental health counseling as part of a temporary custody order but the court cannot order that a parent believe the other parent did not abuse the children and cannot order that the therapist "wholeheartedly accept" that the mother's beliefs about the father's conduct are untrue.

Lueallen v. Lueallen, _N.C. App._, _S.E.2d_ (September 6, 2016). The trial court awarded primary physical and sole legal custody of child to the father after finding that mother had a false belief that father had physically abused the child and that father was a "druggie" and an "alcoholic." The trial court concluded that these "baseless and false" beliefs "created an environment of investigation, physical, psychological and emotional that has created anxiety in the child and has not been in the child's best interest." The court ordered that mother receive mental health treatment and therapy to enable her to believe father did not physically abuse the child and that he is not addicted to drugs or alcohol and to help her understand the impact of her false accusations on the child. In the 'final' custody order, the trial court ordered court reviews of the progress of her therapy, setting them at 30, 60 and 90 days following the entry of the order. The order provided that mother's visitation would be determined based on her progress in therapy. Mother appealed.

The court of appeals first held that the custody order was a temporary order rather than a final determination. The order set clear "reconvening dates" with relatively brief periods of time between reviews and the order made it clear that mother's visitation schedule would not be finally resolved until after the final review hearing.

Regarding the substance of the custody order, the court of appeals rejected mother's argument that the findings of fact were "haphazard" and unclear and constituted "mere recitations of testimony," holding instead that the findings actually resolved all factual issues raised by the evidence and adequately explained the basis for the trial court's determination of best interest. The court also rejected mother's argument that the evidence did not support the trial court's findings of fact after determining mother actually was not contesting the sufficiency of the evidence but rather simply was arguing that the judge erred by failing to adopt her interpretation of the evidence presented.

The court of appeals did agree with mom's contention that the trial court overreached its authority when it ordered that she come to believe father did not abuse the child and is not addicted to drugs and alcohol before she can have full visitation with her child. Citing a similar order reviewed and overruled in *Peters v. Pennington*, 210 NC 1 (2011), the court held that a trial court cannot dictate what a parent believes. The court pointed out, however, that the trial court can make decisions based on a parent's actions and can order mental health therapy with

the goal of causing a parent to "conform [her] behavior and speech when dealing with [the minor child] fully in accord with the trial court's findings and conclusions." In other words, the court cannot order that the mother actually believe what the court finds to be true, but the court can order that she act and speak as though she believes what the court finds to be true whenever she is with her son. The court of appeals also explained that while a therapist cannot be told what facts to believe when making judgments about the mother's mental health, the trial court can order that the therapist read the entire court order before beginning treatment.

Denial of visitation to parent

- A parent cannot be denied all contact with child unless court concludes either that parent is unfit or that visitation with the parent is not in the child's best interest.
- Findings of fact must support trial court's conclusion that visitation is not in the child's best interest.
- Findings of fact must be supported by evidence and cannot be based solely on judge's personal opinions.

McNeely v. Hart, *unpublished opinion*, _N.C. App._, _S.E.2d_, (September 20, 2016). Trial court denied mother's request for visitation after concluding that it was not in the best interest of the child to spend time with her because she engaged in prostitution. The court made a finding that "the act of performing sexual favors for individuals in exchange for money is illegal, immoral, and unhealthy for an individual's physical, moral, and spiritual well-being." Evidence presented during the hearing indicated that the child had never been exposed to any aspect of plaintiff's prostitution and that plaintiff was very good with children, had a good relationship with the minor child and was otherwise a fit and proper parent.

The court of appeals vacated the denial of visitation after concluding that the custody order did not contain sufficient findings of fact to support the conclusion that mother's visitation with the child was not in the child's best interest. According to the court of appeals, the trial court "failed to make any findings of fact regarding what effect, if any, the plaintiff's prostitution had on the minor child" and instead based the conclusion on "the trial court's personal opinion."

Child Support

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Imputing income; ability to pay purge based on imputed income

- Findings of fact supported trial court's conclusion that mother was deliberately depressing her income in bad faith disregard of her child support obligation, so trial court did not err in imputing income to her.
- Trial court did not err in holding mom in civil contempt for failure to pay in accordance with the temporary support order after concluding she had the ability to pay based in part on her earning capacity rather than her actual income.
- Trial courts should attach child support worksheet to child support orders to show how support was determined.

Lueallen v. Lueallen, _N.C. App._, _S.E.2d_ (September 6, 2016). The trial court imputed income to mother in an amount she testified she would earn if she became fully employed after concluding she was deliberately depressing her income in bad faith disregard of her child support obligation. The court of appeals affirmed the trial court, concluding that evidence that mother voluntarily quit a teaching job without first finding another job, stated that she had been looking for another job but had not actually applied for anything, and stated in an email to father that she did not believe mothers should have to pay child support all supported the trial court's conclusion that she was acting in bad faith.

The trial court also held mother in civil contempt for failing to pay as directed by the temporary child support order. The court of appeals rejected mom's argument that the trial court erred in concluding she acted willfully in failing to pay and in concluding she had the present ability to comply with the purge condition. The court of appeals held that the trial court could consider the imputed income to support the conclusion mom had and has the ability to comply with the support order. In addition, the court of appeals noted that evidence established mom clearly had some funds during the relevant time periods but chose to pay nothing. The court stated that this was "relevant to determining her motivation and bad faith." Mom also paid very large sums as attorney fees and expert witness fees and testified that she did not obtain financial assistance from anyone to pay the fees.

Domestic Violence

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5th Amendment Right

- Witness waives his 5th Amendment right by failing to invoke that right.
- While a witness does not waive his 5th Amendment right simply by voluntarily testifying, he does waive the privilege with regard to matters covered by his voluntary testimony.
- Defendant's constitutional rights were not violated by the questioning of the trial judge where all of the questions related to matters covered by defendant's direct examination.

Herndon v. Herdon, _N.C._ , 785 S.E.2d 922 (2016), *reversing* _N.C. App. _, 777 S.E.2d 141 (2105).

Shea Denning wrote a Criminal Law Blog post about the court of appeals' opinion in this case last fall. See "Herndon v. Herndon and Pleading the Fifth," http://nccriminallaw.sog.unc.edu/herndon-v-herndon-and-pleading-the-fifth/ (October 15, 2015). The following is her summary of the court of appeals decision:

In May 2014, Steven Herndon filed a complaint and motion for a domestic violence protective order against his wife, Alison Herndon. Mr. Herndon alleged that Ms. Herndon had drugged his food and drink on at least three occasions, causing him to pass out and become ill. Mr. Herndon said that after he became incapacitated, Ms. Herndon went out to see her lover, leaving their four minor children at home unsupervised. Mr. Herndon said he lived in fear that his wife would cause him imminent and serious bodily injury.

At the hearing to determine whether a domestic violence protective order should be entered, Ms. Herndon's counsel called her client as a witness. The following exchange then took place:

THE COURT: All right. Before we do that, let me make a statement. You're calling her. She ain't going to get up there and plead no Fifth Amendment?

COUNSEL: No, she's not.

THE COURT: I want to make sure that wasn't going to happen because you—somebody might be going to jail then. I just want to let you know. I'm not doing no Fifth Amendment.

Ms. Herndon testified. The trial judge did not allow Mr. Herndon's counsel to cross-examine her, but asked questions herself. Some of the questions concerned whether Ms. Herndon had admitted

in text messages that she was drugging her husband. Ms. Herndon answered many of the judge's questions with variations of "I don't recall" or "I don't remember."

After questioning Ms. Herndon, the trial judge stated: "I find your limited testimony you did talk about to be not credible that you don't remember." The court subsequently entered a written domestic violence protective order against Ms. Herndon.

Ms. Herndon alleged on appeal that the trial court's warnings violated her Fifth Amendment rights. A majority of the court of appeals panel agreed, vacating and remanding the case for a new hearing "that disregards Ms. Herndon's previous testimony." The majority acknowledged that a witness cannot voluntarily take the stand to testify and also claim the right to be free from cross-examination on matters raised by her own testimony on direct examination. *See Brown v. United States*, 356 U.S. 148, 155-56 (1958) (explaining that a witness who voluntarily testifies "cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute").

However, the court concluded that the trial court's admonishment left Ms. Herndon with the impermissible choice of "forgoing her right to testify at a hearing where her liberty was threatened or forgoing her constitutional right against self-incrimination." The court explained that "[a]lthough Ms. Herndon's direct testimony did not address her alleged drugging of her husband, the trial court asked her about text messages that corroborated this allegation." Ms. Herndon's responses, which the trial court later relied upon in finding her not credible may have resulted from her reluctance to assert her Fifth Amendment right. And her reluctance may have been attributed to the trial court's warning that she might be imprisoned if she did so.

Judge Bryant dissented on the basis that the defendant waived her Fifth Amendment privilege; thus, the trial court's warnings had no prejudicial effect

Supreme Court decision

In her blog, Shea pointed out some concerns about the court of appeals decision. The supreme court also had concerns and reversed the court of appeals. The court stated:

> "We acknowledge that the trial court's conduct was inappropriate and the trial judge should not have threatened defendant with jail; however, we do not believe the trial judge's actions amounted to a constitutional violation."

The court first held that defendant waived his right to invoke the privilege by not actually invoking the privilege. According to the court, "defense counsel did not make an offer of proof, object, or otherwise demonstrate a concern for defendant's constitutional rights." In addition, while agreeing with the court of appeals that a defendant does not waive the privilege simply by voluntarily testifying, the court held that a witness does waive the right to invoke the privilege with regard to matters raised by the witness's voluntary testimony. In this case, the court held that all of the court's questions to defendant related directly to matters defendant testified about on direct.

Personal jurisdiction

- Long-arm authorization and minimum contacts are required for DVPO.
- Mother failed to meet her burden of proof to establish personal jurisdiction when she offered no evidence of where act of domestic violence occurred and no evidence of defendant's contacts with North Carolina after defendant filed a motion to dismiss for lack of personal jurisdiction.

Mannise v. Harrell, _N.C. App._, _S.E.2d_ (September 6, 2016). Plaintiff mother filed a complaint for a DVPO, alleging father threatened to kill her when he found out she planned to move with their child from Pennsylvania to North Carolina. While the complaint alleged mother was a resident of North Carolina at the time the action was initiated, it did not allege where the threat took place, that mother was a resident of North Carolina when the threat occurred, or that defendant had any connection to North Carolina at all. She did allege defendant was a resident of Pennsylvania. The trial court granted an *ex parte* DVPO and after father was served in Pennsylvania, he immediately filed a motion to dismiss for lack of personal jurisdiction over him.

The trial court denied his motion to dismiss on two grounds. First, the court determined that North Carolina courts had personal jurisdiction over father because mother's attorney 'forecast' in argument that evidence would show the alleged act of domestic violence had occurred in this state when defendant threatened plaintiff over the telephone while she was in North Carolina.

Second, the trial court concluded that personal jurisdiction in the form of long-arm authorization and minimum contacts are not necessary for the entry of a DVPO. Citing appellate opinions from other states, the trial judge concluded that when a DVPO is a prohibitory only, personal jurisdiction is not required. According to the cited appellate opinions, if the DVPO only prohibits a defendant from committing acts that are illegal anyway, such as acts which constitute domestic violence, the DVPO is prohibitory only and requires no personal jurisdiction. Minimum contacts and long-arm authorization only are necessary if the order required defendant to "undertake any actions."

The court of appeals disagreed with the trial court and the appellate opinions from the other jurisdictions and held that "the entry of a domestic violence protective order must be consistent and compatible with North Carolina's long-arm statute, and also must comport with constitutional due process." The court of appeals explained that all DVPOs, whether they only prohibit acts of domestic violence or whether they also require a defendant to act, have both "legal and non-legal consequences" for a defendant. Citing the collateral consequences of a DVPO, such as the impact in a future custody proceeding of a conclusion that a defendant committed an act of domestic violence and the fact that potential employers frequently ask job applicants about DVPOs, the court held that "the issuance of a domestic violence protective order implicates substantial rights of a defendant." Therefore, the court stated, a "[p]laintiff is required to prove personal jurisdiction over defendant. To hold otherwise would violate Due Process and offend traditional notions of fair play and substantial justice."

The court of appeals then held that plaintiff in this case had failed to meet her burden of proof required to defeat defendant's motion to dismiss. When a defendant raises the issue of personal jurisdiction, plaintiff is required to produce evidence such as testimony or at least an affidavit to establish the basis for personal jurisdiction. In this case, the trial judge concluded that the fact defendant threated plaintiff over the telephone while she was present in North Carolina, along with "the parties historical and present connections to this state, the viciousness of the precipitating event, and the nature of the threats to exact revenge," established both long-arm statutory authorization for jurisdiction and minimum contacts. The court of appeals held that the trial court erred in basing this conclusion on argument of counsel alone. Plaintiff's complaint did not state that the act had occurred in North Carolina or say anything about the parties' contacts with North Carolina except for the information contained in the Affidavit as to the Status of the Minor Child attached to the complaint, and plaintiff did not respond to defendant's motion to dismiss with any sort of affidavit or testimony to give details about contacts or the telephone call.

Divorce and Annulment

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Marriage

- Marriage is not void or voidable simply because no license was issued.
- Marriage was valid where ordained minister performed ceremony even though the parties had not obtained a license and stated at the time of the ceremony they thought the marriage was not "legal" due to the lack of a license.

In the Matter of the Estate of Peacock, _N.C. App._, 788 S.E.2d 191 (June 21, 2016). Following the death of Richard Peacock, the clerk of court determined Bernadine Peacock was not an heir of the estate because Richard and Bernadine were not married. The clerk found that an ordained minister had performed a traditional Episcopal ceremony for the couple in Richard's hospital room on the day before his death but concluded that, because the two had not obtained a marriage license before the ceremony, the marriage was not valid. The superior court agreed with the clerk of court but the court of appeals reversed. Citing numerous cases, the court held that case law clearly provides that the failure to obtain a license does not make an otherwise valid marriage either void or voidable. The failure to obtain a license subjects the minister who performs the ceremony to a fine, but the marriage is unaffected.

The court of appeals also rejected the argument that the parties did not actually 'consent' to the marriage as required by GS 51-1 because although they wanted to marry they did not believe they would be legally married as a result of the ceremony without the license. The court of appeals held that there is no requirement that the parties "understand or agree with all of the legal consequences of the marriage." The statute requires only that the couple "consent to presently take each other as husband and wife."

Postseparation Support and Alimony

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Establishment of support obligation; earning capacity

- Alimony is determined by income and expenses of the parties at the time of the order.
- Trial court has the discretion to make alimony payable from time request for alimony was filed.
- Alimony must be based on actual present income at time of alimony trial unless court determines party is depressing income in bad faith.
- Once court determines party is depressing income in bad faith, amount of income imputed must be based on evidence of party's present earning capacity.
- Trial court did not err in including amount of past annual bonuses in supporting spouse's present actual income where evidence showed she had received a bonus each of the preceding four years.

Burger v. Burger, _N.C. App._, _S.E.2d_ (August 16, 2016). Trial court determined unemployed husband "had a naïve indifference toward his self-support" and imputed minimum wage. After determining he was the dependent spouse and wife was a supporting spouse, the court ordered wife to pay alimony for 10 years with the term beginning when the husband filed his claim for alimony, approximately four years before entry of the alimony award.

On appeal, wife first argued that the trial court should have imputed more than minimum wage to husband because he had a college degree, a master's degree, and a law degree. The court of appeals upheld the trial court conclusion that evidence at trial established husband did not have the capacity to work as a lawyer due to health problems. In addition, wife offered no evidence of husband's earning capacity other than a credit card application he filled out five years before trial indicating he had annual income in the amount of $60,000.

Wife also argued the trial court erred in including an amount in the determination of her annual income that reflected the amount of bonuses she had received in years past. She argued there was no evidence she would continue to receive the bonuses in the future. The court of appeals upheld the trial court, explaining that the trial court had the discretion to include the bonus amount in the calculation of present actual income because wife had received the bonuses for each of the prior four years and there was no evidence indicating she would not receive similar bonuses in the future.

Finally, the court of appeals rejected wife's argument that the trial court erred in making the 10 year term of the alimony award begin near the time husband filed his request for alimony rather than making the term begin at the time the alimony order was entered. The court of appeals held that the trial court has the discretion to determine the point in time the award begins. Further, the trial court was not required to consider the income and expenses of the parties during the time

before the alimony trial when it decided to start the award before the alimony trial. The award must be based on economic circumstances of the parties at the time the alimony order is entered, even if the court makes the award payable at some point in time before the alimony trial.

Equitable Distribution

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Family Law Arbitration Act

- Where arbitration agreement provided clearly that a party who failed to object in writing to a violation of the arbitration agreement waived the ability to challenge the decision of the arbitrator and defendant failed to object to the arbitrator's actions in writing during the arbitration process, trial court erred by vacating the arbitration award based on defendant's claims that arbitrator failed to abide by the agreement and committed errors of law.
- Oral objection by defendant and statement on the record that he planned to file a motion objecting to the arbitrator's pretrial decisions was insufficient to preserve defendant's objection when agreement specified that objections must be made in writing.

Eisenberg v. Hammond, _N.C. App._, 788 S.E.2d 619 (July 5, 2016). Trial court vacated decision by arbitrator after determining arbitrator violated the terms of the arbitration agreement and made decisions contrary to law by allowing the daughter of the parties to testify outside of the presence of the parties. However, the arbitration agreement specified that any objection to decisions made by the arbitrator during the arbitration process must be made in writing. The court of appeals reversed the decision of the trial court to set aside the arbitration award after concluding defendant waived his right to object to the actions of the arbitrator by proceeding with the arbitration process without submitting his objections in writing. The fact that defendant's counsel noted the objections orally on the record before the beginning of the arbitration hearing and stated his intention to submit the written objection was not sufficient to meet the requirements of the agreement to preserve his objections.

Resulting trust; constructive trust; marital property

- Trial court has the authority to dismiss *sua sponte* a complaint for failure to state a claim when it is clear from the face of the complaint plaintiff has not stated a cause of action.
- A resulting trust arises when one person pays for property but another person takes title. The trust will be imposed in favor of the person paying for the property.
- A resulting trust must arise at the time title is conveyed. Paying down a mortgage following transfer of title will not support imposition of resulting trust.
- Marital property does not exist outside of an equitable distribution proceeding, so property owned by husband at time of his death could not be marital property because parties had not separated at the time of his death and neither party had requested equitable distribution.
- Plaintiff failed to state a claim for imposition of a constructive trust where she failed to allege that defendant took title to property in violation of a duty owed to her or as the result of fraud.

Tuwamo v. Tuwamo, _N.C. App._, _S.E.2d_ (July 19, 2016). Plaintiff's husband paid the mortgage on the home in which they lived during their marriage and eventually paid the entire debt. Following the death of husband, husband's brother filed proceeding to evict plaintiff from the home because title to the home was in his name and had been since the time it was purchased. Plaintiff initiated this action, arguing that a resulting trust should be imposed or in the alternative, a constructive trust. After denying both plaintiff's and defendant's request for summary judgment, the trial court dismissed plaintiff's complaint after concluding she failed to state a cause of action.

The court of appeals first held that a trial court has the authority to *sua sponte* dismiss a complaint for failure to state a claim pursuant to Rule 12(b)(6) when it is clear from the face of the complaint that plaintiff's allegations do not support a cause of action. Therefore, it was not error for the trial court to dismiss plaintiff's complaint even though defendant did not specifically request a Rule 12(b)(6) dismissal.

The court then affirmed the trial court's conclusion that the facts alleged by plaintiff do not support imposition of a resulting or a constructive trust. Regarding the resulting trust, the court first held that plaintiff wife did not pay the mortgage on the house. Instead, the debt was paid by her husband and she brought this action in her own name and the estate of her husband was not involved. The court of appeals rejected her argument that imposition of the resulting trust would result in the creation of marital property. According to the court of appeals, marital property exists only in the context of equitable distribution. As plaintiff and her husband were not separated at the time of his death and neither had filed a claim for equitable distribution, wife had no individual claim to the property simply because her husband may have had an equitable interest in it.

In addition, a resulting trust only applies if the purchase price is paid by the person seeking the imposition of the trust at the time title is taken to the real property. In this case, the bank actually supplied the money used to purchase the land when title was taken in the name of husband's brother. Plaintiff's complaint alleged only that her husband paid off the mortgage debt incurred by brother after he took title to the property and therefore was insufficient to support a claim for a resulting trust.

The court of appeals also rejected plaintiff's argument that her facts would support imposition of a constructive trust. A constructive trust arises when "one obtains title to property in violation of a duty he owes to another" or when there is "actual or presumptive fraud" usually involving "the breach of a confidential relationship." As wife made no allegations of breach of duty or fraud by defendant, her complaint failed to state a claim for the imposition of a constructive trust.

Imposing Constructive Trust; Necessary Party Must Be Joined Before Trust is Imposed

- Trial court erred in conducting the hearing to determine whether a constructive trust should be imposed on funds owned by husband's mother at the same time the court conducted the hearing to determine whether husband's should be joined as a necessary party to the equitable distribution proceeding.
- Legal owner of property must be joined as a party before court imposes a constructive trust on the property because legal owner has the right to participate as a party in the proceedings to determine whether the trust should be imposed.

Tanner v. Tanner, _N.C. App._, _S.E.2d_ (August 2, 2016). Husband filed action for equitable distribution. Wife alleged husband transferred funds to his mother immediately before husband and wife separated and alleged he made the transfer to wrongfully remove the funds from equitable distribution. Wife requested that the court join husband's mother as a necessary party to the ED case and impose a constructive trust on the funds owned by her so the funds could be distributed as marital property.

The trial court conducted a single hearing on both the issue of whether husband's mother should be joined and whether a trust should be imposed. The mother was present at the hearing because she was called as a witness to testify but she was not represented by counsel, she did not offer evidence and she did not cross-examine witnessed. Following the hearing, the trial court entered an order joining the mother as a party and imposing a constructive trust on the funds owned by her. The order stated that mother was a necessary party but no summons was issued to mother and mother was not served with process.

Mother appealed and the court of appeals vacated the order imposing the constructive trust. According to the appellate court, the mother was a necessary party that had to be joined ***before*** the trial court considered imposing the constructive trust on her property. As a necessary party, she had the right to participate as a party in the hearing to determine whether she should lose ownership of her property. Because she was not a party at the time of the hearing to determine whether the trust should be imposed, the order imposing the constructive trust was void.

Divisible property

- Trial court erred in awarding 'all gains and losses' in a marital savings account between the date of separation and the date of distribution where there was no evidence of the value of the account on the date of distribution.
- Gains and losses of the account may be divisible property but only if evidence establishes the value of the account on the date of distribution to show the value of the increase or decrease in marital property between the date of separation and the date of distribution.

Burger v. Burger, _N.C. App._, _S.E.2d_ (August 16, 2016). Trial court classified the "Wells Fargo Savings Plan" owned by the parties on the date of separation as marital property and established that the date of separation value was $498,672. The equitable distribution judgment

distributed the date of separation value of the plan equally between the parties and also provided that each party would receive "all passive gains and losses accruing on his or her respective share from the date of separation through the date of division of the account." Wife argued on appeal, and the court of appeals agreed, the trial court erred in distributing postseparation gains and losses between the parties without first classifying the gains and losses as divisible property. Because no evidence was offered to establish the specific amount of gains and losses on the date of distribution, the court could not classify the gains and losses as divisible property.

Note: At one point in the opinion, the court refers to the account as a "401k" plan. If an account is a retirement account pursuant to GS 50-20.1, that statute requires that the court distribute the marital portion of the account and requires that the award "shall include gains and losses on the prorated portion of the benefit vested on the date of separation." The opinion in *Burger* seems to assume the account being classified and valued was not a retirement account subject to the provisions in GS 50-20.1.

Changing title to real property; Rule 70; *nunc pro tunc*

- While Rule 70 allows a judge to 'direct' that another person execute a deed when a party ordered to do so has not executed the deed, the person has no authority to execute the deed until the judge enters a written order. An oral directive from the court is insufficient.
- *Nunc pro tunc* cannot be used to back date a civil order/judgment unless the order/judgment actually was reduced to writing and signed by the judge on the date in the past.
- An ED judgment is not effective to transfer title to real property unless the judgment is filed with the Register of Deeds.

Dabbondanza v. Hansley, _N.C. App._, _S.E.2d_ (August 16, 2016).

- Wife and husband held joint title to a track of real property. In an ED judgment, the court ordered that title be conveyed to wife and ordered that husband execute a deed transferring his interest to wife. When husband failed to execute the deed, the court orally directed the clerk of court to execute the deed pursuant to Rule 70 of the Rules of Civil Procedure. The clerk executed the deed.
- After the clerk executed the deed, defendant in this case obtained a judgment against husband.
- After defendant's judgment was docketed, wife obtained a written order from the court in the earlier ED trial directing the clerk to execute the deed. The written order was entered *nunc pro tunc* to the date the judge orally directed the clerk to execute the deed.
- Wife thereafter sold the property to plaintiffs in the present action.
- Defendant attempted to execute the judgment against the property now held by plaintiffs, arguing that his judgment had attached to husband's interest in the property.
- Plaintiffs filed this action seeking to quiet title and enjoin defendant's attempt to execute against the track of real property.
- Trial court held that held that defendant's judgment did not attach to plaintiff's property.

- Defendant appealed.

The court of appeals reversed the trial court and held that defendant's judgment did attach to plaintiff's property.

Rule 70. The court of appeals held that the deed executed by the clerk changing title from husband and wife to wife alone was invalid because the court had not ordered the clerk to execute the deed. Rule 70 of the Rules of Civil Procedure allows the court to order a third party to execute a deed when the party ordered to do so fails to execute the deed. However, a court order is not entered until it is reduced to writing, signed by the judge and filed with the clerk of court. In this case, the court orally directed the clerk to act but did not enter an order. The oral directive was insufficient to authorize the clerk to act. Since the clerk deed was ineffective to transfer title, defendant still held title to the property when defendant docketed the judgment against defendant.

Nunc pro tunc. The trial court's attempt to *nunc pro tunc* the written Rule 70 order back to the date the clerk signed the deed was ineffective. A civil judgment/order cannot be entered *nunc pro tunc* unless 1) the order actually was entered on the date in the past but the record does not reflect the order due to a clerical mistake and 2) no prejudice will result to a party as a result of the *nunc pro tunc* order. An oral rendition of judgment by the court is not entry of judgment pursuant to Rule 58 of the Rules of Civil Procedure. If an order was not originally written and signed, the court has no authority to use *nunc pro tunc* to back date an order.

In this case, no order was entered at the time the court directed the clerk to sign the deed so the attempt to *nunc pro tunc* the written order back to that date was ineffective. In addition, because defendant's judgment attached to the real property before the *nunc pro tunc* order was entered, he clearly would have been prejudiced by the back dating as it would have invalidated the lien he had on the real property.

ED judgment. Finally, the court of appeals held that the ED judgment itself did not convey title to wife. While it is possible for the ED judgment to contain all necessary language to be an instrument of conveyance, the judgment must be filed as a deed in order to actually convey title to the real property. In this case, the ED judgment clearly stated that the title to the property transferred to wife but the judgment had not been recorded in the office of the Register of Deed.

Unequal distribution

- Unequal distribution that resulted in husband receiving 99% of the marital and divisible estate was not an abuse of discretion.
- Where seven distribution factors weighed in favor of husband and only one weighed in favor of an equal division, court of appeals could not hold distribution was an abuse of discretion.

Shope v. Pennington, *unpublished opinion*, _N.C. App._, _S.E.2d_, (September 6, 2016). This is an unpublished opinion so it is not binding precedent. However, it is an interesting application of established principles. The parties were married only 6 and ½ years and the main marital asset was a farming business operated primarily by husband. The trial court awarded 99% of the total value of the marital and divisible estate to husband after making numerous findings of fact as to distribution factors.

On appeal, wife argued that the distribution was "nonsensical" and "did not comport with the remedial ends of equitable distribution." She also argued that "the purpose of equitable distribution is to create mathematical parity among the parties to the marital estate and contend[ed] that a judgment that does not substantially achieve that end is reversible."

The court of appeals rejected her contentions, holding that long established principles of equitable distribution vest complete discretion in trial judge to determine a distribution that is fair in a case. As long as the trial court finds at least one distribution factor, there is no basis for reversal on appeal absent an abuse of discretion. The court of appeals held that where, as in this case, the trial court has found seven factors that 'favor' husband, the trial judge must be affirmed because the appellate court "simply lacks a judicially manageable standard to make a better fairness determination than the trial court."

Classification; required findings of fact

- No asset can be presumed to be marital property without a prima facie showing of the circumstances of its acquisition.
- Trial court must make findings of fact to support classification of each asset or debt.
- Classification of property as marital requires findings of fact to establish the property was acquired during the marriage and owned on the date of separation.

Uhlig v. Civitarese, *unpublished opinion*, _N.C. App._, _S.E.2d_, (September 20, 2016). While this is an unpublished opinion and as such does not have precedential value, the case provides a helpful review of established principles.

The parties disputed the classification of several accounts and offered conflicting evidence as to the nature and origins of the accounts. The trial court classified one account as marital, despite making findings of fact that wife deposited funds she had received as inheritances during the marriage. The court made a conclusion of law that wife "failed to meet her burden of proof" to show that all or part of the account was separate property on the date of separation. However, the court did not make findings to support the classification of the account as marital. The court of appeals held that any marital classification must be supported by findings to show when the account was created and that it existed on the date of separation. The trial court erred by reaching a conclusion of law, *i.e.*, that wife failed to meet her burden of proof, before making the required findings of fact to support the conclusion.

Similarly, the trial court made findings of fact that another account had been opened during the marriage by the husband and was owned on the date of separation. The trial court then concluded that "husband met his burden of proof" to show the account was separate property without making findings of fact to support that conclusion. According to the court of appeals, the separate classification must be supported with findings to show the property falls into a category of separate property. In this case, husband testified that the account contained funds he inherited during the marriage but the ED judgment made no findings as to that fact.