Family Law Update
Cases Decided and Legislation Enacted Between June 16, 2015 and September 15, 2015

[Including case summaries reprinted from Summer 2015 for discussion of ED, alimony and spousal agreements]

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Domestic Violence

Cases Decided/Legislation Enacted Between June 16, 2015 and September 15, 2015

Relief; "catch-all" provision

- The broad 'catch-all' provision in GS 50B-3(a)(13) authorizing the court to include as part of a DVPO "any additional prohibitions or requirements the court deems necessary to protect any party or minor child" does not give trial court the authority to order law enforcement to search defendant's person, vehicle and residence.
- The catch-all provision in GS 50B-3(a)(13) allows the trial court to order additional prohibitions on or requirements for the parties to the case. The plain language of the statute indicates that the court has no authority to order persons other than parties to act.

State v. Elder, 773 S.E.2d 51 (N.C., June 11, 2015), affirming on different grounds, NC App., 753 SE2d 504 (2014). The trial court entered an ex parte DVPO against defendant pursuant to GS Chapter 50B. In addition to ordering defendant to surrender all firearms, the DVPO also ordered – pursuant to the catch-all provision in GS 50B-3(a)(13) – that the law enforcement officer serving the DVPO upon defendant search the defendant's person, vehicle and residence and seize any and all weapons found. As a result of that search, defendant was charged with manufacturing a controlled substance, maintaining a place to keep controlled substances, and possession of drug paraphernalia. Defendant made a motion to suppress the evidence found during the search, arguing the trial court had no authority to order the search. The trial court denied the motion to suppress but the court of appeals reversed. The Supreme Court affirmed but modified the court of appeals' decision.

According to the Supreme Court, because all of the relief authorized in GS 50-13 relates to the trial court's ability to order parties to the case to act or not act, the final provision allowing the court to order "any additional prohibitions or requirements" clearly allows only prohibitions or requirements directed at the parties. The court held that a broader interpretation that would allow the court to order searches by law enforcement would violate the federal constitution.

Dating relationship

- "Dating relationship" should be interpreted broadly to cover a wide range of romantic relationships.
- Parties who "dated" for three weeks were in a dating relationship.
- A showing of subjective fear is all that is required to prove plaintiff was placed in fear of continued harassment; plaintiff is not required to prove that defendant intended to cause fear of continued harassment.
- Evidence that plaintiff suffered anxiety and sleeplessness and altered her daily activities was sufficient to show actual substantial emotional distress.

Thomas v. Williams, 773 S.E.2d 900 (N.C. App, July 7, 2015). Plaintiff Caroline Thomas and defendant Kevin Williams met in April 2014 and "dated" for less than three weeks. "Dated" is the term used in the opinion. There is nothing in the case indicating whether "dated" means that

the parties went to dinner and a movie two or three Friday nights, met for coffee on a couple of occasions, hung out with mutual friends a few times, or something else.

On May 1, 2014, Caroline told Kevin she had no interest in continuing the relationship and asked him to stop calling her. But Kevin continued to attempt to contact Caroline through phone calls, voicemails and text messages. In June, 2014, Caroline filed a 50B proceeding and the trial court entered a DVPO after concluding Caroline and Kevin had been in a dating relationship and that Kevin's conduct throughout May and June "placed plaintiff in fear of continued harassment that rises to such a level as to inflict substantial emotional distress."

Kevin appealed, arguing that he and Caroline did not have a personal relationship. In affirming the trial court's conclusion that the parties were in a dating relationship, the court of appeals noted that GS 50B-1(b)(6) provides that:

1. A dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of a relationship; and

2. A "casual acquaintance or ordinary fraternization between persons in a business of social setting is not a dating relationship."

Because neither party argued that they never actually dated – Kevin argued only that they did not date very long – the court does not discuss at all the type of activities that constitute dating. Instead, the court held that the only issue to be resolved in this case was "how long a "continuous" "romantic" relationship must exist in order for it to exist "over time."

In answering this question, the court held that the term 'dating relationship' in this context should be interpreted broadly enough to cover a wide range of 'romantic' relationships. To support this conclusion, the court noted that the exclusion of only "casual acquaintances" and people who merely "fraternize" with each other indicates a legislative intent to exclude from the definition of dating relationship "only the least intimate of personal relationships." According to the court, this expression of legislative intent coupled with the rule of statutory construction that remedial statutes such as the 50B statute be interpreted broadly, means that the mere fact that a relationship is "short-term" does not "categorically preclude" that relationship from being one covered by Chapter 50B.

Instead, the court listed "six non-exhaustive factors" that should be used to determine if a dating relationship existed:

1. Was there a minimal social interpersonal bonding of the parties over and above [that of] mere casual [acquaintances or ordinary] fraternization?
2. How long did the alleged dating activities continue prior to the acts of domestic violence alleged?
3. What were the nature and frequency of the parties' interactions?
4. What were the parties' ongoing expectations with respect to the relationship, either individually or jointly?
5. Did the parties demonstrate an affirmation of their relationship before others by statement or conduct?
6. Are there any other reasons unique to the case that support or detract from a finding that a "dating relationship" exists?

Applying these factors to the case at hand, the court found that dating for less than three weeks "appears to exceed the minimal social interpersonal bonding" discussed in factor #1 and the fact that plaintiff became afraid of defendant after less than three weeks addressed factor #2. The fact that factors #3, 4 and 5 were not addressed by the trial court order was "not dispositive." With regard to factor #6, the court found it significant that defendant continued to harass plaintiff for two-to-three months after plaintiff tried to end the relationship.

Evidence that defendant contacted plaintiff repeatedly over the space of a month after plaintiff told him not to contact her and continued to contact her after plaintiff filed for a DVPO, that he left her one 'hostile' voicemail, that she was afraid of him, and that his actions caused her anxiety and sleeplessness and caused her to alter her normal daily activities due to her anxiety and inability to work, was sufficient to support conclusion that defendant placed plaintiff in fear of continued harassment and caused her substantial emotional distress. Court of appeals rejected defendant's argument that his actions would not cause a reasonable person to experience fear, holding that subject fear is all that is required to prove an act of domestic violence.

Recording ex parte hearings; fear of continued harassment; surrender of firearms

- GS 7A-198 requires that all "civil trials" in district court be recorded. Because a hearing on a request for an ex parte DVPO is a "civil trial" within the meaning of that statute, those hearings must be recorded. [*But see* S.L. 2015-173 described below, amending GS 7A-198 for ex parte DVPOs entered on or after July 31, 2015].
- Ex parte hearings before magistrates do not need to be recorded.
- Evidence that defendant threatened to commit suicide was sufficient basis to order him to surrender all firearms in the ex parte order.
- A subjective rather than objective test is used to determine whether plaintiff was in fear of continued harassment.
- A showing that plaintiff's fear was so great that she could not perform tasks required by her employment is sufficient to show she suffered actual substantial emotional distress.
- Trial court erred in ordering surrender of firearms in DVPO without finding one of the factors listed in GS 50B-3.1(a).

Stancill v. Stancill, 773 S.E.2d 890 (N.C., June 16, 2015). Plaintiff requested an ex parte and one-year DVPO based on her allegation that defendant placed her in fear of imminent bodily injury and in fear of continued harassment. The trial court granted both an ex parte DVPO and a one-year DVPO after concluding defendant committed an act of domestic violence by placing plaintiff in fear of continued harassment. The conclusion was based on evidence that in 2007 or 2008 (years before this action was filed), defendant admitted to plaintiff that he had tried to kill her. One year before institution of this action, defendant sent plaintiff a text message stating "I am killing myself. I need you." During the month before plaintiff filed this action, defendant sent numerous messages telling plaintiff that because she refused to reconcile with him, she would have to "take the wrath that comes," and reminding her that he could be very mean when he was unhappy.

Defendant appealed both the ex parte DVPO and the final DVPO.

Regarding the ex parte, defendant first argued that the trial court erred by not recording the ex parte hearing. The court of appeals agreed after concluding that the ex parte hearing is a civil trial within the meaning of GS 7A-198, a statute which requires that all civil trials be recorded. [**NOTE:** Following this decision, the General Assembly enacted S.L 2015-173 to exempt ex parte and emergency hearings pursuant to Chapters 50B and 50C from the reporting requirement for orders entered on or after July 31, 2015]. However, because the defendant could show no prejudice resulting from the failure to record in this case, the court did not remand the case to the trial court.

Defendant also argued that the trial court made insufficient findings of fact to support the ex parte DVPO. The court of appeals disagreed, holding that while findings of fact in the ex parte DVPO "must identify the basis for the act of domestic violence," the order in this case was sufficient because it referred to plaintiff's complaint and to the text messages from defendant attached to plaintiff's complaint and the trial court checked the box on the form beside the ultimate finding of fact that defendant placed plaintiff in fear of continued harassment.

The court of appeals also rejected defendant's argument that the trial court erred in ordering surrender of firearms in the ex parte because there was no evidence to support the finding that he threatened suicide. The court of appeals disagreed holding that the evidence of defendant's recent statements considered in light of the statements made years earlier were sufficient to cause plaintiff to believe defendant was threatening to kill himself.

Regarding the final DVPO, defendant argued that the evidence was insufficient to cause a reasonable person to be in fear of continued harassment. The court of appeals held that the act of domestic violence is determined based upon the subjective fear of the plaintiff and there is no requirement that the fear be objectively reasonable. In this case, evidence established that plaintiff actually felt fear based on defendant's communications that tormented and terrorized her. In addition, the evidence that she was unable to engage in her profession of selling homes because she feared defendant would wait for her in an empty house to attack and kill her was sufficient to establish that she suffered actual substantial emotional distress. According to the court of appeals, "a level of fear so great that a person cannot perform the tasks required by her employment would likely cause substantial emotional distress."

The court of appeals did agree with defendant's contention that the trial court erred in ordering surrender of firearms as part of the final DVPO because the trial court failed to make findings indicating the existence of one of the factors listed in GS 50B-3.1(a). According to the court of appeals, an order of surrender is not appropriate unless the trial court checks one of the boxes finding that one of the factors exist. This indicates without specifically holding that the trial court cannot use the catch-all provision in GS 50B-3(a)(13) to support the order of surrender based on the more general conclusion that the relief is necessary to protect the plaintiff or a minor child.

Legislation

S.L. 2015-173 (H 59). Regarding 50B and 50C Orders: No Recording Required for Ex parte Hearings. Amends GS 7A-198 in response to the *Stancill* decision discussed above. That statute provides that all civil trials in district court must be recorded. The legislation amends GS

7A-198(e) to specify that reporting will not be required for "ex parte or emergency hearings before a judge pursuant to Chapter 50B or 50C of the General Statutes."

The amendment applies to ex parte hearings conducted on or after July 31, 2015.

S.L. 2015-176 (S 192). Regarding 50B and 50C Order: Electronic Transmittal of Orders to Law Enforcement. Amends GS 50B-3(c) to provide that "law enforcement agencies shall accept receipt of copies of the [DVPO issued in Chapter 50B case] issued by the clerk of court by electronic or facsimile transmission for service on defendants." The amendment was effective August 5, 2015.

The legislation adds the same language to GS 50C-9(b) relating to the service of Civil No-Contact Orders.

S.L. 2015-25 (H 79). Regarding 50C Civil No-Contact Orders: Allow Criminal Contempt for Violations. Amends GS 50C-10 to clarify that both civil and criminal contempt can be used to address violations of no contact orders entered pursuant to Chapter 50C. The amendment was enacted in response to *Tyll v. Berry*, 758 SE2d 411 (NC App 2014), wherein the court of appeals indicated that the original version of GS 50C-10 allowed only civil contempt to be used in response to a violation of a Civil No-Contact Order. Amendment applies to orders entered on or after October 1, 2015.

S.L. 2015-284 (H 284). Regarding 50B and 50C Orders: No Fines for Civil Contempt. Amends civil contempt statute GS 5A-21 to specify that a person found in civil contempt is not subject to the imposition of a fine. The only remedy allowed for civil contempt is imprisonment until respondent complies with the purge condition. Amendment enacted in response to *Tyll v. Berry*, 758 SE2d 411 (NC App 2014), wherein the court upheld the trial court's imposition of a fine after holding respondent in civil contempt. Amendment applies to civil contempt orders entered on or after October 1, 2015.

S.L. 2015-62 (h 465). Regarding 50B and 50C Orders: **Electronic Filing.** Creates new GS 7A-343.6 to authorize the Administrative Office of the Courts to develop a program for electronic filing in 50B and 50C cases in all counties. Each district is required to adopt local rules permitting the clerk to accept electronically filed 50B and 50C complaints when they are transmitted from a domestic violence program. This provision was effective June 5, 2015.

For orders entered on or after December 1, 2015, Chapters 50B and 50C are amended to specify that all documents filed, issued, registered, or served relating to an ex parte, emergency, or permanent DVPO or Civil No-Contact Order may be filed electronically. The amendment also authorizes video conferencing for hearings requesting ex parte or emergency DVPOs or Civil No-Contact Ordesr. The amendment specifies that hearings for a permanent DVPO or Civil No-Contact Orders cannot be conducted through video conference.

S.L. 2015. 91 (S 60). New Chapter 50D Permanent Civil No-Contact Order. Effective October 1, 2015, creates new Chapter 50D authorizing the entry of a Permanent Civil No-Contact Order for victims of sex offenses. The new Chapter appears to anticipate an expedited trial of the request for the injunction in that it provides that a defendant must be informed that he/she has 10 days within which to file an Answer. However, the statute does not provide specifically for a trial within any particular period of time and it does not authorize ex parte or temporary relief. The legislation directs the AOC to create the appropriate forms to implement the process.

The new chapter allows the court to issue a protective order for a plaintiff against a person who has been convicted of committing a sex offense against the plaintiff when the court finds that plaintiff did not request a no-contact order in the criminal case pursuant to GS 15A-1340.50 and finds that there are reasonable grounds for the victim to fear future contact with the respondent. The protective order will stay in effect for the lifetime of the respondent, subject to the right of the victim to request that the court rescind the protective order because she/he no longer has reason to fear contact with the respondent.

The protective order can order the respondent not to threaten, visit, assault, molest or otherwise interfere with the victim, to not follow, harass, abuse or contact the victim, and to stay away from the victim's school, residence, employment or other specified place. The statute also authorizes any other relief deemed necessary and appropriate by the court. Violation of a permanent no-contact order is punishable by contempt and is a Class A1 misdemeanor.

Child Support

Cases Decided/Legislation Enacted Between June 16, 2015 and September 15, 2015

Contempt; laches not available to bar enforcement

- Laches is not available to bar a claim for enforcement of a child support obligation imposed by court order.

Malinak v. Malinak, _ S.E.2d _ (NC App., August 18, 2015). Consent order entered in March 2000 ordered defendant to pay child support. More than a decade later, in April 2014, plaintiff filed a motion requesting defendant be held in civil contempt for failure to pay support. At that time, defendant owed $48,000 in arrears. Defendant filed an answer pleading the statute of limitations as to amounts coming due more than 10 years before initiation of the contempt proceeding and laches regarding the other amounts. The trial court barred recovery of the amounts due more than 10 years before the proceeding and applied laches to bar those coming due before March 2011. The trial court determined defendant owed $6,800.

The court of appeals upheld the amounts barred by the statute of limitations but reversed the trial court's determination that laches barred recovery of a portion of the amounts not barred by the statute of limitations. According to the court of appeals, it is well established in North Carolina case law that the doctrine of laches cannot be applied to bar recovery of child support due pursuant to court order.

Modification; imputing income

- Trial court erred in imputing income to dependent spouse without concluding she was depressing her actual income in bad faith.

Nicks v. Nicks, 774 S.E.2d 365 (NC App., June 16, 2015). Mother filed motion to modify support. At the time the existing order was entered, she earned $8,000 per month working as a physician in a medical clinic. She became unemployed when her employer closed the clinic but she decided not to look for another job due to her need to care for her daughter who was experiencing mental health issues. The trial court imputed income to mother after concluding that she was voluntarily unemployed but should be working on at least a part-time basis. After imputing income, the trial court denied the motion to modify based on the conclusion there had been no change in circumstances.

The court of appeals held that it was error for the court to impute income without first concluding that mother was not earning income in deliberate disregard of her support obligation. In remanding the case to the trial court for additional findings and conclusions, the court of appeals reminded that trial court that income cannot be imputed simply because a party is voluntarily unemployed. Instead, income can be imputed only if the motivation for not working is the intent to avoid a support obligation.

Legislation

S.L. 2015-284 (H 284). Civil Contempt. Amends civil contempt statute GS 5A-21 to specify that a person found in civil contempt is not subject to the imposition of a fine. The only remedy allowed for civil contempt is imprisonment until respondent complies with the purge condition. Amendment enacted in response to *Tyll v. Berry*, 758 SE2d 411 (NC App 2014), wherein the court upheld the trial court's imposition of a fine after holding respondent in civil contempt. Amendment applies to civil contempt orders entered on or after October 1, 2015.

S.L. 2015-117 (S 488). Update to UIFSA – The Uniform Interstate Family Support Act. Makes numerous amendments to Chapter 52C to conform NC law to the revised Uniform Family Support Act adopted by the Uniform Laws Commissioners in 2008.

The following summary of the new act was prepared by the Uniform Laws Commission:

The Uniform Interstate Family Support Act (UIFSA) provides universal and uniform rules for the enforcement of family support orders by: setting basic jurisdictional standards for state courts; determining the basis for a state to exercise continuing exclusive jurisdiction over a child support proceeding; establishing rules for determining which state issues the controlling order in the event proceedings are initiated in multiple jurisdictions; and providing rules for modifying or refusing to modify another state's child support order.

In November 2007, the United States signed the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance ("the Convention"). This Convention contains numerous provisions that establish uniform procedures for the processing of international child support cases. In July 2008, the Uniform Law Commission amended UIFSA to incorporate changes required by the Convention. In order for the United States to fully accede to the Convention it was necessary to modify UIFSA by incorporating provisions of the Convention that impact existing state law. The 2008 UIFSA amendments serve as the implementing language for the Convention throughout the states. Importantly, enacting the UIFSA amendments will improve the enforcement of American child support orders abroad and will ensure that children residing in the United States will receive the financial support due from parents, wherever the parents reside.

The bulk of the 2008 amendments are housed in a new section of UIFSA: Section 7. The new section provides guidelines and procedures for the registration, recognition, enforcement and modification of foreign support orders from countries that are parties to the Convention. Specifically, Section 7 provides that a support order from a country that has acceded to the Convention must be registered immediately unless a tribunal in the state where the registration is

sought determines that the language of the order goes against the policy of the state. Once registered, the non-registering party receives notice and is allowed the opportunity to challenge the order on certain grounds. Unless one of the grounds for denying recognition is established, the order is to be enforced. Additionally, Section 7 requires documents submitted under the Convention be in the original language and a translated version submitted if the original language is not English.

In September 2014, Congress passed federal implementing legislation for the Convention. Importantly, the new law (the Preventing Sex Trafficking and Strengthening Families Act) requires that the 2008 UIFSA amendments be enacted in every jurisdiction as a condition for continued receipt of federal funds supporting state child support programs. Failure to enact these amendments during the 2015 legislative session may result in a state's loss of this important federal funding.

S.L. 2015-220 (H 308). Change to Law Regarding Ordering Health Insurance Coverage

Between 1984 and 2008, regulations from the federal child support enforcement program provided that insurance available through an employer was coverage available at a reasonable cost. See 71 FR 54965 (Sept. 20, 2006)(explaining history of federal medical support regulations). This provision was based on the assumption that employer coverage was widely available and heavily subsidized. To conform to the federal regulations, GS 50-13.11(a1) provided that "health insurance for the benefit of the child is considered reasonable in cost if it is employment related or other group insurance, regardless of service delivery mechanism."

The court of appeals held that this provision did not mean that a trial court could not determine that some other insurance was available at a reasonable cost; it meant only that if coverage was available through an employer or other group plan, insurance coverage must be ordered. *Reams v. Riggan*, 224 N.C. App. 78 (2012). In addition, the court of appeals held that the employer coverage did not necessarily need to be provided through the parent's employer. *See Ludlam* (insurance provided by mother's new husband's employment can be considered reasonably priced insurance if appropriate findings are made; there would be no inherent error in ordering mother to pay insurance premiums for coverage provided through husband's employer).

Recognizing that employer provided insurance has become less available and more expensive, federal regulations were changed in 2008 to remove the requirement that employer coverage be considered coverage available at a reasonable cost. The regulations now provide that cost of coverage is considered reasonable if the cost to the parent "does not exceed five percent of his or her gross income or, at State option, a reasonable alternative income-based numeric standard defined in State law… ". 45 CFR 303.31(b)(1).

Despite the change to federal law, GS 50-13.11(a1) remained unchanged until this legislative session. However, acknowledging the change in the federal rules, the 2015 Child Support Guidelines effective January 1, 2015, removed the statement that employer coverage is coverage

available at a reasonable cost and replaced it with the general statement that coverage must be ordered when available to a parent at a reasonable cost.

S.L. 2015-220 (H 308)

For child support orders issued on or after August 18, 2015, GS 50-13.11(a1) now conforms to federal law and provides:

> "health insurance for the benefit of the child is considered reasonable in cost if the coverage for the child is available at a cost to the parent that does not exceed five percent (5%) of the parent's gross income. In applying this standard, the cost is the cost of (i) adding the child to the parent's existing coverage, (ii) child-only coverage, or (iii) if new coverage must be obtained, the difference between the cost of the self-only and family coverage."

The legislation makes no change to the provision providing that the court also may require one or both parties to maintain dental insurance.

2015 Guidelines Amended

In response to the new legislation, the following language has been added to the 2015 Child Support Guidelines:

> At the time of the adoption of these Child Support Guidelines, G.S. 50-13.11(a1) specified that health insurance is considered reasonable in cost if it is employment related or other group health insurance, regardless of the service delivery mechanism. After the adoption of these Child Support Guidelines, S.L. 2015-220 amended G.S. 50-13.11(a1) and provided that for orders entered on or after August 18, 2015, health insurance is reasonable if the coverage for the child is available at a cost to the parent that does not exceed five percent (5%) of the parent's gross income. In applying this standard, the cost is the cost of (i) adding the child to the parent's existing coverage, (ii) child-only coverage, or (iii) if new coverage must be obtained, the difference between the cost of self-only and family coverage.

Equitable Distribution
******Cases Decided Between October 7, 2014 and June 2, 2015*******
(Also printed in Summer Conference Materials June 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, 773 S.E.2d 93 (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.

Equitable Distribution

Cases Decided/Legislation Enacted Between June 16, 2015 and September 15, 2015

Distribution of military retirement account; survivors benefit plan

- Trial court had authority to enter order determining plaintiff rather than third party defendant was the rightful beneficiary of the Survivor's Benefit Plan.
- Because the purpose of the action was to exclude third party defendant from any interest in property located in NC, the trial court properly exercised in rem jurisdiction.
- Trial court did not err in entering the order where ED judgment clearly ordered former husband to maintain a Survivor's Benefit Plan with plaintiff named as the beneficiary.

Ellison v. Ellison v. Smith-Ellison, _S.E.2d _(NC App., August 4, 2015). As part of an ED order, defendant former husband was ordered to "maintain the Survivor's Benefit Plan ("SBP") on his [military] pension naming Plaintiff as beneficiary." Defendant former husband remarried twice following entry of the ED order and then died. He failed to designate Plaintiff as the former spouse beneficiary of the SBP as required by the ED order. After former husband died, plaintiff realized that he had not designated her and that she had failed to protect her interest by obtaining a "deemed election" within one year of the divorce. Plaintiff petitioned the Army Board of Correction of Military Records seeking to have that Board order that she be named as the beneficiary rather than the person who was married to former husband at the time of his death (the "last wife"). The Board responded that the order could be entered only if the last wife of the deceased former service member agreed, or if a court entered an order, in an action in which the last wife was a party, concluding that plaintiff was the rightful beneficiary. Plaintiff filed a motion in the ED case and added last wife as a third party defendant. Based on the original ED judgment, the trial court entered an order of summary judgment concluding plaintiff is the rightful beneficiary of the SBP. Third-party last wife appealed.

Last wife first argued that the trial court lacked personal jurisdiction over her. The court of appeals held that the trial court properly exercised in rem jurisdiction. As neither party contested the trial court conclusion that the interest in the SBP is property located in NC, the court of appeals accepted that fact. Since the action was brought to exclude the third party defendant from any interest in property located in NC, the court of appeals held that the trial court properly exercised in rem jurisdiction.

Last wife also argued that the trial court should not have granted summary judgment as there were material issues of fact as to why former husband did not name plaintiff as beneficiary. The court of appeals rejected the argument, holding that the trial court was acting only in response to the request from the Board. Because the issue before the trial court was limited to whether the original ED order gave the right to receive the benefits to the plaintiff, any equitable argument that plaintiff should not receive the benefits must be made to the Board.

Definition of marital debt; student loans; joint benefit

- Marital debt is debt incurred during the marriage, owed on the date of separation and incurred for the joint benefit of the parties.
- Party seeking the marital classification has the burden of proving that the debt was incurred for the joint benefit of the parties.
- Student loans incurred by the wife during the marriage were properly classified as marital where wife showed the parties were married long enough after she earned her degree to "substantially enjoy" the benefits of the higher salary she earned as a result of the degree.

Warren v. Warren, 773 S.E.2d 135 (NC App., June 16, 2015). After getting married, the parties agreed plaintiff would stop working to stay home with the children. When the children grew older, the parties agreed plaintiff would return to school to earn a degree so she could "increase her income for the benefit of the family." She incurred student loans in her name alone. The funds were used for school expenses but also for living expenses of the family while wife was a full-time student.

After wife graduated, she was employed in the field of her degree and earned much more than she had earned before deciding to stay at home with the children. The parties remained together for twenty months after plaintiff began earning this income.

The trial court classified the loan debt as marital based upon findings that the loans were incurred with the intent that the degree would benefit the marriage, some of the loan proceeds were used to pay household expenses, and the increased earning capacity of the plaintiff actually benefited the family during the marriage.

The court of appeals affirmed, pointing to all of those facts as supporting the conclusion of joint benefit. Despite citing cases from other states indicating that *an expectation* of joint benefit at the time of the loans is sufficient to support a marital classification, the court of appeals nevertheless held that evidence must show the marriage "lasted long enough" for the couple to "substantially enjoy" benefits gained from the degree.

So it appears from this holding that even if loans are incurred because the parties jointly believe at the time the debt is incurred that they both will benefit, the debt will not be marital if, for example, the parties separate before the degree is earned. Or, if the degree is earned but for some reason – such as the unavailability of jobs or the onset of a medical disability– the spouse is unable to actually earn more money because of the degree, the debt will not be marital.

Property owned by Trust

- Trial court had no authority to distribute property owned by a trust.
- Court in ED proceeding can declare one or both spouses to be the equitable owners of property held in name of another person or entity by imposing a constructive or resulting trust on the property. However, a trust cannot be imposed unless the legal title holder is made a party to the ED case.
- Trial court erred in failing to classify, value and distribute postseparation increase in value of a marital IRA.

- Evidence of value of the IRA at the time of trial was sufficient to support the classification of the appreciation as divisible property even though the ED order was not entered until 4 months later.

Nicks v. Nicks, 774 S.E.2d 365 (NC App., June 16, 2015). During the marriage of the parties, a trust was created. The trust was funded in part with 100% membership interest in an LLC. Property that was owned by the parties was transferred to the LLC. So on the date of separation, the LLC owned the property that was acquired by the parties during the marriage and the LLC was owned by the trust.

The trial court classified the LLC as martial property and distributed it to husband.

The court of appeals reversed, holding that the LLC was not marital property because it was not owned by either or both parties on the date of separation. Acknowledging that the LLC held property that would have been marital if owned by the parties, the court of appeals held that the facts of the case may justify the trial court's imposition of a constructive trust on the LLC or on the property owned by the LLC. However, a trial court cannot consider imposing a trust on property unless the legal title holder to the property is made a party to the ED action. The court of appeals remanded the case to the trial court for consideration of whether the trust should be joined and if so, whether a constructive trust should be imposed on the LLC or on the property owned by the LLC.

The court of appeals also held that the trial court erred by failing to classify, value and distribute the postseparation increase in value of a marital IRA when evidence showed the value of the account increased between the date of separation and the date of trial. Husband argued that in order for the court to classify the increase as divisible property, evidence must establish the value of the property on the date of distribution. He argued that because the actual date of distribution was the date the ED judgment was entered 4 months after the conclusion of the trial, there was no evidence offered of actual date of distribution value. The court of appeals rejected his argument, holding that the delay in the entry of judgment in this case was not substantial and husband made no showing that the value or circumstances had changed significantly in the four month period.

Legislation

S.L. 2015-284 (H 284). No Fines for Civil Contempt. Amends civil contempt statute GS 5A-21 to specify that a person found in civil contempt is not subject to the imposition of a fine. The only remedy allowed for civil contempt is imprisonment until respondent complies with the purge condition. Amendment enacted in response to *Tyll v. Berry*, 758 SE2d 411 (NC App 2014), wherein the court upheld the trial court's imposition of a fine after holding respondent in civil contempt. Amendment applies to civil contempt orders entered on or after October 1, 2015.

Alimony

******Cases Decided Between October 7, 2014 and June 2, 2015*******
(Also printed in Summer Conference Materials June 2015)

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.

Postseparation Support and Alimony

Cases Decided/Legislation Enacted Between June 16, 2015 and September 15, 2015

Imputing income; term of alimony award; delay in entry of order

- Evidence supported trial court's conclusion that defendant was suppressing his income in deliberate disregard of his obligation to support his family.
- Findings of fact support trial court's determination that alimony should be paid for 18 years.
- Where defendant could show no actual prejudice, 20-month delay in entry of alimony order following the alimony trial did not violate defendant's constitutional rights.

Juhnn v. Juhnn, 775 S.E.2d 310 (NC App., July 7, 2015). Trial court alimony order imputed income to defendant after concluding he was deliberately depressing his income in bad faith disregard of his support obligation and ordered alimony for a term of 18 years. On appeal, defendant argued that the findings of act in the order did not support the conclusion that income should be imputed to him and that it was an abuse of discretion to award alimony for 18 years. In addition, defendant argued that the 20-month delay between the conclusion of the alimony trial and the entry of the alimony order violated his constitutional rights. The court of appeal rejected his arguments and upheld the trial court order.

Imputed income. The court of appeals held that the trial court's conclusion that defendant was suppressing income in bad faith was supported by findings that defendant:

> Engaged in a pattern of concealing income and under reporting his income that was fraudulent, deceitful and demonstrative of bad faith;
> Filed falsified and inaccurate tax returns;
> Engaged in a course of conduct subsequent to separation to deliberately depress his income because of his blatant disregard of his marital obligation to provide support for his dependent spouse and children;
> Committed marital misconduct by abandoning plaintiff and their three children;
> Intentionally shut down his brokerage business and understated the income from that business;
> Forged his wife's signature on tax returns;
> Provided support for his paramour and her children while refusing to support his wife and children; and
> Engaged in voluntary unemployment.

Term of 18 years. The court of appeals held that the term of 18 years was adequately supported and explained by the findings of fact listed above along with the following additional facts:

> Defendant engaged in marital misconduct;
> Defendant always was the sole means of support for the family;
> Defendant has a greater income earning capacity than plaintiff;
> Plaintiff was absent from the workforce for over 16 years due to the agreement between the parties that she would stay home with the children;
> Plaintiff lacks English language skills and has neither the education nor training to find employment sufficient to meet her reasonable economic needs;

Plaintiff had to borrow money from her sister to pay for housing, food and other assistance;
Plaintiff is in debt with no prospect of working her way out of it; and
Parties were married for 16 years.

Delay in entry of order. The court of appeals held that defendant failed to show he had been prejudiced by the 20-month delay in the entry of the alimony order. The court rejected defendant's argument that he was prejudiced by the accumulation of amounts due under the order. The court held that defendant would not have such a large sum to pay if he had complied with the PSS order in effect while the alimony claim was pending. In addition, the court rejected his argument that the delay impacted his ability to appeal the order because hearing transcripts and exhibits had been lost during the delay period. The court held that the record presented on appeal was sufficiently complete to permit a satisfactory review of all of his arguments on appeal.

Findings to support award of alimony; determination of reasonable needs; consideration of tax consequences; denial of PSS

- Trial court findings of fact were not sufficient to support award of alimony where the findings failed to show the reason the trial court ordered permanent alimony.
- Where findings of fact showed "competing factors" regarding the supporting spouse, trial court was required to offer more explanation to support the duration of the award.
- Trial court did not err in concluding reasonable needs of the dependent spouse amounted to $11,000 per month even though her affidavit alleged needs of $13,000.
- Trial court in alimony case is "not required to accept at face value the assertion of living expenses offered by the litigants themselves."
- Trial court erred in imputing income to dependent spouse without concluding she was depressing her actual income in bad faith.
- Trial court erred in failing to make findings of fact concerning the tax ramifications of an alimony award when dependent spouse offered evidence of the tax ramifications.
- Trial court erred in dismissing wife's claim for PSS that had not been heard by the time the permanent alimony trial began without making findings of fact to support the dismissal.

Nicks v. Nicks, 774 S.E.2d 365 (NC App., June 16, 2015). Findings of fact in order for permanent alimony established that plaintiff was the supporting spouse, had committed marital misconduct by abandoning defendant, that he was disabled, and that he would receive disability pay until he reached the age of 65. The court of appeals held that these findings "demonstrate that there are competing factors the court must weigh and consider in reaching and explaining its decision on the duration of the alimony award." As the order contained no further findings or explanation, the court remanded to the trial court.

Reasonable expenses. The court of appeals rejected wife's contention that the trial court erred by concluding that her reasonable monthly expenses amounted to approximately $11,000 when her affidavit detailed expenses in the amount of approximately $13,000. The court of appeals held that a trial court is not required to accept a litigant's assertions concerning what expenses are reasonable. In this case, the trial court order explained that it accepted all of wife's expenses except for expenses related to upkeep and maintenance of the home, monthly saving for the child of the parties, and amounts saved for vacation and a new car.

Imputing income. The trial court imputed income to wife after concluding that she was a physician who was voluntarily unemployed but should be working on at least a part-time basis. The court of appeals held that it was error for the court to impute without finding that wife was not earning income in deliberate disregard of her support obligation and remanded the case to the trial court for additional findings and conclusions. In this case, wife stopped working in order to care for the daughter of the parties who was experiencing mental health issues. The court of appeals reminded that trial court that income cannot be imputed simply because a party is voluntarily unemployed. Instead, income can be imputed only if the motivation for not working is the intent to avoid support obligations.

Tax consequences. Wife offered expert testimony about the federal and state tax ramifications of various alimony awards. The expert testified to the amount by which annual awards of $60,000, $90,000, $120,000 and $155,000 would be reduced due to state and federal taxes. The trial court awarded alimony in the annual amount of $36,000 but made no findings of fact regarding the evidence of tax consequences. The court of appeals remanded for further findings, holding that GS 50-16.3A lists tax consequences as one of the factors the trial court must consider when deciding amount and duration of alimony when evidence of the consequences is offered. While wife offered no evidence of the taxes that would be assessed on the $36,000 award, the evidence offered by wife clearly showed that the amount actually available to wife for support would be reduced due to taxes. The court of appeals explained that evidence of tax consequences does not require that the trial court increase the amount of alimony ordered to adjust for the taxes that must be paid, but the alimony order must show that the trial court considered the taxes when deciding on the appropriate amount of support.

PSS. The court of appeals agreed with wife's contention that the trial court erred in dismissing her claim for PSS without giving reasons for the dismissal. Due to continuances granted throughout the litigation of this case, wife's claim for PSS did not come on for hearing until the date set for the permanent alimony trial. After awarding alimony, the trial court dismissed the PSS claim. The court of appeals held that GS 50-16.8 requires that the trial court explain its reasons for the granting or denial of a claim for PSS. The court held that while the granting or denial of a request for alimony terminates a supporting spouse's obligation to pay PSS, "this does not necessarily mean that an order awarding alimony cannot also provide for the payment of an already-pending claim for postseparation support when warranted." The court further explained that the trial court had discretion to determine whether or not PSS is appropriate in this case, but the final order on the issue must explain the decision of the trial court.

Spousal Agreements

******Cases Decided Between October 7, 2014 and June 2, 2015*******
(Also printed in Summer Conference Materials June 2015)

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*, 772 S.E.2d 13 (one of two cases with same caption)(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*, 772 S.E.2d 13 (one of two cases with same caption) (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.