Family Law Update
Cases Decided Between
June 6, 2017 and October 3, 2017

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Custody
Cases Decided and Legislation Enacted Between June 6, 2017 and October 3, 2017

Civil Contempt; right to appointed counsel; purge conditions regarding visitation

- Trial court was not required to inquire into defendant's desire for and ability to pay for legal counsel before civil contempt hearing based on defendant's alleged violation of a custody order.
- Supreme Court opinion in *McBride v. McBride*, 334 NC 124 (1993), requiring the appointment of counsel for indigent respondents in civil contempt cases applies to child support cases only.
- Whether appointment of counsel for indigent alleged civil contemnors is required by federal Due Process is a determination to be made on a case-by-case basis.
- Findings that father was late for exchanges following his visitation on more than 40 occasions in a two-year period of time were sufficient to support conclusion that he willfully violated terms of the custody order.
- A purge that required father to both pick-up and drop off the child at mother's home for the next three weekend visits was not an improper modification of the custody order that generally required the parents to meet half-way to exchange the child.

Wilson v. Guinyard, _ N.C. App. _, 801 S.E.2d 700 (June 20, 2017). Mother initiated civil contempt proceedings against father for alleged violations of visitation provisions in custody order. Father lives in Charleston, South Carolina and mother lives in Durham, North Carolina. The custody order called for exchanges for visitation to be made at South of the Border on specified times on certain Fridays and Sundays. Mother alleged father was habitually late for these exchanges.

Two months before the contempt hearing, father signed a consent to the withdrawal of his counsel and one week before the hearing, he requested a continuance to retain new counsel. The trial court denied his request and proceeded with the contempt hearing. Father was held in civil contempt and he appealed.

Right to counsel. Father's first argument was that the trial court erred in failing to inquire into his desire and eligibility for court appointed counsel, citing *McBride v. McBride*, 334 NC 124 (1993), wherein the supreme court held that indigent persons who may be incarcerated for civil contempt must be afforded court appointed counsel. The court of appeals rejected his argument, stating that *McBride* applies "specifically to civil contempt proceedings for nonsupport." Because this contempt was for violation of a custody order rather than an order for failure to pay child support, "the question of whether an indigent, alleged contemnor is entitled to counsel under the Due Process Clause of the Fourteenth Amendment to the United States Constitution is a determination made on a case-by-case basis." Appointment is required for an indigent person "only where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise insure fundamental fairness." The court of appeals held that father had no right to counsel in this case because he "has the ability to comply with the purge conditions as imposed and [the] presents no unusually complex issues of law or fact which would necessitate the appointment of counsel."

Contempt. The court of appeals also rejected father's argument that the findings of fact made by the trial judge did not support the conclusion that he was in willful contempt. The trial court

found that father was habitually late for visitation exchanges based on evidence that father had been late for over forty exchanges in a two-year period and had completely failed to return the child on the required date on one occasion. Father argued that because the custody order provided that parties were to abide by the schedule for exchanges set forth in the order absent "unforeseen circumstances," he could not be he held in contempt for being late, even on numerous occasions, if he had a reason for being late. The court of appeals upheld the trial court's findings that the reasons he provided did not amount to "unforeseen circumstances" as contemplated by the custody order.

Purge conditions. The trial court provided that father could purge the contempt by picking up and dropping the child off at the mother's home for the next three weekend visitations. The court further provided that if he was more than 30 minutes late for any of these three exchanges, his next visitation would be forfeited. Father argued on appeal that this purge condition was an inappropriate modification of the custody order. While acknowledging that a court may not modify a custody order *sua sponte* in a contempt proceeding, the court of appeals affirmed the trial court after concluding that this purge condition did not modify the custody order, noting that "permanent joint legal and secondary physical custody remained with the defendant both before and after the contempt order." According to the court of appeals, "providing additional dates and locations for custodial visitation not inconsistent with the governing custody order is not modification of the terms of custody."

Blog Post regarding this case, On the Civil Side, August 25, 2017

Right to Counsel in Civil Contempt Proceeding for Violation of Custody Order

When a court is considering whether to hold a party in civil contempt for the failure to comply with provisions in a child custody order, must the court inform that parent that he has the right to a court-appointed attorney if he wants an attorney and is unable to afford one?

The court of appeals recently held that the answer to that question must be determined on a "case-by-case basis" with appointed counsel being required only "where assistance of counsel is necessary for the adequate presentation of the merits, or to otherwise insure fundamental fairness."

***Wilson v. Guinyard* (NC App June 20, 2017)**

Mother Ms. Wilson initiated civil contempt proceedings against father Mr. Guinyard for alleged violations of visitation provisions in custody order. Father lived in Charleston, South Carolina and mother lived in Durham, North Carolina. The custody order called for exchanges for visitation to be made at South of the Border on specified times on certain Fridays and Sundays. Mother alleged father was habitually late for these exchanges.

Two months before the contempt hearing, father signed a consent to the withdrawal of his counsel and one week before the hearing, he requested a continuance to retain new counsel. The trial court denied his request and proceeded with the contempt hearing. The trial court held father in civil contempt and provided he could purge the contempt by picking up and dropping the child off at the mother's home for the next three weekend visitations. The order specified that if father

was more than 30 minutes late for any of these three exchanges, his next visitation would be forfeited and he would be jailed for 72 hours.**

On appeal, father argued the trial court erred in failing to inquire into his desire and eligibility for court appointed counsel, stating:

> "The rule of this State is that "[w]here a defendant faces the potential of incarceration if held in contempt, the trial court must inquire into the defendant's desire for and ability to pay for counsel to represent him as to the contempt issues." *D'Alessandro v. D'Alessandro*, 235 NC App 458 (2014); *King v. King*, 144 NC App 391 (2001). He can waive his right to representation but the record must reflect that he was advised of his right and he must voluntarily waive it." *Id.*

The court of appeals rejected father's argument and held he had no right to counsel under the circumstances of this case. The court acknowledged that Due Process requires that "a defendant should be advised of his or her right to have appointed counsel where the defendant cannot afford counsel on his own, and 'where the litigant may lose his physical liberty if he loses the litigation' [citations omitted]." However, the court held that it is up to the litigant facing contempt to show "(1) he is indigent, and (2) his liberty interest is at stake," and explained that the determination of whether a liberty interest is at stake "is a determination made on a case-by-case basis." Citing *Hodges v. Hodges*, 64 NC App 550 (1983), the court of appeals further explained that when a civil proceeding may result in imprisonment, "appointment of counsel for indigents is required only where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise insure fundamental fairness." In this case, the court of appeals held appointment of counsel was not necessary because defendant had the ability to comply with the purge conditions as imposed and the case presented no "unusually complex issues of law or fact." The court offers no additional guidance on what type of issues would be sufficiently complex to require the appointment of counsel.

What about *McBride v. McBride*?

The North Carolina Supreme Court held in *Jolly v. Jolly*, 300 NC 83 (1980), that Due Process does not require the appointment of counsel in civil contempt proceedings arising out of the nonpayment of child support as the impact on a respondent's liberty interest is slight. Because a court is required to determine the respondent has the actual present ability to comply with any purge condition imposed in a civil contempt order, the respondent "holds the keys to the jail" in that he simply needs to comply with the court order to avoid imprisonment.

However, when the court revisited the issue in the case of *McBride v. McBride*, 334 NC 124 (1993), the North Carolina Supreme Court determined that the focus in *Jolly* was "misplaced," at least in the context of civil contempt proceedings arising out of the nonpayment of child support. According to the court, "experience" showed that respondents in these civil contempt proceedings often are incarcerated without the trial court first determining they have the ability to pay the amount ordered as a purge. The court reasoned that because respondents do not "hold the keys to the jail" if they do not have the actual ability to pay the purge, assistance of counsel is necessary to insure that they do not go to jail unless they actually have the ability to pay.

The *McBride* court therefore held that "absent appointment of counsel, indigent contemnors may not be incarcerated for failure to pay child support." The court instructed trial courts to "assess the likelihood of incarceration" at the outset of the contempt hearing and, if incarceration is likely, "inquire into the [respondent's] desire for counsel and the ability to pay."

Does *McBride* apply in custody cases?

While *McBride* spoke directly to concerns arising in child support enforcement cases, the court of appeals has applied the holding in *McBride* to vacate a civil contempt order arising out of the violation of a custody order. In *D'Alessandro v. D'Alessandro*, 235 NC App 458 (2014), the court of appeals broadly held that "when a defendant faces the potential of incarceration if held in contempt, the court must inquire into defendant's desire for and ability to pay for counsel to represent him as to the contempt issues." Because the trial court failed to conduct this inquiry in this case, the court of appeals "reversed both the contempt of the custody order and the contempt of the child support order." The court did not explicitly address the issue of whether *McBride* was limited to the child support enforcement proceedings.

However, in the recent *Wilson v. Guinyard* opinion, the court of appeals held that *McBride* applies "specifically to civil contempt proceedings for nonsupport" and adopted the standard in *Jolly* for determining whether appointed counsel is required in other types of civil contempt proceedings. Even though the court in *Wilson* cited the *D'Alessandro* case, the court nevertheless states that the holding in *McBride* has not been applied outside of the context of contempt for failure to pay child support.

So until the supreme court tells us otherwise, it appears that respondents facing civil contempt arising out of the failure to comply with the terms of a custody order are not entitled to court-appointed counsel, at least absent the existence of "unusually complex issues of law or fact."

**According to *Reynolds v. Reynolds*, 356 NC 287 (2002), adopting dissent in court of appeals, 147 NC App 566 (2001), this contempt order appears to be criminal contempt rather than civil contempt. In *Reynolds*, the dissent from the court of appeals adopted by the supreme court explained that when the court imposes a specific period of incarceration that is "suspended" upon the contemnor's compliance with conditions, the order is more in the nature of criminal rather than civil contempt. In this case, the father was at risk for a 72-hour confinement until he completed the three visitation exchanges as ordered; it was in essence a 72-hour sentence suspended on the condition that he comply with the conditions of the next three visitations. Appointment of counsel always is required for indigent respondents in criminal contempt cases. GS 7A-451(a)(1); *State v. Wall*, 49 NC App 678 (1980). The issue of whether the contempt order in *Wilson* actually was an order for civil contempt was not addressed by the court.

Comment to blog post by John Rubin

I don't think this decision settles an indigent defendant's right to appointed counsel in civil contempt cases that do not involve child support. In McBride v. McBride, 334 N.C. 124 (1993), the North Carolina Supreme Court recognized that an indigent defendant has the right to

appointed counsel in a civil contempt case if the court intends to imprison the defendant. Observing that McBride involved a civil contempt proceeding for nonsupport, the Court of Appeals stated in this decision that in other civil contempt contexts, such as contempt for a violation of a custody order, the right of an indigent defendant to appointed counsel is not automatic and instead depends on the complexity of the issues and is decided on a case-by-case basis even if the court imprisons the defendant. The Court of Appeals found that this case did not present unusually complex issues of law or fact requiring the appointment of counsel. Sl. op. at 7-8.

The court did not stop there, however, and gave other grounds for its decision. The court found that the defendant had retained a lawyer, that he requested that his retained lawyer withdraw, that he knew that the court had denied his motion to continue to retain new counsel, and that he "never represented he was indigent nor requested the trial court to appoint him an attorney prior to or during the hearing." Sl. op. at 8-9. These findings may make the discussion about the reach of McBride unnecessary to resolution of the case. The defendant wasn't entitled to counsel because he wasn't indigent (the court observed that he owned his own business and spent money for a Super Bowl party), didn't ask for appointed counsel, and arguably gave up any right to counsel by releasing his retained lawyer knowing that the court was not going to grant him a continuance.

Reading the decision as depending on these other grounds may avoid a possible conflict with North Carolina law. Although McBride involved a nonsupport case, the Supreme Court appeared to base its decision as much on the nature of the punishment as on the violation alleged, observing that "jail is just as bleak no matter which label is used." 334 N.C. at 130. Thereafter, in D'Allessandro v. D'Allessandro, 235 N.C. App. 458 (2014), the Court of Appeals held that McBride applied when the defendant was jailed for a violation of a custody order as well as a child support order. In addition, G.S. 7A-451(a)(1) provides that an indigent person is entitled to counsel in any case "in which imprisonment . . . is likely to be adjudged." Although not discussed in McBride, this statute may provide additional support for the principle articulated in McBride that a person is entitled to be represented by counsel before being jailed

Modification; findings did not support new custody order

- Trial court erred in ordering continuation of reunification counseling after trial court found that earlier reunification counseling has caused the child intense psychological stress and that additional counseling would "re-traumatize" the child.

Williams v. Chaney, _ N.C. App. _, 802 S.E.2d 756 (July 18, 2017). This case involves the appeal of a modification of a custody order in a case that has lasted most of the life of the now 16-year-old child. The first custody order was entered when the child was less than one-year old and there had been four prior appeals in the case before the present one. When the child was approximately eight years old, psychological problems of mom caused the trial court to grant primary custody to dad and to prohibit mom from having unsupervised contact with the child. For three years, mom did not see the child at all but then requested additional visitation. When the child was around 11, the trial court ordered visitation with mom that gradually increased in frequency and duration and ordered reunification therapy for mom and child. Mother continued

to experience problems and in 2013, the trial court entered an order finding that child suffered symptoms of PTSD from his interactions with his mother, limited mom to phone contact and attendance at son's extracurricular activities, and ordered mom, dad and child to participate in reunification therapy. The motion filed requesting modification of that 2013 order led to this current appeal.

As a result of the modification hearing, the trial court concluded that there had been a substantial change since the 2013 order in that the relationship between the mother and the child had worsened, that mother's conduct caused the child extreme stress and that the reunification therapy continued to "re-traumatize" the child. However, the new child support order entered by the court was substantially identical the order being modified. Mom was denied visitation but allowed phone contact and allowed to watch the child engage in some extracurricular activities. In addition, the court ordered dad to secure a new therapist and ordered all three to continue to engage in therapy designed to encourage the child to voluntarily visit with the mother.

On appeal, dad argued that the trial court's findings did not support the new custody order and the court of appeals agreed. According to the court of appeals, the trial court findings established clearly that the reunification therapy was harmful to the child and that visitation with the mother was not in the child's best interest. Because the findings of fact did not support the court's order to continue therapy, the court of appeals vacated the modification order and instructed the trial court to enter a new custody order limiting mom to phone contact and some extracurricular activities with no additional required reunification therapy.

Legislation

S 53 AN ACT TO AUTHORIZE LAW ENFORCEMENT OFFICER TO OBTAIN CUSTODY OF A CHILD UPON DETERMINATION BY THE COURT THAT THE CHILD IS IN DANGER. Effective October 1, 2017 and applies to temporary custody orders entered on or after that date.

The legislation amends GS 50-13.3 and GS 50-13.5 to provide that the court has authority to order law enforcement to take custody of a minor child when issuing a temporary custody order if the court complies with the provisions of GS 50A-311. That statute provides that if a petitioner files a verified request for a pick-up warrant and:

> [i]f the court, *upon the testimony of the petitioner or other witness,* finds that the child is imminently likely to suffer serious physical harm or be removed from this State, it may issue a warrant to take physical custody of the child.

In addition to requiring actual testimony rather than allowing the court to rely on a verified motion, the statute requires that the warrant actually "recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based."

Any warrant issued also must "provide for the placement of the child pending final relief."

AOC-CV-667 (Warrant Directing Law Enforcement to Take Immediate Custody of Child Subject to a Child Custody Order) was revised to reflect this statutory change and was made available October 1, 2017.

Blog Post regarding this legislation, On the Civil Side, June 16, 2017

More on Law Enforcement Involvement in Custody Cases

In my earlier blog post, Ordering Law Enforcement Officers to Enforce a Child Custody Order, Jan. 15, 2016, I discussed North Carolina case law indicating that a trial court's authority to order law enforcement to assist in the enforcement of a child custody order is very limited. The General Assembly recently enacted legislation to clarify that the warrant provision in GS 50A-311 is a tool available to trial court judges seeking to enforce North Carolina custody orders as well as orders issued in other states and countries.

NC Case Law

In re Bhatti, 98 NC App 493 (1990) and *Chick v Chick*, 164 NC App 444 (2004), both reversed trial court orders requiring that law enforcement officers "assist" in the enforcement of a custody order. In both of those situations, the custody orders being enforced were issued by courts in other states. The court of appeals held in both cases that the trial court had no authority to order law enforcement to assist, noting that GS 50-13.3 provides that custody orders are enforceable through "traditional contempt proceedings." The court in *Chick* acknowledged GS 50A-311, a provision in the Uniform Child Custody Jurisdiction and Enforcement Act (the UCCJEA) which allows a court to issue a warrant directing law enforcement to take physical custody of a child when a child is in imminent danger or likely to be removed from the state, but held that the trial court in that case had not made the findings of fact required to invoke the authority in that statute. In both *Bhatti* and *Chick* the court of appeals stated "we [are] unaware of any statutory basis for invoking the participation of law enforcement officers in producing the children."

GS 50A-311 Warrant for Physical Custody

In that earlier blog post, I suggested that the warrant provision in GS 50A-311 could be interpreted to apply to cases involving North Carolina custody orders rather than limited to the enforcement of out of state orders. However, many attorneys, judges, and law enforcement officers remained uncertain that this provision in Part 3 of the UCCJEA, the part of the UCCJEA clearly addressing primarily the enforcement of custody orders from other states and countries, could be read broadly to apply to North Carolina orders. This lack of clarity was especially troubling to law enforcement officers, who need to know their authority to act in these cases is unambiguous and firmly grounded in the law. The recent legislative amendment appears to resolve the issue.

The Legislative Amendment

S.L. 2017-22 (S53) applies to orders entered on or after Oct. 1, 2017 and amends GS 50-13.5(d)(3) to state that:

> "A temporary custody order that requires a law enforcement officer to take physical custody of a minor child shall be accompanied by a warrant to take physical custody of the child as set forth in GS 50A-311."

In addition, the legislation also amends GS 50A-311 to clarify that:

> "An officer executing a warrant to take physical custody of the child, that is complete and regular on its face, is not required to inquire into the regularity and continued validity of the order. An officer executing the warrant pursuant to this section shall not incur criminal or civil liability for its due service."

The process for issuing a GS 50A-311 warrant

The amendment appears to provide that a trial court can order law enforcement to take physical custody of a child to enforce a temporary custody order if the court issues a warrant pursuant to the provisions in GS 50A-311. That statute provides that a petitioner seeking enforcement of a child custody determination "may file a verified application for the issuance of a warrant to take physical custody of the child if the child is immediately likely to suffer serious physical harm or be removed from this State." The warrant may be issued "[i]f the court, ***upon the testimony*** of the petitioner or other witness, finds that ***the child is imminently likely to suffer serious physical harm or be removed from this State****"*.

So the statute does not allow the warrant to be issued upon affidavits or verified pleadings alone. Instead, the court must receive actual testimony about the need for the warrant and the warrant may issue only if the court concludes the child is in imminent danger of serious physical harm or removal from the state.

If the warrant is issued, GS 50A-311 appears to require an expedited hearing. The statute states that upon issuance of the warrant, the petition seeking enforcement of the custody order "must be heard on the next judicial day after the warrant is executed unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible."

The warrant itself must:

- "(1) Recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based;
- (2) Direct law enforcement officers to take physical custody of the child immediately; and
- (3) Provide for the placement of the child pending final relief."

In addition, the warrant can order "conditions upon placement of a child to ensure the appearance of the child and the child's custodian."

The statute provides that a warrant to take physical custody of a child is enforceable throughout this State and specifies that "[i]f the court finds on the basis of the testimony of the petitioner or other witness that a less intrusive remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law enforcement officers to make a forcible entry at any hour."

Child Support
Cases Decided and Legislation Enacted Between June 6, 2017 and October 3, 2017

Notice of appeal

- Trial court erred in failing to dismiss wife's appeal of child support judgment where she failed to file it within 30 days from the entry of judgment.
- Wife did not have 10 days after husband's appeal to file child support appeal where husband appealed equitable distribution and alimony but did not appeal the child support judgment.

Slaughter v. Slaughter, _ N.C. App. _, _ S.E.2d _ (July 18, 2017). Trial court entered judgment for ED, alimony and child support. Within 30 days after entry, husband filed notice of appeal of the ED and alimony judgments. Within 10 days of his notice of appeal but more than 30 days following the entry of judgment, plaintiff filed a cross appeal of the ED judgment and the child support judgment. Husband moved to dismiss the child support appeal as untimely but the trial court denied his motion. The court of appeals reversed, holding that wife had 10 days from the time husband filed his appeal to file cross appeals. However, wife could cross appeal only those judgments from which husband appealed. Because husband did not appeal the child support judgment, wife was required to file her original appeal of that issue within 30 days from the entry of the judgement.

Deviation; attorney fees; costs

- Trial court erred in failing to make appropriate findings of fact to support deviating from the child support guidelines.
- Deviation requires four-step process: 1) determination of guideline amount, (2) determination of child's reasonable needs and relative ability of each parent to pay, (3) determination of whether guideline amount will or will not meet the needs of the child, exceeds the needs of the child or is otherwise unjust or inappropriate, and (4) making written finding of fact as to each of those determinations.
- Trial court order requiring plaintiff to pay attorney fees contained appropriate findings to support conclusion that defendant was a party with insufficient means to defray the expenses of the case and the findings were supported evidence of defendant's income and child care expenditures and by the affidavit submitted by defendant's attorney.
- Trial court was not required to compare the states of the parties when determining whether defendant had insufficient means to defray the cost of the case.
- Trial court did not err in including in attorney fee award amounts incurred by defendant to respond to plaintiff's request for a Writ of Mandamus because trial court determined the fee to be reasonable.
- Trial court had authority to order plaintiff to pay costs even though defendant did not specifically ask for an award of costs in his pleadings.
- Trial court erred by awarding defendant credit for the overpayment of child support when there was no evidence offered to show defendant overpaid child support. Trial court cannot rely on argument of counsel as evidence.

Sarno v. Sarno, _N.C. App._, _S.E.2d_ (September 19, 2017). Trial court deviated from the guidelines on its own motion. The court made findings of fact only as to the parties' incomes,

health insurance cost for the child, and work related childcare costs. The court of appeals vacated the child support order after concluding that the trial court failed to support the deviation with appropriate findings of fact. Deviation requires findings as to the amount required by the guidelines, the needs of the child and the ability of the parties to pay, and that the guidelines do not meet or exceed the needs of the child or are otherwise unjust and inappropriate.

The trial court also ordered plaintiff to pay attorney fees to defendant. Wife argued the order was insufficient because it did not contain sufficient findings to support the conclusions required by GS 50-13.6 and that the evidence did not support the findings that were made. Wife argued the trial court erred by making "a bald statement that [defendant] has insufficient means to defray the expenses of the suit" without evidence in the record to support the conclusion. The court of appeals disagreed, concluding that the evidence of defendant's actual income, the evidence that he had paid all of the expenses relating to the child while the case was pending, and the information in the affidavit submitted by defendant's lawyers about the fees and expenses he had incurred in the case were sufficient to support the conclusion that he had insufficient means.

The court of appeals also rejected plaintiff's argument that the fee award should not have included compensation for fees incurred in responding to a request for writ of mandamus filed by plaintiff because defendant's arguments made in response to the request for the writ were not accepted by the appellate court. The court of appeals upheld the fee award, holding that the determination of the reasonableness of the fees incurred is a matter left to the discretion of the trial judge.

The court of appeals also rejected plaintiff's argument that the trial court erred in ordering plaintiff to pay $3500 in costs when defendant's pleadings did not expressly request an award of costs. According to the court of appeals, a "party is entitled to relief which the allegations in the pleadings will justify … It is not necessary that there be a prayer for relief or that the prayer for relief contain a correct statement of the relief to which the party is entitled." Because there was a legal basis for the award of costs, the court had the authority to award costs.

Finally, the court of appeals agreed with plaintiff's argument that the trial court erred in awarding defendant a credit for the overpayment of child support when there was no evidence offered to establish that defendant had overpaid. Noting that neither plaintiff nor defendant testified about the overpayment, the court of appeals held that the trial court should not have relied on the argument of counsel to establish the facts related to the alleged overpayment

Modification; failure to file motion

- Voluntary support agreement approved by the court modifying terms of original support order was not void due to the failure of either party to file a motion to modify and show a substantial change in circumstances.

Catawba County ex. Rel. Rackley v. Loggins, _N.C._, _S.E.2d._, *reversing* N.C. App, 784 S.E.2d 620 (2016).

In 1999, Shawna Rackly and Jason Loggins signed a Voluntary Support Agreement and the court approved the agreement, making it a court order for support. The agreement provided that

Loggins would pay $0 monthly child support, assign all unemployment benefits to the child support agency, reimburse the State $1,996 for public assistance paid on behalf of his children, and provide health insurance for the children whenever it became available to him through his employment.

In 2000, a motion to show cause for contempt was filed, alleging defendant had failed to reimburse the public assistance as ordered in the 1999 order. As a result of the contempt proceedings, defendant paid a portion of the amount owed and agreed to a modification of the 1999 order. In June 2001, the court entered a "Modified Voluntary Support Agreement and Order" with the consent of all parties providing that defendant would pay $419 per month in child support starting July 1, 2001 and reimburse the State $422 for assistance provided to his children. No motion to modify was filed before the modified order was entered by the court.

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

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

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

The supreme court reversed the court of appeals, holding that the failure to file a motion to modify did not divest the district court of jurisdiction. The court listed the following as the reasons the trial court retained jurisdiction to modify the original support order:

(1) The trial court maintained continuing jurisdiction over the child support issue until the child reached majority or until the death of one of the parties;

(2) The language of GS 50-13.7(a) does not create a jurisdictional prerequisite that would divest the court of jurisdiction;

(3) The legislative history of this statutory provision suggests that the General Assembly did not intend to create a jurisdictional prerequisite;

(4) The provision requiring a motion to modify a child support order to be filed so as to prompt a district court's review of an existing child support order is directory rather than mandatory, and therefore did not deprive the court of jurisdiction; and

(5) The VSA filed by plaintiff satisfied the purpose of GS 50-13.7(a).

Two justices concurred in the result only, arguing that the failure to file a motion does deprive the trial court of jurisdiction but concluding that the VSA filed by consent in this case "served as the functional equivalent of a motion."

It is important to remember that this case holds only that the failure to file a motion does not render a modification void. GS 50-13.7(a) clearly requires that a motion be filed and that the court conclude there has been a substantial change in circumstances before the court modifies a support or a custody order. The failure to follow the requirements of the statute is a legal error that can be challenged in a direct appeal by a party who does not waive objection to the error.

It also is important to remember that the court's decision in this case relies on the continuing jurisdiction of a trial court in a child support or custody case until a child reaches majority or a party dies. A trial court does not have continuing jurisdiction in other types of civil cases. *See Whitworth v. Whitworth*, 222 NC App 771 (2012)(trial court has no jurisdiction to act in an equitable distribution case following final judgment absent an appropriate post-judgment motion).

Domestic Violence
Cases Decided and Legislation Enacted Between June 6, 2017 and October 3, 2017

Legislation

S.L. 2017-92 (H 343). An Act to Ensure that Domestic Violence Victims are Protected by Clarifying that a Valid Protective Order Remains in Effect at the Trial Court Level Throughout the Pendency of an Appeal by the Aggrieved Party Unless the Court Finds That a Stay is Necessary in the Interest of Justice.

Effective October 1, 2017, GS 50B-4 is amended to add new section (g) to provide that a DVPO is enforceable in the trial court pending appeal, unless the court of appeals issues a stay.

Also effective October 1, 2017, GS 50B-3 is amended to add new section (b2) to provide that upon the request of either party at a hearing after notice or service of process, the court can modify any protective order after finding good cause.

New form AOC-CV-326 (Modified Order of Protection) was created and existing form **AOC-CV-313** (Motion to Renew, Modify or Set Aside Domestic Violence Protective Order) was modified to reflect this change. Both forms were made available as of October 1, 2017.

Kids in DV Cases, posted to blog On The Civil Side, March 13, 2015

Minor Parties in 50B Cases

It is not uncommon for persons under 18 to commit acts of domestic violence or need protection from domestic violence. Common questions that arise include:

- Can a minor be a defendant in a 50B proceeding?
- If so, how is the child served and what happens when the child violates the DVPO?
- Can a minor be a plaintiff?
- Does a minor need to be a plaintiff to be protected by a DVPO?

Minor defendants

The general rule is that any minor can sue or be sued in a civil proceeding, as long as the court appoints a Rule 17 GAL. This rule applies in 50B cases, with only one limitation**.** A defendant must be at least 16 years old when the personal relationship supporting the domestic violence claim is that found in GS 50B-1(b)(3), parties related as parents and children, or as grandparents and grandchildren.
When defendant is a minor, process must be served both upon the minor and also upon the child's parent, guardian or "person having care and control" of the minor. If defendant has none of those, service also must be made upon the GAL. GS 1A-1, Rule 4(j)(2).

The clerk may appoint the GAL for a defendant if requested. If no request is made, the court must appoint a GAL on its own motion before proceeding with the trial. GS 1A-1, Rule 17(c) and (e).

The role of the Rule 17 GAL is one of substitution. *See In re P.D.R.*, 737 S.E.2d 152 (2012). A minor is legally incompetent, so the GAL 'substitutes' for the minor party. Obviously this raises many issues about the specific duties of the GAL; a topic for a future blog post. Case law does not provide much guidance. However, appellate courts have stated that " [a]ppointment of a GAL under Rule 17 for an incompetent person 'will divest the [incompetent party] of their fundamental right to conduct his or her litigation according to their own judgment and inclination.' *In re J.A.A. & S.A.A.*, 175 N.C.App. 66, 71(2005)".

It is clear that a Rule 17 GAL is **not** the child's lawyer, see NC State Bar Formal Ethics Opinion, 04 FEO 11, and any adult can serve in the role.
The cost of a Rule 17 GAL is apportioned as court costs between the parties. *See Van Every v. McGuire*, 125 N.C. App. 578 (1997). While GS 50B-2(a) states that "no court costs shall be assessed for the filing, issuance, registration, or service of a protective order or petition for a protective order or witness subpoena," this provision does not prohibit the award of other costs authorized by GS 7A-305(d)(7).

How is a DVPO enforced against a minor?

A DVPO can be enforced by contempt. GS 50B-4. Children age 16 and above are treated the same as adults for contempt. GS 5A-34. However, violations by children at least 6 but not yet 16 must be addressed in the juvenile justice system, unless the child:

- Is emancipated, or
- Before the act, has been convicted in superior court for any criminal offense.

GS 5A-34.
Violation of a DVPO also is a crime. GS 50B-4.1. Delinquent acts by a child under the age of 16 will be prosecuted through the juvenile justice process while a child 16 or 17 years old is prosecuted as an adult.

Minor plaintiffs

A minor can be a plaintiff in a Chapter 50 proceeding if the minor:

- Is an aggrieved party, meaning someone with a personal relationship with the defendant; and
- Is an alleged victim of domestic violence, or has a minor child residing with or in her custody who is an alleged victim of domestic violence.

GS 50B-1(a).

A Rule 17 GAL must be appointed for the minor plaintiff and, as in the case where defendant is a minor, the role of the GAL is one of substitution.
Generally, the clerk appoints the GAL at the time the complaint is filed. AOC Form CV-318.

It is important that the complaint show the name of the child as plaintiff rather than the name of the GAL. Significant confusion results when a DVPO refers to 'plaintiff' but the person listed on the face of the complaint is not actually the plaintiff. There is no need for the name of the GAL to appear anywhere on the face of the complaint. The order appointing the GAL is sufficient to inform the court and any other interested person that the appointment has been made.

Does a minor need to be a plaintiff to be protected by a DVPO?

Not always.

Chapter 50B allows an adult aggrieved party to seek protection for herself **and** a minor child residing with her or in her custody, **or just for a minor child** residing with her or in her custody. GS 50B-1(a).

This allows an adult – a parent for example – to be the only plaintiff in a 50B action filed due to acts committed against both the parent and child or just against the child. As long as defendant is someone with whom the adult plaintiff has a personal relationship, the child does not need to be named as a party to be protected by the DVPO.

If the child is not a party, there is no need for a GAL.
However, in some circumstances the child must be a plaintiff to be protected by the DVPO.

If the parent does **not** have a relationship with the defendant, the parent does not meet the definition of aggrieved party and cannot file a 50B action. Then the child must be the party to receive protection. The most common example is teenagers in a dating relationship. Mom of teenager cannot be plaintiff because she is not an aggrieved party. However, mom can be appointed GAL for the teenager. In that situation, mom is NOT a party. To avoid confusion, the child should be named clearly as plaintiff rather than mom.

Marriage
Cases Decided and Legislation Enacted Between June 6, 2017 and October 3, 2017

Legislation Acknowledging Same-Sex Marriage
Technical Corrections Bill, 2017-102, SECTION 35, effective July 12, 2017

G.S. 12-3 (definitions applicable throughout General Statutes) is amended by adding two new subdivisions to read:

"(16) "Husband and Wife" and similar terms. – The words "husband and wife," "wife and husband," "man and wife," "woman and husband," "husband or wife," "wife or husband," "man or wife," "woman or husband," or other terms suggesting two individuals who are then lawfully married to each other shall be construed to include any two individuals who are then lawfully married to each other.

(17) "Widow" and "Widower." – The words "widow" and "widower" mean the surviving spouse of a deceased individual."

Blog Post About this Legislation: On The Civil Side, August 8, 2017

New Legislation Acknowledges Same-Sex Marriage

In *Obergefell v. Hodges*, 135 S.Ct. 2584, 2607 (2015), the Supreme Court of the United States held "the Constitution … does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." Citing this specific language from *Obergefell*, the Supreme Court again held in a more recent opinion that a state must "provide same-sex couples the constellation of benefits that the States have linked to marriage." *Pavan v. Smith*, 137 S.Ct. 2075, 2077-78 (2017).

Acknowledging this clear mandate that the state treat same-sex marriages the same as opposite sex marriages and afford the same rights and responsibilities to all married couples, the North Carolina General Assembly enacted an important but easy to miss amendment to a seldom referenced statute as part of the voluminous 2017 Technical Corrections Bill.

"Rules for the Construction of Statutes"

To be honest, I do not remember ever reading GS 12-3 before a colleague told me it had been amended as part of the technical corrections bill, 2017 S.L. 102, section 35, in response to the change in our marriage laws. The statute contains a list of rules that apply to the interpretation of all General Statutes unless the specific statute provides otherwise. The amendment in the technical corrections bill adds the following two new sections:

> "(16) "Husband and Wife" and similar terms. – The words "husband and wife," "wife and husband," "man and wife," "woman and husband," "husband or wife," "wife or husband," "man or wife," "woman or husband," or other terms suggesting two individuals who are then lawfully married to each other shall be construed to include any two individuals who are then lawfully married to each other.
>
> (17) "Widow" and "Widower." – The words "widow" and "widower" mean the surviving spouse of a deceased individual."

The amendment was effective July 12, 2017.

Implications of the Amendment

The new statute confirms what most people probably already assumed to be true since the Supreme Court held states cannot limit marriage to opposite sex couples; that is that our laws must be interpreted to apply in the same way to all married couples, regardless of the gender of the spouses. North Carolina statutes relating to the relationship between spouses during the marriage, such as, for example, GS 52-10 regarding contracts between spouses and GS 39-7 relating to conveyances of real property by husbands and wives, as well as our numerous statutes relating to separation and divorce, must be read to apply to same-sex married couples in the same way they apply to opposite sex spouses.

But what exactly that means in the context of interpreting state law regarding the parentage of a child born during a marriage is much less obvious and more complex, too complex to explore thoroughly in a blog post. However, there are several statutes relating to parentage that clearly now must be interpreted to apply to both opposite sex couples and same sex couples.

One example is our step-parent adoption statute, GS 48-4-401 *et. seq.*, which allows for the adoption of a child by the "spouse" of a parent. Even without the recent amendment to G.S. 12-3, it seems clear there is no basis even in the specific language of the statute to limit its application to opposite sex spouses.

Two other statutes relating to parentage are more directly impacted by the amendment to GS 12-3, one dealing with birth certificates and the other with children conceived through one form of artificial insemination.

Birth Certificates

While it does not legally establish the parentage of a child, GS. 130A-101(e) requires that the name of a mother's spouse be placed on a child's birth certificate. Specifically, that statute provides "[i]f the mother was married at the time of either conception or birth, or between conception and birth, the name of the husband shall be entered on the certificate as the father of the child, except as provided in this subsection."

New GS 12-3(16) appears to require that GS 130A-101(e) be read to provide that when a mother gives birth, the name of her spouse must be placed on the birth certificate as the other parent of

the child, regardless of whether the spouse is a male or a female, unless one of the exceptions in the statute applies.

This interpretation also is required by the recent US Supreme Court decision in *Paven v. Smith*, 137 S.Ct. 2075 (2017), wherein the court reversed a decision by the supreme court of Arkansas holding that a similar statute did not require that the name of a female spouse of a child's mother be placed upon a birth certificate even though it clearly required that a male spouse of the mother be placed on the birth certificate under the same circumstances. The Arkansas Supreme Court had concluded that because the birth certificate statute "centers on the relationship of the biological mother and the biological father of the child, not on the relationship of the husband and wife," it "does not run afoul of *Obergefell*."

The US Supreme Court in *Paven* disagreed, stating:

> "As a result [of the interpretation of this statute by the Arkansas court], same-sex parents in Arkansas lack the same right as opposite-sex parents to be listed on a child's birth certificate, a document often used for important transactions like making medical decisions for a child or enrolling a child in school. (citations omitted).
>
> *Obergefell* proscribes such disparate treatment. As we explained there, a State may not "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." Indeed, in listing those terms and conditions—the "rights, benefits, and responsibilities" to which same-sex couples, no less than opposite-sex couples, must have access—we expressly identified "birth and death certificate." That was no accident: Several of the plaintiffs in *Obergefell* challenged a State's refusal to recognize their same-sex spouses on their children's birth certificates. In considering those challenges, we held the relevant state laws unconstitutional to the extent they treated same-sex couples differently from opposite-sex couples." (citations omitted)

Children Born Through Heterologous Insemination

North Carolina has only one statute addressing the parentage of a child born through the use of assisted reproductive technology. Enacted in 1971 and not amended since, GS 49A-1 states:

> "Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique."

Medical dictionaries define "heterologous insemination" to be a medical procedure where sperm from a donor who is not the husband or regular partner of the mother is inseminated into the mother. Definitions distinguish the term from "homologous insemination" which means a medical procedure by which the sperm of the mother's husband or regular partner is used.

The amendment to GS 12-3 appears to require that this statute now be interpreted to provide that the spouse of a mother giving birth through the process of heterologous insemination be

considered the parent of that child for all respects, as long as both spouses agreed in writing to the process.

Alienation of Affection and Criminal Conversation

- Trial court erred in concluding the torts of Alienation of Affection and Criminal Conversation are facially unconstitutional.

Malecek v. Williams, _ N.C. App. _, _ S.E.2d _ (September 5, 2017). The court of appeals has ruled that the torts are not facially unconstitutional but concedes they may be unconstitutional as applied in some unusual circumstances.

Blog Post About this Opinion: On The Civil Side, September 6, 2017, by Ann Anderson

Court of Appeals holds that "heart balm" claims are not facially unconstitutional

North Carolina is among only a handful of states still recognizing the civil claims of alienation of affection and criminal conversation. Known as the twin "heart balm" torts, these laws were devised long ago when women were regarded as a type of property and private morals were regular court business. In short, these claims allow a person to sue his or her spouse's paramour for money damages. To prove "alienation of affection," a plaintiff must show that the defendant wrongfully alienated and destroyed the genuine love and affection that existed between plaintiff and spouse. (Although lovers typically are the target of these suits, a defendant could be another third person who has set out to create the rift.) To prove criminal conversation, a plaintiff must show that the defendant had sexual intercourse with the plaintiff's spouse in North Carolina during the marriage (but before separation).

In the other states that have not yet swept them into the dustbin of history, these claims do not often make their way to court. North Carolina appears to be one of only a couple of states in which they are filed regularly and sometimes result in substantial settlements and large verdicts.

But even in North Carolina the continued enforcement of these claims has long been controversial. Over two decades ago a well-known tort treatise declared their legitimacy "problematic" and "dubious." *See* Logan and Logan, North Carolina Torts, Ed. 1996, p. 439. A decade before that, in 1984, the North Carolina Court of Appeals attempted to judicially abolish them, stating that "there is no continuing legal basis for the retention of these tort actions today" and that they "remain permeated with the uncultivated and obsolete ideas which marked their origin." *Cannon v. Miller*, 71 N.C. App. 460, 497 (1984). The court's attempt was, however, rebuffed by the North Carolina Supreme Court without discussion of the merits. 313 N.C. 324 (1985).

In more recent times defendants have challenged these claims on constitutional grounds. In 2014, this effort succeeded at the trial court level in *Rothrock v. Cooke* (see the court's order here), but the case was not appealed. Then last year the Forsyth County case of *Malacek v. Williams* was also dismissed as unconstitutional. Yesterday the North Carolina Court of Appeals issued an opinion reversing that decision.

Malacek v. Williams

In 2015, Amber Malacek, a nurse, began a sexual relationship with Dr. Derek Williams. Marc Malacek, Amber's husband, sued Dr. Williams under both tort theories. Dr. Williams moved to dismiss both claims on grounds that they were facial violations of his First and Fourteenth Amendment rights. The trial court agreed and in May 2016 dismissed the case at the pleadings stage. Mr. Malacek appealed the dismissal, and the Court of Appeals disagreed with the trial court.

The Court of Appeals acknowledged from the outset that "these laws were born out of misogyny and in modern times are often used as tools for enterprising divorce lawyers seeking leverage over the other side." [For a candid admission of this strategy, see here.] The panel went on to make clear that its opinion was "neither an endorsement nor a critique" of the claims, and stated that "[w]hether this Court believes these torts are good or bad policy is irrelevant; we cannot hold a law facially unconstitutional because it is bad policy."

Substantive Due Process

The court agreed that the Unites States Supreme Court in *Lawrence v. Texas* reaffirmed an adult's constitutionally protected interest in "engaging in sexual activity free of governmental intrusion or regulation." The court further agreed that tort claims based on his sexual activity with Ms. Malacek implicate Dr. Williams's Fourteenth Amendment rights. The court noted, however, that *Lawrence* held that regulation of private consensual sexual activity is prohibited "*absent injury to a person or abuse of an institution the law protects*." (emphasis added). The court then declared that marriage is one such protected institution, and that a marital promise of fidelity, once broken, results in injury to the other spouse. Applying a "robust rational basis" review, the court then concluded that North Carolina's need to protect these interests justifies a private tort action that restricts protected sexual activity: "[T]hese torts deter conduct that causes personal injury; they protect promises made during the marriage; and they help preserve the institution of marriage, which provides innumerable benefits to our society." Because Dr. Williams had not shown that the torts "stem from lingering prejudice or moral disapproval that overshadows the State's other reasons for enacting them," he had not demonstrated that they facially violate the Fourteenth Amendment.

Freedom of Speech, Expression, and Association

The Court of Appeals agreed with Dr. Williams that liability for sexual activity implicates his First Amendment right to free expression. Applying the test established in *United States v. O'Brien*, however, the court held that the government's interest in regulating the expression was not based on its *content*, but instead on deterring the "harmful effects *that result*" from it. The court concluded that because these torts have a deterrent effect that benefits the State and society, they are "narrow enough to survive scrutiny under the *O'Brien* test." The court also rejected the argument that the torts burden his First Amendment right to free association. Noting that there are many other ways to associate with a married person without incurring tort liability, the court concluded that "the incidental burden on those rights does not render these torts facially unconstitutional."

Looking Ahead

Whether Dr. Williams will seek additional review by our Supreme Court remains to be seen. In the meantime, the heart balm torts have survived to see another day…at least to a point. The court in *Malacek* closed with a reminder about the limits of its opinion:

"We emphasize that our holding today does not mean that every application of these common law torts is constitutional. There may be situations where an as-applied challenge to these laws could succeed. Take, for example, one who counsels a close friend to abandon a marriage with an abusive spouse. But this case, as the parties concede, is not one of those cases. It was decided as a facial challenge on a motion to dismiss at the pleadings stage. In the future, courts will need to grapple with the reality that these common law torts burden constitutional rights and likely have unconstitutional applications. For now, we hold only that alienation of affection and criminal conversation are not facially invalid under the First and Fourteenth Amendments."

Postseparation Support and Alimony
Cases Decided and Legislation Enacted Between June 6, 2017 and October 3, 2017

Attorney fees

Affidavits by attorney regarding hours worked and fees charged admitted into evidence without objection were sufficient to support trial court's findings of fact as to the reasonableness of the fees charged.

Costs for an expert witness may only be awarded for actual time spent providing testimony at trial, deposition or other proceeding. However, experts appointed by the court pursuant to Rule 706 of the Rules of Evidence are entitled to compensation as the court deems appropriate.

Slaughter v. Slaughter, _ N.C. App. _, _S.E.2d_ (July 18, 2017). Trial court ordered husband to pay a portion of wife's attorney fees incurred in her alimony claim. Husband argued on appeal that the award was not supported by adequate findings of fact as to the reasonableness of the fees charged. The court of appeals disagreed, holding that the attorney fee affidavits submitted by wife's counsel setting out the hours spent on the claim and the fees charged for the time were sufficient to support the trial court's findings of fact that the fee charged by wife's lawyer was reasonable. The court rejected husband's argument that the affidavits were insufficient because they failed to differentiate charged incurred for child support, PSS or alimony. The court of appeals held that because the affidavits were introduced at trial without objection by husband, he could not complain on appeal that the affidavits were insufficient.

Husband also argued that the trial court erred in ordering him to pay $20,000 for fees charged by wife's forensic accounting expert because only $1,200 of the expert's fees were attributable to time actually testifying in court. The court of appeals held that a court has authority to order the payment of costs incurred by a party for expert testimony in court or in a deposition, but the court does not have authority to order the payment of fees incurred for other services by the expert unless the expert is one appointed by the court pursuant to Rule 706 of the Rules of Evidence. That rule allows the court to order the payment of costs associated with the court-appointed expert as the court deems appropriate. In this case, the expert was not appointed by the court, therefore the trial court erred in ordering husband to pay more than the amount charged for time giving actual testimony.

Income of Supporting Spouse

Trial court erred in ordering supporting spouse to pay alimony without making a specific finding of fact regarding the current actual income of the supporting spouse.

Trial court erred when it based an award of alimony on an average of a supporting spouse's income in past years without making a finding of fact as to the spouse's present actual income and without finding that the spouse's evidence of his actual income was not credible.

Green v. Green, _ N.C. App. _, _S.E.2d_ (October 3, 2017). Trial court ordered husband to pay alimony in the amount of $6000 per month. The alimony order contained a finding as to his

average income in 2014 and 2015 but did not contain a finding as to his actual present income at the time of trial (order entered in 2016). The trial court did make a finding that husband's financial affidavit alleged a monthly income that was less than the average income the court found for 2014 and 2015, but the court did not specifically state that it did not find husband's assertion credible.

The court of appeals reversed and remanded the alimony order, holding that the trial court abused its discretion in determining husband had the ability to pay alimony without making a finding as to his actual present income. The court rejected wife's argument that averaging income from past years is acceptable when there is no credible evidence of actual current income. The court of appeals acknowledged that use of average income has been approved in such cases but pointed out that the trial court in this case did not state that husband's evidence regarding his income was not credible.

Equitable Distribution
Cases Decided and Legislation Enacted Between June 6, 2017 and October 3, 2017

Valuation; effect of entry of default

- Where evidence of classification and value of household items was introduced during the ED trial, trial court erred in failing to value and distribute the property even though plaintiff testified that he "did not care about" the household furnishings.
- Entry of default by the clerk of court did not divest trial court of jurisdiction to make findings of fact and conclusions of law to dispose of a divorce and ED claim.
- Actions for divorce and annulment cannot be resolved by default.

Ellison v. Ellison, *unpublished opinion*, _ N.C. App. _, 801 S.E.2d 391 (June 20, 2017). Plaintiff filed complaint for absolute divorce and ED. When defendant did not file an Answer within 30 days of service, plaintiff obtained entry of default by the clerk. Wife nevertheless filed an Answer and Counterclaimed for PSS, alimony and ED after the entry of default.

The trial court conducted an ED trial and defendant appeared and participated. The trial court entered an ED judgment and plaintiff appealed. On appeal, the court of appeals remanded the case for findings as to the value of household furnishings after concluding that the trial court erred in failing to value the property after "taking judicial notice that plaintiff testified that 'he did not care anything about the home furnishings." The court of appeals held that once evidence was introduced regarding the classification and valuation of the household furnishings, the trial court was required to make findings of fact about the evidence.

The most interesting thing about the case is the footnote in the opinion regarding the entry of default. The court of appeals stated in the footnote that the entry of default did not divest the trial court of jurisdiction to hear evidence from both parties and make findings of fact regarding the claims for divorce and ED. The court cited *Adair v. Adair*, 62 NC App 493 (1983), as holding that a default judgment does not dispose of an underlying claim for divorce. In addition, the court cites *Hawkins ex. Rel. Thompson v. Hawkins*, 192 NC App 248 (2008)(because GS 50-10(a) provides that every allegation in an action for divorce or annulment is deemed denied and no judgment may be entered unless the court makes the required findings of fact, the entry of a default in a divorce proceeding does not relieve plaintiff of the burden of presenting evidence to prove all allegations required for judgment).

While not mentioned by the court of appeals in this unpublished opinion, a North Carolina Supreme Court case decided in 1961 indicates that the prohibition of default judgments applies in cases other than divorce and annulment. In *Schlagel v. Schalgel*, 253 NC 787 (1961), the court held there can be no default judgment in absolute divorce, divorce from bed and board, or alimony. The court stated "jurisdiction over the subject matter of divorce, and actions affecting the marriage relationship is given only by statute, and in the grant, judgments in favor of plaintiff affecting the marriage are prohibited, except upon the finding of material facts by [the court or] by a jury.

Marital LLC as necessary party

- Trial court erred by limiting amount of compensation and distributions husband could receive from marital LLC without making the LLC a party to the ED proceeding.
- Trial court has authority and obligation to add a necessary party *ex mero motu* if a party does not request joinder.

Geoghagan v. Geoghagan, _ N.C. App. _, 803 S.E.2d 172 (July 5, 2017). Trial court classified and valued a marital LLC in an ED proceeding. The court decided to distribute all ownership interest in the LLC to husband and to require husband to pay wife a substantial distributive award. The ED judgment provided that until the distributive award was paid in full, husband was not to receive salary, bonuses or other compensation from the LLC in excess of limits imposed by the court in the ED judgment. The court of appeals held that the trial court erred in limiting the amounts the LLC could pay to husband without first making the LLC a party to the case. The court of appeals held that the LLC is a necessary party to any action wherein the court orders it to act or not to act. The court also held that if a party does not file a motion requesting that the LLC be made a party, the trial court has the obligation to join the LLC on its own motion before entering any order that requires or prohibits the LLC from acting.

Blog post about when an LLC must be joined, posted Feb. 12, 2015

Equitable Distribution: When does the marital LLC have to be joined as a party?

The equitable distribution statutes only give trial courts the authority to distribute marital property. This means equitable distribution is all about – and only about – identifying property owned by either or both spouses on the date of separation and determining how it should be distributed between those two people.

Marital property may include ownership interests in businesses and corporations. Just as parties can own stock in a traditional C corporation, parties also can own an LLC or an interest in an LLC. And just as a court would not be required to join, for example, Exon Corporation or Google before distributing stock owned by the parties, a court is not required to join an LLC in an ED case if the court simply distributes the marital ownership interest in the LLC between the parties.

But just as a C corporation is a legal entity, an LLC also is a person in the eyes of the law. So just as a court cannot enter orders affecting the property or personal rights of an individual without first acquiring jurisdiction over that individual and affording that person due process, a trial court cannot enter orders affecting the 'person' or the property of the LLC without first acquiring jurisdiction over the LLC by making it a party to the ED action.

Two recent opinions from the court of appeals illustrate this distinction.

***Montague v. Montague*, 767 SE2d 71 (NC App 2014)**

This opinion is an example of the most common ED scenario involving an LLC. Joinder of the LLC was not even discussed by the appellate court because there clearly was no need to make the LLC a party. The former spouses were the sole owners of the LLC and the only issue before the

trial court was how to classify, value and distribute the marital and divisible property interest in that LLC and in the funds paid from the LLC to the husband following the date of separation. Neither party claimed that property titled in the name of the LLC should be classified as marital property or distributed by the court, and neither party asked the court to order the LLC, or to order the parties in their capacity as managers of the LLC, to do anything.

While there certainly must have been need for a significant amount of evidence about the finances, daily operations and management of the LLC in order for the court to classify, value and distribute the LLC and the funds distributed by the LLC following separation, the trial court had no need to enter any order directly affecting property owned by the LLC or directly affecting the corporate structure of the LLC. Instead, evidence in the possession of the LLC could be gathered though the use of subpoenas, just as evidence is gathered from non-parties in other types of civil cases. There certainly is no need to join the recipient of a subpoena as a party to a civil case. See Rules of Civil Procedure, G.S. 1A-1, Rule 45.

***Campbell v. Campbell*, 773 SE2d 93 (NC App 2015)**

The situation was more complicated in this case. The trial court was requested to enter an injunction to protect the value and business integrity of the LLC while the ED case was pending. While the ultimate goal in the ED case was to distribute the marital ownership interest in the LLC, the trial court attempted to protect the marital interest by entering orders that required action by the LLC, ordered the transfer of funds belonging to the LLC, and otherwise affected the 'person' of the LLC by altering the management structure pending the final outcome of the ED case.

The court of appeals explained:

> …[T]he trial court ordered Defendant to transfer $350,000.00 of TSG assets without first adding TSG as a party. The trial court also effectively ordered TSG to act by ordering the parties, as the only members of TSG, to appoint Dr. Tharp as an interim controlling manager of TSG, and it specifically ordered TSG to act by ordering TSG to indemnify and pay Dr. Tharp and to post an unsecured bond during the pendency of the preliminary injunction. Finally, the trial court affected the management structure of TSG by finding that Defendant was not a manager of TSG, even though TSG's filings consistently listed Defendant as a manager of TSG and TSG's attorney repeatedly testified that Defendant was a manager, albeit not one "necessary to the function of the company.

In holding that the LLC must be joined before such orders will be valid, the *Campbell* opinion states:

> The courts are not free, for the sake of convenience, to completely ignore the existence of a legal entity, such as [an] LLC." …"A corporation, even one closely held, is recognized as a separate legal entity ... [even when its members are] engaged in litigation which is personal in nature[.]" …"When the separate legal entity has not been made a party to an action, the trial court does not have the authority to order that entity to act. … Moreover, even where a named party to an action is a member-manager of an LLC, the assets of which

> are contested in a pending equitable distribution action, "[t]he trial court exceed [s] its authority when it order[s] [that named party] to transfer the assets of the LLC" without first adding the LLC as a party to the action.

More to Come….
Sometimes a party will allege that property actually owned by another person or entity - such as an LLC - nevertheless is marital property because one or both parties were the 'equitable' owners of that property on the date of separation. Parties become 'equitable' owners when the court determines that it is unjust or otherwise inequitable for the legal owner of the property to retain ownership of the property.
This will be the topic of my next blog post, but of course, the legal owner must be joined and afforded due process before that property can be declared marital property and distributed to other people.

Blog post about when an LLC must be joined, posted February 17, 2016

Equitable Distribution: When Marital Property is Not Owned by a Party……

In the recent case of *Nicks v. Nicks*, 774 SE2d 365 (NC App 2015), husband transferred property acquired during the marriage to an LLC and the LLC thereafter was transferred to a trust. All of this occurred before the date of separation. Understandably, the trial judge in the equitable distribution action filed after the parties separated felt that the property transferred to the LLC should be classified as marital property and distributed between the spouses, so the trial court classified the LLC itself as marital property and distributed it the husband as his share of the marital estate. The court of appeals vacated the ED judgment and remanded the case to the trial court after concluding the LLC was not marital property because it was not owned by either or both spouses on the date of separation.

Does this mean a spouse can avoid ED simply by transferring ownership of property to an LLC or other third party before the date of separation, or by allowing family members or others to hold legal title to property acquired with marital funds during the marriage?
Not necessarily. Equitable principles can be applied to bring property that should have belonged to one or both spouses on the date of separation into the marital estate, but only if appropriate procedure is followed and the legal title holder of the property is afforded due process.

Only Marital and Divisible Property Can be Distributed

As I said in my last post addressing when a marital LLC needs to be joined as a party to an ED action, equitable distribution is all about – and only about – distributing marital and divisible property. The court has no authority to distribute any property that is not marital or divisible property. Marital property includes only property owned by either or both spouses on the date of separation. In *Nicks*, the court of appeals vacated the ED judgment because the trial court distributed the LLC that was owned by the trust rather than by either or both spouses. Similarly, in *Weaver v. Weaver*, 72 NC App 409 (1988), a piano gifted to the children of the parties before the date of separation was not marital property because it was not owned by either spouse on the

date of separation. And there are a number of other similar opinions from the court of appeals. Property cannot be marital property unless it is owned by one or both spouses on the date of separation.

Ownership Includes Equitable Ownership

However, in *Upchurch v. Upchurch*, 122 NC App 172 (1996)(Upchurch I), the court of appeals held that ownership for purposes of ED includes both legal and equitable ownership and recognized that within the context of an ED proceeding, a court has the equitable authority to impose a constructive or resulting trust upon property legally owned by someone other than a spouse. While in other situations a party has a right to have a jury determine whether grounds exist for the imposition of a trust, the Supreme Court held in *Sharp v. Sharp,* 351 NC 37 (1999), that there is no jury trial right when the issue arises in the context of an ED case. The judge rather than the jury must decide whether a trust should be imposed.

The court of appeals also has held that a trial court can impose a trust on property owned by a third party even if neither spouse expressly requests that relief in a pleading. *Weatherford v. Keenan,* 128 NC App 178 (1998).If the trial court finds grounds to impose a trust, the court can order the title to the property be conveyed to one or both spouses and classified as marital property. *Gragg v. Gragg*, 94 NC App 134 (1989).

Three Types of Trusts

The three types of trust are express, resulting and constructive.

Express is as the name implies; a trust created by an actual agreement between the parties that a third party will hold title for one or both spouses. The court simply enforces the express agreement between the parties.

A resulting trust arises from the presumed intent of the parties at the time title is taken by one party under facts and circumstances showing that the beneficial interest in the real or personal property is in another. The most common situation giving rise to a resulting trust is when title is held by one person but one or both spouses provided the purchase money for the property. For example, a resulting trust was imposed in *Gragg* because although husband's father held title to the parties' marital home and had paid a down payment for the property, the husband and wife made monthly payments on the mortgage for 10 years.

A constructive trust is the most commonly imposed trust, appropriate when the court determines it is necessary to prevent the unjust enrichment of the title holder when he or she acquired title through fraud, breach of duty or some other circumstance making it inequitable for that person to retain title. *Upchurch; Glaspy v. Glaspy,* 143 NC App 435 (2001); *Dechkovskaia v. Dechkovskaia*, 754 SE2d 831 (NC App 2014). So in *Upchurch v. Upchurch*, 128 NC App 46 (1998)(Upchurch II), the court imposed a constructive trust in favor of wife on bonds, title to which was transferred shortly before separation by husband to son to avoid equitable distribution. And in *Weatherford*, a constructive trust was imposed in favor of wife on one-half

the value of improvements made to the parties' home, which was originally titled in name of husband's parents but which husband inherited after separation.

Legal Owner Is a Necessary Party

Significantly, the court of appeals in *Nicks* did not reverse the trial court. Instead, the court vacated and remanded, holding that while it was inappropriate for the trial court to classify the LLC as marital property while it was owned by the trust rather than by one of the parties, the party seeking to have the property classified as marital was not without a remedy. However, the remedy cannnot be imposed unless the legal owner of the property – in this case the trust – is joined as a party to the ED action for the sole purpose of determining whether an equitable trust should be imposed. Principles of due process require that property not be taken from a legal owner without the court first acquiring jurisdiction over the person or entity and affording the person or entity the opportunity to participate in the legal process that may result in the loss of ownership of that property. *Dechkovskaia.*

Refiling claim after voluntary dismissal

- Trial court did not err in dismissing wife's complaint for ED and alimony filed more than 10 years after she voluntarily dismissed her original claim for ED and alimony.
- Remarriage of the parties did not toll the passing of the one-year time limitation on the refiling of claims dismissed pursuant to Rule 41.

Farquhar v. Farquhar, _ N.C. App. _, 802 S.E.2d 585 (July 5, 2017). The parties separated in 2003 and wife filed claims for ED and alimony. The parties divorced in 2004. The parties subsequently reconciled and remarried in 2005. Following the remarriage, wife took a voluntary dismissal of her ED and alimony claims. The parties' second marriage lasted ten years. Following their second separation in 2015, wife filed a complaint for ED and alimony arising out of the first marriage. The trial court dismissed the claims as barred by the first divorce after concluding that wife had only one year to refile the claims following her voluntary dismissal.

Wife appealed but the court of appeals affirmed. While the entry of divorce terminates a party's right to ED and alimony, a divorce judgment will not affect ED and alimony claims pending at the time the judgment is entered. In addition, Rule 41 of the Rules of Civil Procedure allows a party to take a voluntary dismissal of those claims following entry of divorce and retain the right to refile those claims within one year of the voluntary dismissal. *Stegall v. Stegall,* 336 NC 473 (1994). Wife acknowledged that it had been much more than one year since she dismissed her claims, but argued that the one-year time period was tolled during the second marriage of the parties. She argued that because she could not litigate the claims while the parties were married, the one-year period did not begin to run until their subsequent separation. The court of appeals disagreed, stating that it refused to hold that "claims are indefinitely tolled by a second marriage of the parties so that they may tucked away and used as a sword in a hypothetical, future action."

Valuation of business; distributive awards

- Trial court was not required to make findings of fact to resolve disagreement between valuation experts on particular aspects of the valuation methodologies used to value a law practice.

- Report from valuation expert was sufficient evidence to support the trial court's finding of fact as to the value of the law practice.
- Findings of fact were sufficient to show how husband could pay a $494,000 distributive award.

Slaughter v. Slaughter, _ N.C. App. _, _S.E.2d_ (July 18, 2017). The trial court valued husband's law practice by adopting the valuation of wife's expert instead of the valuation of husband's expert. Husband argued on appeal that because the two experts disagreed over the attorney compensation adjustment and the capitalization rate used in their valuation methodologies, the trial court was required to resolve the issue by making specific findings of fact as to the appropriate compensation adjustment and capitalization rate. The court of appeals disagreed and held that the trial court properly and completely resolved the factual issues regarding the value of the business when it adopted the final value calculated by plaintiff's expert. The court of appeals also rejected husband's argument that the trial court was required to make a separate finding of fact as to the goodwill of the practice and husband's argument that the trial court erred in relying on the expert to determine whether increases in the value of the practice were active or passive increases. The expert's report was competent evidence of value and of the nature of the increase in value and was sufficient to support the trial court's findings of fact regarding value and the classification of the increase in value.

The court also rejected husband's argument that the trial court's findings were insufficient to show he had the ability to pay the $494,000 distributive award ordered by the trial court. While the trial court concluded that husband's ownership interest in his law firm was not liquid, the ED judgment contained other findings showing he had the ability to "unilaterally obtain liquid distributions from" the law firm and that he had the "ability and willingness to use the [law firm] credit card to pay personal expenses." The court of appeals held that these findings showed two sources of payment of the distributive award.

Classification of contingency fee; distribution of mortgage; distributive award

- Contingency fee received by lawyer husband after the date of separation was not marital or divisible property where case generating the fee was not settled until after the date of separation.
- Trial court was not required to order wife to refinance mortgage on marital home when the marital debt was distributed to her.
- Presumption in favor of an in-kind distribution was rebutted by fact that marital property included a closely held corporation and by the trial court's conclusion that an in-kind division was impractical.
- Plenary evidence in the record showed liquid assets husband could use to pay distributive award ordered by the court.

Green v. Green, _ N.C. App. _, _S.E.2d_ (October 3, 2017). Lawyer husband appealed from equitable distribution judgment that awarded wife a portion of funds husband received after the date of separation as the result of a settlement of a contingency fee case, distributed to wife the marital home and the mortgage on the marital home without requiring wife to refinance the mortgage, and ordered husband to pay wife a distributive award of $150,000.

Contingency fee profits.

Husband was a shareholder partner in a law firm that was incorporated as a Subchapter C corporation. Husband's ownership interest in the firm was marital property. Before the date of

separation, the firm acquired a contingency fee case. Husband worked on the case before separation and after. After the case settled, husband received a profit distribution from his ownership interest was much larger than was normal. The trial court determined that the amount he received that reflected the excess value from the contingency case was deferred compensation and divisible property and distributed a portion of the funds to the wife in the final equitable distribution judgment.

On appeal, husband argued that the trial court erred in the classification of the funds and the court of appeals agreed. According to the court, the funds did not represent deferred compensation because husband did not earn the right to receive the funds until after the date of separation. The contingency fee agreement provided that no compensation would be earned unless the client recovered, so husband has no right to receive any compensation until the case was resolved following separation.

The court of appeals also held that the funds did not represent divisible property under GS 50-20(b)(4)(b) which provides that divisible property includes property:

> "received after the date of separation but before the date of distribution that was acquired as the result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses and contract rights."

Without discussing whether husband's work on the contingency case before the date of separation could support a conclusion that a portion of the funds were "acquired as the result of the efforts of either spouse during the marriage and before the date of separation," the court of appeals held that the funds were not divisible property because defendant did not have a contract right to receive the funds on the date of separation and because the funds did not constitute a bonus.

Mortgage Debt

Husband also argued that the trial court was required to order wife to refinance the mortgage on the marital home when it distributed that marital debt to her in order to ensure that husband could not be held liable for the debt. The court of appeals rejected his argument, holding that the trial court properly classified and distributed the debt to wife and there is no requirement that the trial court order refinancing. The court also noted that husband did not ask the trial court for such an order and introduced no evidence at trial that wife had the ability to refinance.

Distributive Award

Finally, husband argued that the trial court failed to support the distributive award with the conclusion that the presumption in favor of an in-kind distribution had been rebutted and with findings about how the distributive award would be paid. The court of appeals disagreed, holding that the presumption was rebutted by the fact that defendant's interest in the law firm is a closely-held business interest and by the trial court's conclusion that an in-kind division was impractical. The fact that the judgment did not specifically say the presumption had been rebutted was "harmless error". In addition, the court of appeals held that there was "plenary evidence" in the record showing husband had sufficient liquid assets to pay the distributive award.

From Summer 2017 Update

Equitable Distribution
Cases Decided Between October 4, 2016 and June 6, 2017

Corporations; actions filed in superior court while ED pending

- Superior court erred in concluding that the prior pending action doctrine applied to prohibit the superior court from considering wife's claims against husband and marital corporations for breach of fiduciary duty, breach of contract, demand for an accounting, and for *quantum meruit.*
- While the prior pending doctrine did not apply to take jurisdiction from the superior court, principals of judicial economy require that the superior court action be held in abeyance until the equitable distribution action is resolved.

Baldelli v. Baldelli, _ N.C. App. _, 791 S.E.2d 687 (October 4, 2016). Wife filed action in superior court against husband and against several closely held corporations formed and operated during the marriage of the parties. Wife's claims arose out of the operations of the corporations. She alleged breach of contract and breach of fiduciary duty. In addition to damages, she requested an accounting and *quantum meruit*.

At the time wife filed the action in superior court, an equitable distribution action was pending between the parties in district court. The parties contended that the corporations were marital property. Husband filed a motion to dismiss the superior court action and the superior court granted his motion after concluding the superior court had no jurisdiction to proceed based on the prior pending action doctrine.

The court of appeals disagreed and remanded the case to the superior court. The court of appeals explained that in order to determine whether the prior pending action applies to prohibit the exercise of jurisdiction in a case, the court must decide whether the first case filed involves the same claims between the same parties as the second case filed. To determine whether the cases involve the same claims, the court should determine whether it is possible for the party filing the second action to obtain the relief available in the second action if successful in the initial action. In this case, the court of appeals pointed out that the only remedy in equitable distribution is the distribution of marital property. So, in the ED case, wife may be awarded shares of the marital corporation and/or may be awarded a larger share of marital property based on considerations of distribution factors, some of which may be related to the claims raised in the superior court proceeding. Despite this similarity of issues, the court held that wife could not receive damages in the form of a money judgment or an accounting in the district court proceeding as she can in the breach of contract and breach of fiduciary duty actions pending in superior court. For that reason, the prior pending action doctrine did not apply to prohibit the exercise of jurisdiction by the superior court in this case.

However, the court of appeals held that because of the similarity of the issues in the two cases and the chance that the final distribution of marital property would impact wife's potential recovery in the superior court action:

> "we do not believe it is in the interest of judicial economy or clarity for both of these actions to proceed simultaneously. To allow both actions to proceed concurrently would invite conflict between the resolution of interrelated issues in the two actions."

The court therefore held that the superior court action:

> "should be held in abeyance pending the resolution of the district court domestic relations case and the results of the equitable distribution case taken into consideration in the resolution of the superior court case."

**For a similar result and discussion of the prior pending action doctrine, see the *unpublished decision* in Stokes v. Drug Safety Alliance, _N.C. App._, 792 S.E.2d 187 (November 1, 2016)(fraud claim arising out of ED claim must be held in abeyance until ED action is complete).

Pleading ED; military pension; survivor benefit plan; amendment of ED judgment

- While neither party included allegations in their pleadings referencing equitable distribution or a date of separation, both asked that the court unequally distribute marital property in their favor as part of their prayers for relief. The requests were sufficient to state claims for equitable distribution.
- A claim for equitable distribution can be filed along with a request for divorce from bed and board.
- Parties must be living separate and apart at the time a claim for ED is filed.
- Trial court properly denied husband's request to amend the ED judgment due to changed circumstances. While the court has approved modifications to QDROs to effectuate the terms of original judgment, an ED judgment cannot be modified simply to change the underlying judgment due to a change in circumstances.

Gurganus v. Gurganus, _ N.C. App. _, 796 S.E.2d 811 (February 21, 2017). Equitable distribution judgment entered in 2003 awarded wife a percentage of defendant's military pension to be paid when he begins to receive benefits and ordered that Survivor Benefits be maintained in favor of wife. The "Seifert formula" was applied in the distribution order to designate the percentage of each pension payment received by husband in the future that would be paid to wife. The Seifert formula is the time earning the pension while married over the total time husband earned the pension by serving in the military until the time he begins to receive the benefits. It is referred to as the Seifert formula because it was approved by the North Carolina Supreme Court in the case of *Seifert v. Seifert*, 319 NC 367 (1987).

In 2014, husband filed a motion in the cause seeking a declaration that the "Seifert formula" that was applied under the original judgment to divide his monthly pension payments was improper because it would allow wife to "benefit from his rise in the military ranks and the corresponding increase in retirement benefits that were attained due to his active efforts postseparation." He also asked that the expense of the Survivor Benefit Plan be assigned to wife. In addition, husband argued that his active efforts to advance in the military and wife's attempts to "impede his advancement" constituted a substantial change in circumstances that would support modification of the ED judgment. The trial court granted wife's motion for summary

judgment on each of husband's claims, ruling there was no basis in law for granting the requests. Husband appealed.

On appeal, husband first argued that the original ED order was entered without subject matter jurisdiction because neither party properly pled a claim for ED in the original pleadings and because the parties were living together when wife first filed her action for divorce from bed and board and alimony. In her complaint, wife made no factual allegations about marital property and did not state that the parties were living apart – because they were living together at the time she filed her complaint – but she did ask for an unequal distribution of marital property in the prayer for relief section of her complaint. Husband filed an answer after the partied separated. His answer also included a request for an unequal division of marital property in his prayer for relief section. The court of appeals held that both pleadings were sufficient to state a claim for equitable distribution but because wife's claim was filed before the parties separated, it was not sufficient to give the trial court jurisdiction to adjudicate the ED claim. However, husband's claim was sufficient to put the issue before the court because it was filed after the parties began to live separate and apart.

The court of appeals also rejected husband's argument that the ED judgment should be amended because application of the Seifert formula results in "manifest unfairness" because it allows wife to share in the rewards of husband's postseparation efforts. Agreeing with the trial judge that there is no basis in law to amend the ED judgment, the court of appeals noted that the Seifert court considered and rejected that same argument when it approved the formula. Acknowledging that the court allowed an amendment of a QDRO in *White v. White*, 152 NC App 588 (2002), where the military spouse had converted his retirement to disability pay after the entry of the ED judgment, the court of appeals held that the situation in this case was different. While the amendment in White simply effectuated and enforced the terms of the original order, husband in this case simply wants to change the original order due to changes that were completely foreseeable at the time of the entry of the order. In fact, the Seifert formula was adopted for the express purpose of allowing the nonemployee spouse to earn growth on her portion of the pension in the years before receipt by sharing in the growth that occurs to the pension due to the military member's continued years of service after the ED judgement is entered.

*** Effective December 23, 2016, federal law was amended to address the concerns like those raised by husband in the *Gurganus* case. State courts no longer are allowed to distribute the portion of a military pension that is attributable to time served by the military member following the date of divorce.

The following two blog posts [www,civil.sog.unc.edu] were intended to explain this change to federal law:

Equitable Distribution: Change in Federal Law Regarding Military Pensions Part 1

Before 1981, military pensions were not subject to division by state courts in marital dissolution proceedings. However, Congress enacted the Uniformed Services Former Spouses Protection Act (USFSPA) to provide that, for pay periods after July 25, 1981, "disposable retired pay" of military personal is subject to division by a state court in a divorce proceeding. 10 USC

1408(c)(1). Effective December 23, 2016, Congress has changed the definition of "disposable retired pay" as it relates to property distribution upon divorce in a way that has left family law practitioners and judges across the country struggling to quickly determine how to reconcile existing state law with the new federal definition. In this blog post, I will try to explain the change as it relates to North Carolina equitable distribution law. In my next post, I will discuss some issues and questions arising from the change.

The Change to Federal Law

Before the effective date of this amendment, the USFSPA defined "disposable retired pay" as "the total monthly retired pay to which a member is entitled less [certain specified] amounts."

The 2016 amendment adds that the:

> "monthly retired pay to which a member is entitled shall be—
>
> "(i) the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order, as increased by
> "(ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member's retirement using the adjustment provisions under that section applicable to the member upon retirement.".

National Defense Authorization Act for Fiscal Year 2017, sec. 641; PL 114-328, December 23, 2016, 130 Stat 2000.

Before this amendment, state courts had the authority to order a division of any portion of a service member's disposable retirement pay, even if retirement occurred many years after the property division and the total disposable retired pay reflected years of continued service following the state property division. The new amendment means that state courts now have authority to distribute only that portion of a member's final retirement pay that would have been paid to the service member had she or he retired on the date of the entry of the property division order plus any cost of living adjustments that occur between the time of the property division and the actual retirement of the service member.

How does this affect North Carolina law?

It appears that this change will not affect either the classification or the valuation of a military pension in a North Carolina equitable distribution proceeding.

G.S. 50-20.1 requires that all pensions be classified using the coverture fraction; the numerator of the fraction represents the number of years of the marriage, up to the date of separation, which occurred simultaneously with the employment that earned the pension, and the denominator represents the total number of years during which the pension accrued up to the date of separation. So for example, if one spouse has been employed by the same company earning a pension for 10 years by the date of separation, and the parties were married for 5 of those years,

we know that 5/10ths or one half of the date of separation value of the pension is classified marital property. *See Bishop v. Bishop*, 113 NC App 725 (1994); *Robertson v. Robertson*, 167 NC App 567 (2004). Because classification is determined as of the date of separation and the date of separation always will be before the date of the division order, the federal change to the definition of disposable retired pay will not affect the classification of any pension under North Carolina law.

Similarly, North Carolina law requires that pensions be valued as of the date of separation by assuming that the military service member retired on the date of separation. *Bishop*. So again, because the date of separation always will be before the date of the division order, the change to the federal law will not result in a change in the value of a pension under North Carolina law.

What about distribution?

In *Seifert v. Seifert*, 319 NC 367 (1987), the Supreme Court approved of the use of a very common application of the distribution method authorized by GS 50-20.l(a)(3) and (b)(3).

Referred to as "the fixed percentage method" or "deferred distribution," these statutes authorize the court to make an award of pension benefits payable "as a prorated portion of the benefits made payable to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits." The *Seifert* court approved use of a specific fraction to determine the "prorated portion of benefits" to be paid in the future. The fraction is the total time earning the pension while married up to the date of separation over the total time earning the pension up to the time of actual retirement.

This fraction is applied to the total disposable retired pay of a service member, which until December 2016 was defined to mean the total retirement pay of the service member at the time of actual retirement. Service members have argued that application of a fraction such as the one approved in *Seifert* inappropriately allowed the non-service member spouse to share in increases in retirement benefits earned by the service member spouse after the date of separation. The court in *Seifert* rejected this argument, holding instead that using a fraction that takes into account the total employment time earning the pension makes "deferral of payment … possible without unfairly reducing the value of the award [to the nonemployee spouse]… and [allows] the nonemployee spouse [to] share in any growth in the benefits [earned during the marriage]."

The recent change in the federal definition of disposable retired pay will significantly affect the amount of benefits that will be received by a former spouse of a retired service member if the fraction approved in *Seifert* continues to be used. That is because the fraction will be applied to a smaller number, the amount of retirement pay the service member would have received if he or she retired on the date the distribution order was entered plus cost of living adjustments that accrued between that date and the actual date of retirement.

Consider an example. Wife joins military shortly after marriage. Parties separate after 20 years and court decides pension is 100% marital and husband should receive 50% of the marital portion. Wife stays in military until she retires with 30 years of service. Her disposable retired pay under the old definition (and the amount she actually will receive even with this new definition applicable only for the purpose of property distribution upon divorce) is $3000 per month. Application of the *Seifert* fraction to the $3000 will result in payment to husband of $1020 per month. [20 years/30 years times 50% times $3000 = $1020]

However, application of the fraction to the new definition of disposable retired pay means that, assuming for the sake of illustration that the distribution order is entered the same year the parties separate, husband will be awarded a portion of a 20 year retirement benefit plus cost of living adjustments rather than a portion of a 30 year benefit. Let's assume for this example that this amount would be $2200. When wife retires after 30 years, husband will receive $748 per month rather than the $1020 he would have received before the legislative change. [20 years/30 years times 50% times $2200 = $748].

This Raises Some Questions

I think the first legal issue to address is the question of whether application of the *Seifert* fraction in light of this change results in distributions that may be inherently unfair to the non-military spouse. If so, does North Carolina law actually require that we use the *Seifert* fraction or are judges and litigants free to determine the "prorated portion of the benefits made payable to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits" in some other way?

Equitable Distribution: Change to Federal Law Regarding Military Pensions Part 2

In my last blog post, I wrote about a recent change to federal law regarding the portion of a military pension subject to division by a state court in a divorce proceeding. Effective December 23, 2016, the definition of disposable retired pay in the context of a division of a military pension in a marital dissolution proceeding found in 10 USC sec. 1408 was amended to be the amount a service member would have received had he retired on the date of divorce plus cost of living adjustment accruing between the date of divorce and the date of actual retirement. Before amendment, the definition of disposable retired pay was the total amount a service member receives upon actual retirement, regardless of whether that amount reflected years of service and elevations in rank of the service member following the date of divorce.

The change in the definition of disposable retired pay does not appear to impact the way we classify and value a military pension under North Carolina equitable distribution law, but the change does raise issues regarding how military pensions actually are divided between the parties when the fixed percentage, deferred distribution method of division is used.

Distribution Methods

In *Seifert v. Seifert*, 319 NC 367 (1987), the Supreme Court explained the difference between the immediate offset method of distributing a pension and the fixed percentage, deferred distribution method. In the immediate offset method, the pension is valued and distributed to the service member whose employment earned the pension. The other spouse receives more marital property to offset the value of that spouse's marital interest in the pension that is distributed to the service member spouse. This method is not the most common distribution method because it requires that there be sufficient other marital property to offset the value of the pension. In most cases, the value of a marital pension far exceeds the rest of the marital estate. If the immediate offset method is used to accomplish an equitable distribution, the recent change to the federal law will not affect the process at all.

The fixed percentage, deferred distribution method is far more common. The division of the marital portion of a pension is accomplished by the entry of an order designating the portion of each future retirement check that must be paid to the non-service member former spouse when the service member retires and begins to receive retirement benefits. The *Seifert* court approved of the use of a fraction to determine the portion of each future pension check payable to the non-service member spouse. In that case, the fraction was to be applied to the total retirement pay received by the service member upon retirement, an amount determined by his rank and years of service at the time of retirement. The recent change in federal law means that the fraction set out in our division orders now will be applied to a lesser amount, the amount the service member would be receiving had he or she retired on the date of divorce** plus any cost of living adjustments accruing between the date of divorce and the service member's actual retirement date.

Do we need to modify the *Seifert* fraction?

The fraction used in *Seifert* had a numerator that was the amount of time earning the pension while married up to the date of separation and a denominator that was the total time the service member spent earning the pension up to the time of his retirement.

While the *Seifert* court decided that application of this fraction to award the non-service member a share of the total pension earned by the service member up to the date of retirement was fair because it protected the non-service member's interest in the growth of the marital interest over time, application of this same fraction to the lesser amount now authorized by federal law will result in a dilution of the non-service member's marital interest. For a discussion of this dilution effect that at least one appellate court concluded is unfair to the non-service member spouse, see *Douglas v. Douglas*, 454 SW3d 591 (Tex. App. 2014). To avoid this dilution, the denominator of the fraction must be the total time earning the benefits that actually being divided rather than the total time earning all the benefits the service member will receive. With the change in the federal law, the benefits actually being divided are only those earned by the service member up to the date of the divorce.

Can we apply the *Seifert* formula this way?

I think so. The court in *Seifert* defines the denominator of the fraction used in that case as "the total period of participation in the plan." I do not think it is inaccurate to interpret this definition to mean the total period of participation in the plan "earning the amount being divided." That certainly is what the court meant considering the facts in *Seifert,* but the amount being divided in that case was the member's full retirement pay. If we define the amount being divided in accordance with the new federal law, the denominator should be the total number of years earning the pension up to the date of the divorce.

Returning to the admittedly over simplistic example from my last post, let's assume we have spouse who served in the military 20 years while married up to the date of separation, 22 years up to the date of divorce and 30 years by the time of actual retirement. Also assume the non-service member is awarded 50% of the marital portion of the pension. The fraction as applied in *Seifert* was 20/30 times 50% times the disposable retired pay received by the service member when he retires. If the disposable retired pay is the service member's full retirement, *Seifert* says that is fair. But if the fraction is applied to the reduced disposable retired pay now required by the federal law, using 30 years as the denominator dilutes the share of the non-service member spouse. To accurately account for the marital interest in the amount actually available for division, the denominator should be 22 years rather than 30.

Other pensions

A change in the fraction may take care of the unfair dilution. However, courts and practitioners also should remember when fashioning distributions that this change in federal law applies only to military pensions. So, if one spouse has a military pension and the other has, for example, a North Carolina state employee pension, the *Siefert* fraction still will be applied to the state employee's full retirement benefits at the time of retirement while the amount of the military pension to be divided will be the reduced disposable retired pay.

Should courts and practitioners somehow adjust the distribution to account for this difference? This is a difficult question to answer because the difference in the two pensions will not be reflected in their valuation within the context of the equitable distribution proceeding. For this reason, we cannot assume that the military pension is somehow less valuable than the state employee's pension. Even if it is less valuable, if we use the correct fraction to designate the portion of the military pension that should be paid to the non-service member spouse, how significant will the difference be between what the military pension would have been before the federal law change and what it is now, especially when we add in the cost of living adjustments? That certainly is not something to be considered without actual evidence in each individual case.

**I use the term divorce judgement because the Uniformed Services Former Spouses Protection Act, 10 USC 1408, defines the term court order as "a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree judgment." The amendment changing the definition of disposable retired pay fixes the pay at the time of "the court order".

US Supreme Court; military pension; conversion to disability pay

- Trial court erred when it ordered military member to reimburse former spouse for retirement income she lost when he converted his military pension to disability pay years after the entry of an ED order that awarded wife a share of the member's retirement pay.
- Federal law allows the distribution of 'disposable retired pay' only. Disability benefits are excluded from the definition of 'disposable retired pay.'

Howell v. Howell, 581 U.S. _ (May 15, 2017). The following is the official syllabus of the decision:

The Uniformed Services Former Spouses' Protection Act authorizes States to treat veterans' "disposable retired pay" as community property divisible upon divorce, 10 U. S. C. §1408, but expressly excludes from its definition of "disposable retired pay" amounts deducted from that pay "as a result of a waiver . . . required by law in order to receive" disability benefits, §1408(a)(4)(B). The divorce decree of petitioner John Howell and respondent Sandra Howell awarded Sandra 50% of John's future Air Force retirement pay, which she began to receive when John retired the following year. About 13 years later, the Department of Veterans Affairs found that John was partially disabled due to an earlier service-related injury. To receive disability pay, federal law required John to give up an equivalent amount of retirement pay. 38 U. S. C. §5305. By his election, John waived about $250 of his retirement pay, which also reduced the value of Sandra's 50% share. Sandra petitioned the Arizona family court to enforce the original divorce decree and restore the value of her share of John's total retirement pay. The court held that the original divorce decree had given Sandra a vested interest in the prewaiver amount of John's retirement pay and ordered John to ensure that she receive her full 50% without regard for the disability waiver. The Arizona Supreme Court affirmed, holding that federal law did not pre-empt the family court's order.

Held: A state court may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits. This Court's decision in *Mansell* v. *Mansell*, 490 U. S. 581 , determines the outcome here. There, the Court held that federal law completely pre-empts the States from treating waived military retirement pay as divisible community property. *Id*., at 594–595. The Arizona Supreme Court attempted to distinguish *Mansell* by emphasizing the fact that the veteran's waiver in that case took place before the divorce proceeding while the waiver here took place several years after the divorce. This temporal difference highlights only that John's military pay at the time it came to Sandra was subject to a future contingency, meaning that the value of Sandra's share of military retirement pay was possibly worth less at the time of the divorce. Nothing in this circumstance makes the Arizona courts' reimbursement award to Sandra any the less an award of the portion of military pay that John waived in order to obtain disability benefits. That the Arizona courts referred to her interest in the waivable portion as having "vested" does not help: State courts cannot "vest" that which they lack the authority to give. Neither can the State avoid *Mansell* by describing the family court order as an order requiring John to "reimburse" or to "indemnify" Sandra, rather than an order dividing property, a semantic difference and nothing more. Regardless of their

form, such orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. Family courts remain free to take account of the contingency that some military retirement pay might be waived or take account of reductions in value when calculating or recalculating the need for spousal support. Here, however, the state courts made clear that the original divorce decree divided the whole of John's military pay, and their decisions rested entirely upon the need to restore Sandra's lost portion.