

Family Law Update

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June 2015

Child Custody

Modification

- ☞ Substantial Change in Circumstances Affecting Welfare of the Child
 - ☞ Is a Conclusion of Law
 - ☞ Cannot be based on stipulation of the parties
 - ☞ *Thomas v. Thomas*, 757 SE2d 375 (2014)
 - ☞ Cannot be predetermined in a court order
 - ☞ *Cox v. Cox*, 768 SE2d 308 (2014)

Involuntary Dismissal

- ☞ Involuntary dismissal for failure to prosecute is **with prejudice** unless court explicitly orders otherwise
 - ☞ GS 1A, Rule 41
 - ☞ *Hebenstreit v. Hebenstreit*, 769 SE2d 649 (2015)
- ☞ If with prejudice, order must contain findings as to why lesser sanction is not appropriate
 - ☞ *McKoy v. McKoy*, 214 NC App 551 (2011)

Oltmanns Primary Legal Custody



- ☞ Court must consider 'joint custody' if requested
 - ☞ GS 50-13.2(a)
- ☞ Award of primary legal custody to one parent was supported by findings indicating:
 - ☞ Parents had conflicting values , priorities and parenting styles
 - ☞ Parents distrusted each other
 - ☞ Both were "very intelligent"
 - ☞ "Power struggles" would be detrimental to children
- ☞ Findings that both parents are fit and proper and very involved in children's life did not preclude award of primary legal custody

Child Support

Modification of Order from Another State



- ☞ Subject Matter Jurisdiction to Modify - GS 52C (UIFSA)
 - ☞ State with Continuing Exclusive Jurisdiction is only state that can modify
 - ☞ State loses CEJ when all parties and the child leave state
 - ☞ If no state has CJE and both parties live in NC, NC can modify
 - ☞ If no state has CJE and only one party lives in NC, NC cannot modify
 - ☞ Exception: Parties **can consent** in writing to jurisdiction

UIFSA's "Play-Away" Rule



- ☞ **GS 52C-6-611:** After a child support order issued in another state has been registered in this State, the responding tribunal of this State may modify that order only if ... after notice and hearing it finds that:
 - ☞ a. The child, the individual obligee, and the obligor do not reside in the issuing state;
 - ☞ b. A petitioner who is a nonresident of this State seeks modification; and
 - ☞ c. The respondent is subject to the personal jurisdiction of the tribunal of this State

Modification Jurisdiction



- ☞ *Barclay v. Makarov*, 767 SE2d 152 (2014)
 - ☞ Order entered in Russia
 - ☞ Dad moved to Canada
 - ☞ Mom and child moved to NC
 - ☞ Mom filed motion to modify in NC after living here 9 years
 - ☞ NC court had no subject matter jurisdiction to modify
 - ☞ Mom must file in Canada

Modification



- ☞ Trial court has no authority to modify custody or support order unless a party files a motion to modify
 - ☞ *Henderson v. Henderson*, 165 NC App 477 (2004)
- ☞ Court only can modify provisions of order that parties ask to modify
 - ☞ *Moore v. Moore*, 768 SE2d 4 (2014)
 - ☞ Citing unpublished opinion, *Parrott v. Kriss*, 204 NC App 210 (2010) (no modification of education and other extraordinary expenses if not specifically requested).
- ☞ Trial court erred in modifying medical expenses provision where motions to modify requested only that "child support" be modified
 - ☞ *Moore*

Temporary Order



- ☞ Is it really temporary?
 - ☞ Same rules apply as in custody
- ☞ "Temporary" label is not controlling
- ☞ Temporary if:
 - ☞ Entered without prejudice
 - ☞ Clear reconvening time set in order
 - ☞ Doesn't resolve all issues

Temporary Orders



- ☞ *De la Rosa*, 770 SE2d 106 (2015)
- ☞ Does temporary support order 'convert' to final order?
 - ☞ Entered without prejudice
 - ☞ No reconvening date set
 - ☞ Parties treated it as final when filing motions to modify
 - ☞ Order was final even though entered less than one year before modification request

Imputing Income



- ☞ Parent acted in deliberate disregard of support obligation
- ☞ Amount of income imputed must be based on evidence of earning capacity
 - ☞ *De la Rosa* (error to base amount imputed on parent's monthly expenditures rather than on evidence of earning capacity).

Prospective/Retroactive Support



- ☞ Effective date of prospective support is date action is commenced (unless court deviates)
- ☞ Support for time period before action is commenced is retroactive support
 - ☞ Can be determined using evidence of actual expenditures or using Guidelines
- ☞ Action generally commenced when complaint is filed
- ☞ If action discontinues but is then revived, action is commenced on date action is revived
 - ☞ *Moore v. McLaughlin*, NC App (March 17, 2015)

Domestic Violence



Recording Ex Parte Hearings



- ☞ *Stancil v. Stancil*
 - ☞ Filed June 16, 2015 [not in handout]
- ☞ Ex parte hearing pursuant to GS 50B-2 is a "civil trial" within the meaning of GS 7A-198
- ☞ All civil trials must be recorded
 - ☞ Exception: Magistrate 50B hearings do not need to be recorded

Other “Civil Trials”



- ☞ Yes:
 - ☞ Motions to Modify
 - ☞ Rule 60 motions
- ☞ No:
 - ☞ Entry of Consent Judgment
- ☞ Probably Not:
 - ☞ Rule 65 TRO
 - ☞ 50C ex parte
 - ☞ Emergency Custody orders

Stancil [not in handout]



- ☞ **Surrender of Firearms** Required/ Allowed:
 - ☞ Use/threatened use of firearm or history/pattern
 - ☞ Threat to seriously injure/kill victim
 - ☞ Threat to commit suicide
 - ☞ Serious injury
- ☞ *State v. Elder*, 753 SE2d 504 (2014)(affirmed NC 2015)
 - ☞ Because 50B addresses firearms directly, court cannot use the ‘catch-all’ remedy provision to order something not specifically authorized

Stancil [not in handout]



- ☞ Fear of Continued Harassment
 - ☞ Subjective test used to determine whether conduct “tormented, terrorized, or terrified” plaintiff
 - ☞ Actual substantial emotional distress required
 - ☞ Established by evidence that plaintiff was “unable to perform the tasks required by her employment”

Act of Domestic Violence???



- ☞ **Feb. 13, 2013**: defendant told plaintiff “I ought to kill you”
- ☞ **April 13, 2013**: the parties separated
- ☞ **November 3, 2013**: defendant ‘hacked’ plaintiff’s computer
- ☞ **November 13, 2013**: plaintiff filed for DVPO

Act of Domestic Violence

☞ *Jackson v. Jackson, unpublished*, 768 SE2d 63 (2014)

☞ Trial court concluded:

- ☞ Threat to kill caused fear of imminent bodily injury
- ☞ Computer hacking caused fear of continued harassment

☞ Court of appeals held insufficient evidence to prove act of DV

- ☞ Threat to kill did not cause fear of "imminent" harm
- ☞ Hacking may be harassment but no act of DV when plaintiff testified she suffered no emotional distress

Civil No-Contact Order

☞ S.L. 2015-25 (H 79)

☞ Effective October 1, 2015 and applies to orders entered on or after that date.

☞ Amends GS 50C-10 to clarify that a violation of a Chapter 50C civil protective order is enforceable by civil or criminal contempt

- ☞ (to reverse a court of appeals opinion holding that only civil contempt is available under Chapter 50C).

Equitable Distribution

Classification of Joint Accounts

☞ Account opened during marriage and owned on date of separation

☞ Date of separation value is \$100,000

☞ Both parties agree that husband deposited \$20,000 received from an inheritance 5 years before date of separation

☞ Is account marital, separate or mixed?

Joint Accounts



- ☞ Account is presumed marital
- ☞ Person seeking separate classification has burden to trace separate funds to the date of separation
 - ☞ *Power v. Power*, 763 SE2d 565 (2014)
 - ☞ *Comstock v. Comstock*, 771 SE2d 602 (2015)

Power v. Power



- ☞ No consideration of tax consequences unless there is evidence of the consequences
 - ☞ *And* only if consequences will occur as a result of the ED judgment
 - ☞ See *Cochran v. Cochran*, 198 NC App 224 (2009)
- ☞ Kelly Blue Book is admissible hearsay
 - ☞ Rule 803(17)

Divisible Property



- ☞ GS 50-20(b)(4):
 - ☞ (a) All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.
 - ☞ ...
 - ☞ (c) Passive income from marital property received after the date of separation, including, but not limited to, interest and dividends.

Montegue



- ☞ Money received by one party during separation from marital LLC
 - ☞ If funds are distributions from the LLC = divisible
 - ☞ If funds are salary/fees paid for effort of one party during separation = not divisible
- ☞ Increase in value of LLC during separation
 - ☞ If caused by work of one party = not divisible
 - ☞ If 'passive' - not caused by work = divisible
 - ☞ If caused by compensated work = divisible

Comstock



☞ Marital debt

- ☞ Party seeking marital classification must show joint benefit
 - ☞ Just showing money borrowed was used for household expenses was insufficient
 - ☞ *But cf. Glaspy*, 143 NC App 435 (2001) and *Godley*, 110 NC App 99 (1993).
- ☞ Amounts charged for “women, alcohol, cigars and gambling” were not for the joint benefit of the parties
- ☞ Party who pays marital debt after separation with marital funds is not entitled to “credit” for the payment of marital debt

Warren



☞ Filed June 16, 2015 [not in handout]

☞ Classification of student loan debt:

- ☞ “In order for the court to classify student loan debt as marital debt, the parties must present evidence regarding whether the marriage lasted long enough after incurring the debt and receiving the degree for the married couple to substantially enjoy the benefits of the degree or higher earnings.”

LLCs are people too ☺



- ☞ Property owned by an LLC or other business entity cannot be marital property
 - ☞ Unless party/parties are equitable owners (meaning court can impose constructive or resulting trust)
- ☞ Trial court has no jurisdiction to order LLC to do anything or to order anything that effects property owned by LLC or effects the business structure of LLC unless LLC is joined as a party to the ED action
 - ☞ *Campbell v. Campbell*, NC App (June 2, 2015)

As are Trusts.....



☞ Trusts are legal entities

- ☞ *Nicks v. Nicks* [not in materials]
- ☞ NC App June 16, 2015

- ☞ Court cannot affect trust or property owned by a trust unless trust is joined as a party

Alimony

Role of Fault

- ☞ PSS
 - ☞ Court considers marital misconduct of supporting spouse only if supporting spouse first raises issue of marital misconduct on part of dependent spouse
 - ☞ Misconduct is just a factor
 - ☞ Weight is up to trial judge
 - ☞ No absolute bar to PSS
- ☞ Alimony
 - ☞ Marital Misconduct is one factor court considers in deciding whether award of alimony is equitable and in determining amount and duration of award
 - ☞ Except.....

Illicit Sexual Behavior

- ☞ If dependent spouse commits act of illicit sexual behavior before the date of separation and supporting spouse does not - no alimony can be awarded
 - ☞ *Romulus*, 215 NC App 495 (2011)
- ☞ If supporting spouse commits act of illicit sexual behavior before the date of separation and supporting spouse does not - alimony must be awarded
 - ☞ *Fleming*, 765 SE2d 553 (2014)
- ☞ If both do it - acts become one factor for court to consider
 - ☞ Weight up to judge

Tax Consequences

- ☞ If party offers evidence of tax consequences of an alimony award, trial court must consider and order must reflect consideration
 - ☞ *Nicks v. Nicks* [not in materials] NC App June 16, 2015

Imputing Income



- ☞ Findings of fact must support conclusion that party is suppressing income in bad faith
 - ☞ Motivated by a desire to avoid his/her support obligation
- ☞ Finding that party voluntarily reduced income is not sufficient
 - ☞ *Upchurch*, 767 SE2d 704 (2014)
 - ☞ *Nicks v. Nicks* [not in materials] NC App June 16, 2015

PSS



- ☞ Plaintiff files for PSS, ED, Alimony
- ☞ Divorce entered
- ☞ PSS, Alimony and ED set for trial
- ☞ Can court award PSS for time between DOS and commencement of Alimony award?

Nicks v. Nicks [not in materials]



- ☞ Granting or denying alimony terminates a PSS
 - ☞ GS 50-16.1A(4)(b)
- ☞ "This does not necessarily mean that an order granting alimony cannot also provide for the payment of an already-pending claim for PSS where warranted"
- ☞ Court erred in dismissing PSS claim at start of alimony trial



Spousal Agreements

Ratification



- ⊗ Ratification of contract precludes claims to rescind or void contract due to formation problems like duress and coercion
- ⊗ Ratification occurs as a matter of law when party performs agreement or accepts benefits under agreement after duress/coercion ends
 - ⊗ *Pilos-Narvon*, 771 SE2d 633 (2015)(no ratification when defendant performed under agreement for over one year because duress continued through that time)
 - ⊗ *Jones v. Jones*, NC App (March 17, 2015)(ratification as a matter of law where duress ended as soon as contract was signed; party paid alimony pursuant to agreement and accepted property transferred by the agreement)