Family Law Update
Cases Decided Between
October 17, 2023, and October 1, 2024

Cheryl Howell
School of Government
UNC Chapel Hill
howell@sog.unc.edu

Find the full text of these court opinions at www.nccourts.org

Custody
Cases Decided Between
October 17, 2023, and October 1, 2024

Modification

- When determining whether there has been a substantial change in circumstances, the trial court must consider only circumstances occurring after the entry of the last custody order unless there were circumstances not disclosed to the court before the entry of the last order.
- Trial court erred in considering events which occurred in the 6-month period between the hearing on the last custody order and the entry of that order when determining whether there had been a substantial change in circumstance since the entry of that order because mother had presented the circumstances to the judge in a Rule 59 motion filed before the entry of that custody order and the last custody order reflected the court's consideration of those circumstances.
- Evidence of minor and accidental injuries incurred by the child while in father's care and evidence that father failed to disclose his COVID diagnosis to mother was insufficient to establish a substantial change in circumstances since the entry of the first custody order.

Smith v. Dressler, 291 N.C. App. 197, 895 S.E.2d 459 (2023). At the time of the hearing to establish the initial custody order between the parents, mother was in the military, lived out of state and was unmarried. By the time the initial custody order was entered 6 months after the conclusion of the custody hearing, mother had received a medical discharge from the military, planned to move back to North Carolina, had remarried, and was expecting another child. Between the conclusion of the hearing and the entry of the first custody order, mother filed a Rule 59 motion setting out these changes in her circumstances, but the court did not rule on the motion. However, the first custody order reflected the new circumstances alleged in mother's motion in that it did not mention her military service, and it contained findings that mother has remarried, had another child and relocated to North Carolina. The order granted father primary custody.

Mother filed a motion to modify the first custody order approximately one year after the court entered the first custody order. The trial court concluded there had been a substantial change in circumstances and modified the order to grant mother primary custody. The court included findings regarding the changes in mother's circumstances that occurred between the date of the hearing on the first custody order and the entry of that order, findings that the child had sustained injuries while in father's care since the entry of the fist custody order, and findings that father had failed to inform mother that he had contracted COVID after the entry of the first custody order. The trial court concluded that these facts established a substantial change in circumstances since the entry of the first order.

Father appealed, arguing the trial court erred in concluding there had been a substantial change in circumstances and the court of appeals agreed. According to the court of appeals, the trial court erred in considering the changes in mother's circumstances that occurred between the first hearing and the entry of the first order because it was clear from the first custody order that the trial court considered those circumstances as presented in mother's Rule 59 motion. A trial court

can consider circumstances occurring before the entry of the last custody order if those circumstances were not disclosed to the trial court before the entry of that custody order.

The court also held that evidence of the child's injuries while in father's care did not establish that the child was abused or neglected by father (instead, the injuries were typical of those sustained by active 4-year old children, i.e., bruises, a bloody nose, scratches and head bumps, and a leg fracture sustained while jumping on a trampoline) and held that father's failure to inform mother of his COVID diagnosis was not evidence of a substantial change. According to the appellate court, there is no case law indicating that "the failure to inform another parent of a potential viral infection constituted a substantial change."

Memorandum of Judgment, allocation of legal custody, conversion of temporary order to permanent order

- A memorandum of judgment signed by the parties and filed with the clerk of court was not a custody order because it was not signed by a judge.
- Even if the MOJ was a custody order, it was a temporary custody order that did not convert to a permanent custody order based on the passage of time during the COVID pandemic.
- Before a trial court can award primary legal custody to one parent, the court must make findings to "warrant a division of joint legal authority."
- The trial court did not err in granting mother final decision-making authority regarding the child where findings of fact indicated that the parties were unable to communicate without conflict and that their contentious communications will have an adverse effect on the minor child.

Urvan v. Arnold, 291 N.C. App. 300, 894 S.E.2d 803 (2023). Plaintiff father filed for custody of the minor child and requested a temporary custody order. When the issue of temporary custody came on for hearing, the parties signed a Memorandum of Judgment/Order (AOC form CV-220) setting out a temporary custody schedule. The MOJ was signed by the parties and filed with the clerk of court but was not signed by a judge. The MOJ was filed June 10, 2019.

A hearing was held on custody in March 2022 and a custody order was entered on April 11, 2022. The trial court concluded it was in the best interest of the child to live primarily with defendant mother during the school year and to have time with defendant father, and that it was in the best interest of the child for mother to have primary decision-making authority regarding major decisions affecting the child when the parties are unable to make a mutual decision.

Father appealed, first arguing the trial court erred in using the best interest of the child standard to determine custody rather than first determining that there had been a substantial change in circumstances since the entry of the MOJ.

The court of appeals rejected father's argument, holding that he had failed to preserve the issue by arguing the best interest standard in the trial court. In addition, the court of appeals held that the MOJ was not a court order because it was not signed by a judge and therefore the custody order entered in April 2022 was the initial custody order rather than a modification. In a footnote, the court stated that, even if the MOJ had been a court order, it would not have converted to a

final order due to the passage of time because the delay in reaching the final custody trial was due to the disruptions in the court system caused by the COVID pandemic.

Father also argued that the trial court erred by not awarding joint legal custody to the parties. The court of appeals agreed that the trial court was required to make findings to justify the award of sole legal custody to mother but concluded that the trial court's findings of fact were sufficient to show that joint legal custody was not in the best interest of the child due to the parties' history of contentious communication and the effect this contentious communication would have on the child in the future.

Denial of continuance, time limitations on trials, modification

- Trial court did not abuse its discretion when it denied mother's request for a continuance based on her attorney's withdrawal from the case the day before the custody trial was scheduled to begin where attorney withdrew because mother fired her on the eve of trial.
- Trial court had the authority to limit each party to 2.5 hours for the presentation of their case where parties were provided sufficient notice of the time limitation.
- The fact that mother and father had a contentious relationship at the time of the original custody order did not prohibit the court from determining that the present impact of this contentious relationship on the children constituted a substantial change in circumstances.

Conroy v. Conroy, 291 N.C. App. 145, 895 S.E.2d 418 (2023). The trial court entered an order modifying a custody order between mother and father and mother appealed.

Denial of continuance. Mother first argued that the trial court abused its discretion when it denied her request for a continuance based on her attorney's withdrawal from the case the day before the custody trial was scheduled to begin. The court of appeals held that mother was not entitled to a continuance where the withdrawal of the attorney was based on mother's firing of the attorney on the eve of trial.

Time limitation. Mother also argued that the trial court erred by limiting each side to 2.5 hours for the presentation of their case. The court of appeals rejected mother's argument, holding that the court has the inherent authority "to control the disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants." Where both parties were made aware of the time limitation at the beginning of the trial and reminded of the time issue as the trial progressed, the trial court did not err by imposing the limitation.

Changed circumstances. The trial court concluded that the mother's "poor interpersonal relationships" and her "overall behavior" towards father, along with the inability of the parents to communicate and cooperate as parents had a negative impact on the children and constituted a substantial change in circumstances. Mother argued on appeal that because she and the father had a poor relationship at the time of the original custody order, there had been no change in circumstance to justify modification. The court of appeals rejected this argument, holding that a trial court can conclude that the present impact of the poor relationship between the parents on the children constitutes a change in circumstances. In this case, the trial court's findings of fact supported the conclusion that the behavior of the parents was presently having a negative impact

on the children and would likely continue to impact the children "more and more" as they become older and more aware of their parents' conduct.

Grandparent custody, denial of reasonable visitation to parent

- Findings that the parents failed to take the child to school when they had the ability to do so, resulting in the child missing an extensive number of days of school and making the parents the subject of a truancy proceeding, along with findings that the home conditions of both parents were unsafe and unsuitable for the child, that mother failed to allow child to wear snow boots gifted to her by the grandparents and put bags on her feet instead, and that mother endangered the child by taking her to a park to play after dark, were sufficient to support the conclusion that the parents waived their constitutional right to custody.
- The trial court erred when it limited mother to one weekend of visitation with the child each year without supporting that order with findings that mother was unfit or that reasonable visitation with the mother was not in the best interest of the child as required by GS 50-13.5(i).

Evans v. Myers, 291 N.C. App. 312, 895 S.E.2d 470 (2023). The mother and father of the child shared joint physical and legal custody of the child pursuant to a consent custody order, with the child living with mother for one week and then with the father for one week. The custody order required that the child be enrolled in a school close to mother, but father enrolled the child in a school close to him. The mother did not take the child to school during the weeks the child was with her, claiming that she could not take the child to the school close to father and be at work on time. The child missed an extensive amount of school and truancy proceedings were instituted against the parents.

Paternal grandparents filed a motion to intervene in the custody case between the parents, requesting that the custody order be modified based on a substantial change in circumstances and alleging that the parents had waived their constitutional right to custody. The trial court concluded that the parents had waived their constitutional rights, granted primary custody of the child to the grandparents, awarded father weekend visitation throughout the year, and awarded mother one weekend of visitation each year.

Mother appealed. The court of appeals held that the findings of fact by the trial court were sufficient to support the conclusion that the parents had waived their constitutional right to custody. Findings included that the mother refused to take the child to school, father did nothing to address the situation, the child's grades and educational progress suffered as a result of missing school, that the homes of both parents were unsuitable for the child, and that mother had endangered the child by taking her to play at a park after dark and by not allowing her to wear snow boots purchased for her by the grandparents, wrapping her feet in plastic bags instead.

However, the court of appeals agreed with mother that the trial court erred in limiting her to one weekend of visitation each year without supporting that decision with findings that mother was unfit or that it was not in the best interest of the child to visit with her mother. GS 50-13.5(i) requires that a parent have reasonable visitation with a child unless the court finds that the parent is unfit or that it is not in the best interest of the child to visit with the parent. Limiting the

mother to one weekend each year was not "reasonable visitation," requiring the trial court to support the order with these additional findings.

Intervention following death of parent

- The trial court retained jurisdiction to grant grandparent's motion to intervene in custody case between mother and father following the death of father where the grandparent filed the motion to intervene before the death of father.

Linker v. Linker v. Boling, 291 N.C. App. 343, 895 S.E.2d 620 (2023). Father filed a motion to modify the custody order between him and the child's mother. After he filed his motion to modify, the paternal grandmother filed a motion to intervene to request visitation with the grandchild. Following the filing of the motion to intervene but before the court considered the request, father died. Mother filed a motion to dismiss the request to intervene, arguing that the custody action abated upon the death of the father. The trial court disagreed and allowed the grandparent to intervene.

Mother appealed and the court of appeals affirmed the trial court. The appellate court held that because the grandparent filed the motion before the death of the father, the action did not abate, and the trial court had subject matter jurisdiction to continue with grandparent's request for visitation.

Third party custody

- An interlocutory order that eliminates the fundamental right of a parent to make decisions concerning the care, custody, and control of his children affects a substantial right, allowing immediate appeal of that order. [dissent on this issue]
- The "Petersen presumption" is the presumption that a parent will act in the best interest of his child. Until that presumption is rebutted, custody of the child cannot be determined by the application of the best interest of the child test. A parent is entitled to exclusive care, custody, and control of the child.
- If the presumption is rebutted by clear and convincing evidence, custody then can be decided by application of the best interest standard as provided in GS 50-13.2(a).
- The Petersen presumption is rebutted by a finding that a parent is unfit, has neglected the welfare of the child, or has otherwise acted in a way to forfeit his constitutional protection. Whether the presumption has been rebutted must be determined on a case-by-case basis.
- The evidence in this case was insufficient to support the conclusion that father had waived his constitutional right to exclusive custody of his child.

Maness v. Kornegay and McNair, 292 N.C. App. 129, 897 S.E.2d 154 (2024). Mother and father of child never lived together. When the child was one, mother moved in with plaintiff. Mother had dated plaintiff's son for a while in the past and plaintiff and mother had become close friends. Father exercised visitation with the child for several months after mother moved in with plaintiff. Eight months after moving in with plaintiff, mother moved out of plaintiff's

residence, leaving the child with plaintiff, and mother ceased all contact with father. Plaintiff did not inform father that mother had left the child in her care.

Plaintiff and mother executed a "temporary guardianship agreement" purporting to give plaintiff custody rights over the minor child. A few months later, father located and contracted mother in South Carolina. Mother told father that the child was with her in South Carolina. Before he could visit South Carolina, the father was contacted by NC Dept of Social Services and was informed that his child was with plaintiff. He attempted to take the child from plaintiff, with the assistance of law enforcement, but law enforcement left the child with plaintiff when she showed them the "temporary guardianship agreement" signed by mother. Thereafter, plaintiff filed this custody case against mother and father.

The trial court entered a series of temporary orders during the eighteen months following the filing of the complaint. In each temporary order, the child was left in the primary care of plaintiff with father receiving visitation. At the end of the eighteen-month period, the court held a hearing and determined that both mother and father had waived their constitutional right to custody. The court then set another trial date to determine permanent custody based on the best interest of the child. Father appealed.

The court of appeals first determined that the trial court order was a temporary custody order subject to immediate appeal. [there is a dissent on this issue] According to the majority, while a temporary custody order is an interlocutory order, it can be appealed if the order fails to "state a clear and specific reconvening time" or, it states a time but "the time interval between the two hearings" is not reasonably brief. In this case, the trial court ordered a trial on permanent custody but did not designate a specific "reconvening time". In addition, according to the court of appeals, because the trial court order eliminated "the fundamental right of a parent to make decisions concerning the care, custody, and control of his children," it affected a substantial right, allowing immediate appeal.

The court of appeals held that the findings of fact made by the trial court were insufficient to support the conclusion that father had waived his constitutional right to exclusive custody of his child. The trial court did not find that father was unfit or had neglected the child. Rather, the trial court's conclusion was based on findings that father had failed to provide financial support for the child for over two years, that he had failed "to act as a reasonable parent" when he was unable to locate the mother and child after she left plaintiff's residence, that he allowed plaintiff to act as a parent to the child and did not attempt to respond in any way when he found out about the "temporary guardianship agreement" between plaintiff and mother. The court of appeals held that the evidence was insufficient to establish that father failed to act as a reasonable parent given mother's attempt to keep the child from him and plaintiff's failure to inform him or social services when the mother left the child in her care.

Modification

- The existence of an ongoing conflict or propensity for conflict between the parties that has persisted since the original custody order does not preclude a conclusion that the

ongoing conflict constitutes a substantial change in circumstances affecting the welfare of the children.
- However, it is also not presumed from the mere existence of an ongoing conflict that the conflict adversely affects the children.
- Where trial court findings indicated that the children were relatively insulated from their parents' conflict, the trial court erred in concluding there had been a substantial change in circumstances. Dissent on this issue.
- Conflict between a parent and a parenting coordinator does not necessarily constitute a substantial change in circumstances affecting the welfare of the child.

Durbin v. Durbin, 292 N.C. App. 381, 898 S.E.2d 65 (2024). The parties entered into a consent custody order in 2017 and modified that order by consent in 2020. The two original custody orders provided for shared legal custody, roughly equal physical custody, shared responsibility for communicating information regarding the health of the children and expressly provided for the children to have routine medication. After the 2020 order, the parties also agreed to the appointment of a parenting coordinator. In 2021, plaintiff mother filed a motion to modify custody, citing defendant father's interference with the children's therapy appointments and his insufficient attentiveness to the medical needs of the children as the basis for modification. The trial court concluded there had been a substantial change in circumstances and entered a new custody order which decreased father's time with the children and granted plaintiff "final decision-making authority" when the parties are unable to agree on issues relating to the children. Defendant appealed.

The court of appeals agreed with defendant father that the findings made by the trial court did not support the conclusion that there had been a substantial change in circumstances (there is a dissent on this issue). According to the court of appeals, the trial court made findings regarding the conflict between the parents and about the defendant father's conflict with the parenting coordinator, but very few findings regarding the well-being of the children. In addition, according to the court of appeals, the findings regarding the children indicated that the children were "relatively insulated from the conflict" between the parents. The court stated that while it is "obvious that a parent's unwillingness or inability to communicate in a reasonable manner regarding their child's needs may adversely affect the child, it is also not to be presumed from the mere existence of an ongoing conflict that the conflict adversely affects the child." The court also noted that "this is especially true where, as here, both boys are active teenagers approaching adulthood, can articulate their preferences for themselves, and can take far more responsibility for their activities and schedules than a younger child could."

Findings required to support best interest determination.

- GS 50-13.2 requires that an order for custody include findings of fact that support the determination that the trial court order is in the best interest of the child. Findings must reflect consideration of all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party.

- The trial court order contained insufficient findings of fact to show why the allocation of physical custody between mother and father ordered by the trial court was in the best interest of the child.

Aguilar v. Mayen, 901 S.E.2d 662 (N.C. App., May 7, 2024). Following a trial, the court entered a custody order granting mother primary physical custody of the child and granting father visitation every other weekend. Father appealed, arguing in part that the trial court's findings of fact were insufficient to support the order. The court of appeals agreed, citing GS 50-13.2 which requires that the trial court's findings show why the custody order is in the best interest of the child. The court of appeals held that the one finding made by the trial court that the mother, the father, and the father's wife all had properly cared for the child was insufficient to show why the trial court determined mother should have primary physical custody.

Denial of visitation to a parent

- The trial court findings of fact supported the determination that visitation with mother was not in the children's best interest.
- The provision in the trial court order that the children could determine when and if they visit their mother was not an improper delegation of authority to the children but rather was "mere surplusage" in the order because the court had decided not to award visitation to mother.

Carballo v. Carballo, 901 S.E.2d 822 (N.C. App., May 7, 2024). The trial court granted the father sole physical custody of three children after concluding that forcing the children to visit their mother was not in the best interest of the children due to their "vehemently expressed desire" not to see her. Based on testimony from advocates for the children and from the children's therapists, the trial court concluded that forcing visitation would not be in the best interest of the children and stated "it is reasonable in this case for the children to determine, with the assistance of their therapists, what contact and/or visitation they should have with [mother]."

Mother appealed, arguing that the trial court should not have denied her visitation and that the trial court inappropriately delegated decision-making authority regarding her visitation to the children. The court of appeal affirmed the trial court, holding that GS 50-13.5(i) requires that a trial court make findings of fact that a parent is unfit or that visitation is not in the best interest of the children before denying a parent reasonable visitation. The appellate court held that the findings made by the trial court in this case were sufficient to support the conclusion that an order providing for mother's visitation with the children was not in their best interest because of the strained relationship between the mother and the children. Because the order does not require contact, the statement in the order that the children can decide when and if they will see their mother was "mere surplusage" rather an a delegation of authority to the children.

Mediation agreement in consent judgment, substantial change to support modification, sealing of court records.

- A provision in a consent custody order that the parties would attend mediation or arbitration before submitting issues to the court for resolution did not deprive the trial

court of subject matter jurisdiction to consider father's motion to modify custody when parties did not participate in mediation or arbitration before the matter came before the trial court.
- Where neither party requested mediation, the trial court did not err when it proceeded with the modification trial even though the parties had not participated in mediation as required by local rule.
- The findings of fact by the trial court were sufficient to support the conclusion that there had been a substantial change in circumstances and that it was in the best interest of the child to modify custody.
- Noting that it had *sua sponte* sealed the appellate record in this case, the court of appeals admonished that counsel should take care to protect the privacy of minor children and parties in court filings that are available to the public online.

Scott v. Scott, 901 S.E.2d 846 (N.C. App., May 7, 2024). The trial court entered a consent custody order granting joint physical and legal custody of the child to the parties. The consent order also provided that the parties agreed to attend mediation or arbitration before submitting any subsequent disagreement on decisions about "the general health, welfare, religious training, education and development of the child" to the court.

Father filed a motion to modify custody. The trial court conducted a hearing and determined there had been a substantial change in circumstances and that it was in the best interest of the child to modify custody. The parties did not participate in mediation or arbitration. Mother appealed the modification order.

Mother first argued that the trial court had no subject matter jurisdiction to consider modification before the parties complied with the obligation in the consent order to participate in mediation or arbitration, arguing that the provision created a "condition precedent" to the trial court's jurisdiction. The appellate court held that no agreement or contract between the parties can deprive the trial court of jurisdiction to protect the interests and provide for the welfare of minor children. The court also noted that mother failed to request arbitration or mediation before the hearing on modification and she thereby waived her right to object on appeal.

The court of appeals also rejected mother's argument that the findings of the trial court were insufficient to support the conclusion that there had been a substantial change in circumstances. The trial court found that the parties were unable to follow the custodial arrangement set out in the consent order within a few months after its entry due to mother's need to travel out of town for work. The child was left with the paternal grandparents who then turned the child over to the father. In addition, the trial court found that the child had suffered changes in "personality and temperament" since the entry of the consent order, becoming "less trusting, disrespectful, angry, and throws temper tantrums." The trial court found that the child's living arrangement in the joint custody situation had become "disruptive" and had an adverse effect on the child; and the parties had become "unable to coparent" because their communication was ineffective, hostile, and disruptive. The appellate court held that these findings were sufficient to support the conclusion that there had been a substantial change in circumstances affecting the welfare of the minor child and that modification was in the best interest of the child.

The court of appeals also stated that "we have *sua sponte* sealed the record on appeal to protect the minor child," noting that the record on appeal included confidential medical records of the child, confidential records of a child abuse investigation by DSS, and "records including voluminous personal identifying information of the parties and the child." The court stated "[w]e remind the parties and counsel that filings in this Court are freely available online and they should take care to protect the minor child's privacy in any future proceedings before the trial court or any appellate court."

Procedure for intervention, waiver of parental constitutional right to custody

- When a third-party files a motion to intervene in custody action between the parents, the trial court determines whether the intervention should be allowed by examining the pleadings only; no evidentiary hearing should be conducted.
- To establish standing to intervene in a custody proceeding between the parents, a third party must allege facts that, if proven, are sufficient to establish that the parents have waived their constitutional right to custody.
- A third party does not become a party to the custody proceeding until the motion to intervene is granted. After intervention is granted, the parties can proceed with mediation and discovery.
- The pleading filed along with the motion to intervene established that the grandparents had the right to intervene in the custody action; they alleged the parents waived their constitutional right to custody by being unfit and by permanently ceding their parental rights and responsibilities to the grandparents.
- However, the grandparents failed to present sufficient evidence to support their claims regarding the parents and therefore failed to prove the parents had waived their constitutional right to custody.
- Evidence from grandparents failed to show that the parents intended to permanently cede a portion of their parental control and authority to the grandparents.

Deanes v. Deanes, 901 S.E.2d 880 (N.C. App., May 21, 2024). The trial court entered a custody order between the parents and thereafter, the parents reconciled. Following their reconciliation, maternal grandparents filed a motion to intervene and a motion in the cause for custody of the grandchild. The trial court held a hearing during which the parties presented evidence. Following the hearing, the trial court concluded that the grandparents failed to show that the parents had waived their constitutional right to custody and denied the motion to intervene. The grandparents appealed.

The court of appeals first noted that there was "a procedural issue complicating [the appellate] review." The court then explained that when a motion to intervene is filed by a third-party seeking custody, the standing of that third party to seek custody "should be based on the allegations of the pleadings." If the pleading included with the motion to intervene establishes the standing of the third party, the motion to intervene should be allowed. The third party will not become a party to the case until the motion to intervene is granted. After intervention is granted, the parties can participate in mediation and conduct discovery. The issue of whether the

parents have in fact waived their constitutional rights will be litigated at the custody trial, after the parties have had the opportunity to conduct discovery.

In this case, the court of appeals held that the pleadings filed by the grandparents contained sufficient allegations to establish their standing to seek custody. The grandparents alleged that the parents "ceded parental responsibilities" and "day-to-day decision-making authority" to them; that they have a "permanent parent-like relationship with the minor child and have in fact become the de facto parents" of the child; and that the parents were unfit. "Viewed in the light most favorable to the grandparents", the motion to intervene should have been granted.

Since neither the parents nor the grandparents objected on appeal to the fact that the trial court held an evidentiary hearing, the court of appeals also reviewed the trial court's findings of fact and conclusion that the parents did not waive their constitutional right to custody. The appellate court agreed with the trial court that the evidence presented by the grandparents showed that the grandparents helped the mother care for the child while the mother and the father were separated but there was no evidence that either parent "had any intention of allowing grandparents to assume a parent-like status to the [grandchild]." Quoting earlier cases, the court of appeals explained:

> "[T]he gravamen of inconsistent acts is the volitional acts of the legal parent that relinquish otherwise exclusive parental authority to a third party. …. [T]he specific question to be answered in cases such as this one is: Did the legal parent act inconsistently with her fundamental right to custody, care, and control of her child and her right to make decisions concerning the care, custody, and control of that child? In answering this question, it is appropriate to consider the legal parent's intentions regarding the relationship between his or her child and the third party during the time that relationship was being formed and perpetuated.
>
> Thus the court's focus must be on whether the legal parent has voluntarily chosen to create a family unit and to cede to the third party a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with his or her child. The parent's intentions regarding that relationship are necessarily relevant to that inquiry. By looking at both the legal parent's conduct and his or her intentions, we ensure that the situation is not one in which the third party has assumed a parent-like status on his or her own without that being the goal of the legal parent."

Temporary custody order or permanent order

- Citing what it referred to as the "*Senner* test", [*Senner v. Senner*, 161 NC App 78, 587 SE2d 675 (2003)], the court of appeals held that an order is temporary rather than permanent it either (1) is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings is reasonable brief, or (3) the order does not determine all issues.

- A consent custody order was a temporary order even though it did not specifically state that it was entered "without prejudice" where it was clear from the plain language of the order that it was entered "without the loss of rights" to either party.
- The temporary order did not become a permanent order through operation of time where less than 9 months elapsed between the entry of the consent order and plaintiff's filing of a calendar request and notice of hearing on the issue of custody.

Lawrence v Lawrence, 903 S.E.2d 374 (N.C. App., June 18, 2024). Plaintiff father filed for custody and an ex parte order was entered granting joint physical custody with the parties sharing custody on a week on/week off basis. A temporary custody hearing was held, and the parties entered a consent order on January 13, 2019, granting defendant mother primary physical custody with father having custody every other weekend and one day each week. The consent order was later modified on April 17, 2019, to lengthen father's weekend time and eliminate his weeknight visits. Both orders were referred to as temporary orders and neither order provided for holiday or summer vacation visitation.

A hearing was held on February 18, 2022, to determine whether the last consent order was a temporary order and if so, whether it was converted to a permanent order due to the passage of time. The trial court determined that both consent orders were permanent orders because they were not entered without prejudice to either party, there was no reconvening time set in the orders, and the orders resolved all issues. In addition, the trial court held that, even if temporary when entered, the last consent order converted to a permanent order because neither party filed a motion for a hearing on permanent custody "for a period of no less than 18 months."

Plaintiff father appealed and the court of appeals reversed. The appellate court held that both consent orders were temporary orders because they were entered "without the loss of rights" to either party. Even though neither order contained the language that they were entered "without prejudice", the orders contained several references to the fact the orders were temporary. In addition, the court of appeals held that the record did not show that neither party requested a hearing on permanent custody for more than 18 months. Rather, the court held that the record showed plaintiff filed a calendar request and notice of hearing less than 9 months following the entry of the last consent order. Hearings were rescheduled and continued for a variety of reasons, including the COVID-19 pandemic, withdrawal of plaintiff's attorney, the retirement of plaintiff's subsequent attorney, and not being reached by the court. To determine whether a temporary order has become permanent due to the passage of time, a trial court should consider the amount of time between the entry of the temporary order and the time a party requests a hearing rather than when the court conducts the hearing.

Anticipating a future change in circumstances in a custody order

Madison v. Gonzalez-Madison, _ N.C. App. _, _ S.E.2d _ (August 2024)

On The Civil Side, August 7, 2024

The NC Court of Appeals addresses "self-executing" modification provisions in custody orders

The North Carolina Supreme Court has stated that "[a] judgment awarding custody is based upon conditions found to exist at the time it is entered …." *Stanback v. Stanback*, 266 N.C. 72, 76 (1965). *See also* Kellanos v. Kellanos, 251 N.C. App. 149 (2016)(a district court must consider the pros and cons of ordering primary custody with each parent, contemplating the two options as *they exist [at the time of the hearing]*, and then choose which one is in the child's best interest.").

A custody order can be modified only upon a showing of a substantial change in circumstances affecting the welfare of the child that occurred after the entry of the custody order. G.S 50-13.7; *Shipman v. Shipman*, 357 N.C. 471 (2003). "Evidence of speculation or conjecture that a … change may take place sometime in the future will not support a change in custody." *Benedict v. Coe*, 117 N.C. App, 369, 378 (1994), quoting *Ramirez-Barker v. Barker,* 107 N.C. App. 71, 78 (1992).

But what if it seems very likely, at the time the custody order is entered, that circumstances will change? Can the court anticipate the change in the custody order and provide for a change in the custodial arrangement upon the occurrence of the change?

The court of appeals addressed this issue yesterday in Madison v. Gonzalez-Madison, (N.C. App, August 6, 2024). That opinion, as well as earlier decisions of the appellate court, indicate that a trial court's authority to include "self-executing" modification provisions is extremely limited.

Madison v. Gonzalez-Madison

Both parents are active-duty members of the U.S. Army. While both were stationed in North Carolina when the custody action was initiated, both had been re-stationed in Hawaii by the time of the permanent custody trial. The trial court granted mother primary physical custody of the child and joint legal custody to both parents. However, the court also included provisions in the order that would take effect if either or both parents are relocated by the Army from Hawaii. The trial court found that each parent was expected to have a permanent change of station in 2025 and that mother planned to relocate to Texas at that time. The court created an alternative visitation schedule for the father that would commence if the parents left Hawaii and that included alternative visitation provisions that would apply depending on whether the parties lived further than 100 miles from each other.

On appeal, the father argued that the trial court abused its discretion by including this "self-executing modification provision" in the custody order, and the court of appeals agreed.

The appellate court first noted that several other states have held that self-executing modification orders are generally illegal, and that their legality is unclear in other states, citing Helen R. Davis, *Self-Executing Modification of Custody Orders: Are They Legal?* 24 Am. Acad. Matrim. Laws 53 (2021).

The appellate court then held that the change anticipated by the court was much too speculative to allow the trial court to determine the appropriate visitation schedule before the change occurs. The court of appeals stated:

"Here, the trial court made a call regarding visitation in the future without knowing when either parent may be transferred from Hawaii or where either may be transferred or how far apart Mother and Father would be living from each other. A [station change] could create either a slight change or a drastic change which could uproot [the child] to any United States Army base. We therefore conclude the trial court abused its discretion by incorporating the "self-executing" provisions in the order, provisions which do not take effect until after either parent [transfers] from Hawaii, where the time and place of such transfer is unknown."

Burger v. Smith

The court in *Madison* acknowledged the contrary result in *Burger v. Smith,* 243 N.C. App. 233 (2015). In that case, the court of appeals affirmed an order providing for visitation of an 18-month-old child with mother for two months, then with father for one month, until the child started kindergarten, at which time father's visitation would change and thereafter take place over spring, summer, and Christmas breaks. The court of appeals held that this order was within the trial court's discretion, was supported by a finding that both parents were excellent parents who had provided exceptional care and had strong support systems and was an "appropriate response to the parties' unusual living situation." The mother lived in North Carolina and was a U.S. citizen, but father was not a U.S. citizen and lived sometimes in Canada and sometimes in Africa. Rather than an abuse of discretion, the court in *Burger* held that "[t]he trial court's findings of fact and conclusions of law demonstrate an intention to fashion a custody plan that would foster the development of a close and meaningful relationship between the minor child and both of his parents."

The court in *Madison* distinguished *Burger* by stating that "the changes in circumstances which may occur based on a [military station change for either or both parents] are much more speculative than that in *Burger*," pointing to the fact that there was no way to know whether a station change would result in a "slight or drastic" change for the child.

Cox v. Cox

Although not mentioned by the court in *Madison*, the court of appeals also rejected a "self-executing modification" in the case of *Cox v. Cox*, 238 N.C. App. 22 (2014). In that case, due to concerns regarding the father's mental health, the trial court's custody order required that father reside with his mother when exercising visitation with the child. However, the order also provided that this restriction on father's visitation would be lifted upon a showing that his therapist no longer had concerns about father's mental health or his ability to care for the children on his own. The order specifically provided that this showing would constitute a substantial change in circumstances that would result in the modification of the custody order to lift the restriction on father's visitation.

The court in Cox held that the provision violated the requirements of G.S. 50-13.7, stating "[t]o predetermine that a future event will amount to a substantial change in circumstances warranting a modification of child custody is to predetermine a legal conclusion absent any finding of fact."

The court reached similar conclusions in *Hibshman v. Hibshman*, 212 N.C. App. 113 (2011)(agreement by parties in initial custody order that order was subject to modification without a showing of changed circumstances was ineffective); *Thomas v. Thomas*, 233 N.C. App. 736 (2014)(stipulation by parties at the beginning of modification hearing that there had been a substantial change in circumstances was ineffective; changed circumstances is a legal conclusion of law that must be made by the trial judge); and *Spoon v. Spoon*, 233 N.C. App. 38 (2014)(noting that the trial court would have erred had it relied on a stipulation that the parties made before the entry of the original custody order that a move by mother in the future would constitute a substantial change in circumstances).

UCCJEA, modification jurisdiction, waiver of parental right to custody

- The court of appeals has the duty to address subject matter jurisdiction even if neither party raises the issue.
- North Carolina had subject matter jurisdiction to modify a New York consent custody order where North Carolina was the home state of the child at the time the modification proceeding was initiated in North Carolina and the New York court had ruled that North Carolina was the more convenient forum.
- The temporary order did not become a permanent order through operation of time where less than 9 months elapsed between the entry of the consent order and plaintiff's filing of a calendar request and notice of hearing on the issue of custody.
- Extensive findings of fact, supported by clear, cogent and convincing evidence, were sufficient to support the trial court's conclusion that mother waived her constitutional right to exclusive custody of her child.

Harney v. Harney, _N.C. App._, _S.E.2d_ (September 3, 2024). In June 2019, the child was born in New York where mother resides. Maternal grandfather lives in North Carolina and traveled to be with mother when the child was born. Shortly after the child's birth, grandfather sought and obtained temporary custody of the child in New York due to concerns with mother's home and mental health. A few days later, the New York court entered a stipulation agreement with consent of mother and grandfather that granted both parties joint custody; noted grandfather lived in North Carolina and named grandfather as the child's physical custodian. The stipulation gave mother supervised visitation rights and included provisions mother had to address. The child lived in North Carolina with grandfather since entry of the stipulation order. In June 2020, grandfather filed for custody of the child in North Carolina. In July 2020, mother filed petitions in New York to modify and enforce the New York custody order and motioned to dismiss grandfather's complaint in North Carolina for lack of subject matter jurisdiction, though admitting the child lived with grandfather in North Carolina since June 2019. In October 2020, following a hearing conducted by the presiding New York judge and the North Carolina judge, at which both parties appeared in North Carolina, the New York court declined exclusive, continuing jurisdiction, naming North Carolina as the more appropriate forum, and directing the parties to appear and cooperate in further proceedings in North Carolina. In July 2021, the North Carolina court entered a temporary custody order and held custody hearings over several months. In 2022, the North Carolina court entered a permanent custody order granting grandfather legal

and physical custody, after concluding mother waived her constitutional right to custody. Mother appealed.

Subject Matter Jurisdiction to modify the New York Order

The NC Court of Appeals held that:

- An appellate court has a duty to address subject matter jurisdiction even if not raised by any party. The standard of review of whether a court possesses subject matter jurisdiction under the UCCJEA is de novo. Mother's only argument relating to the North Carolina trial court's subject matter jurisdiction is that the North Carolina court failed to rule on her motion to dismiss. Mother cited no supporting authorities and made no argument on the issue. The court of appeals noted its duty to address jurisdiction and addressed the issue despite mother's failure to raise the issue.

- Under the UCCJEA, "[e]xcept as otherwise provided in G.S. 50A-204 [temporary emergency jurisdiction], a court of this State may not modify a child-custody determination made by a court of another state unless a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) [home state jurisdiction] or G.S. 50A-201(a)(2) [significant connection jurisdiction] **and**: (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207," *quoting* G.S. 50A-203.

- North Carolina had subject matter jurisdiction to enter the custody order under the UCCJEA. The New York and North Carolina trial courts held a hearing on mother's motions filed in New York. The New York court entered an order declining to exercise exclusive continuing jurisdiction in favor of the more appropriate forum of North Carolina in compliance with G.S. 50A-207. Mother did not appeal the New York order, and the order is binding upon North Carolina courts. North Carolina was the child's home state under G.S. 50A-201(a)(1) and the court had modification jurisdiction pursuant to G.S. 50A-203.

Waiver of Parental Rights

The court of appeals held that the extensive findings of fact, made by clear, cogent, and convincing evidence, supported the trial court's conclusion that mom acted inconsistently with her protected status as a parent, thereby waiving her constitutional right to exclusive care, custody and control of her child. Among other things, the trial court found that mother:

- Failed to provide financial support for her child despite her ability to do so,
- Took no action to recover custody of the child after the temporary order was entered in New York,
- Failed to act in a timely manner to address the concerns about the condition of her home and to seek treatment for her mental health issues as ordered by the New York court,
- Failed to make efforts to establish a relationship with the child despite grandfather's efforts to provide her the opportunity to be with the child,
- Screamed profanities at the grandfather in the presence of the child,

- Failed to consult with the child's medical providers or to acknowledge and address the child's medical and emotional issues, and
- Failed to disclose the identity of the child's father after initially alleging that she did not know the identity of the father.

Child Support
Cases Decided Between
October 17, 2023, and October 1, 2024

Registration of foreign order, modification jurisdiction

- A child support order from another state must be registered in North Carolina pursuant to GS 52C-6-602 before it can be modified or enforced in North Carolina.
- The registration of a child custody order pursuant to the procedure in GS 50A-305 does not register the child support provisions contained in the same court order.
- In addition, North Carolina must have modification jurisdiction pursuant to GS 52C-6-611(a) to modify a support order.
- North Carolina did not have jurisdiction to modify a support order entered in Virginia where father and children resided in North Carolina at the time the motion to modify was filed but mother resided in Japan.

Sinclair v. Sinclair, 291 N.C. App. 435, 896 S.E.2d 256 (Dec. 5, 2023).

On The Civil Side post December 20, 2023.

Registration of a Foreign Custody Order Pursuant to GS 50A-305 Does Not Register the Child Support Provisions in the Same Order

A child support order entered by a court in a jurisdiction other than North Carolina must be registered in North Carolina pursuant to the Uniform Interstate Family Support Act, N.C. Gen. State. Chapter 52C ("UIFSA"), before it can be enforced or modified in North Carolina. G.S. 52C-6-609. A child custody order entered by a court in a jurisdiction other than North Carolina is not required to be registered before it can be modified or enforced in North Carolina, see blog post https://civil.sog.unc.edu/does-a-foreign-custody-order-have-to-be-registered-before-our-court-can-enforce-it-or-modify-it/, March 6, 2015, but the Uniform Child Custody Jurisdiction Act, N.C. Gen Stat. Chapter 50A (the "UCCJEA") does provide a registration process for a foreign custody order when a parent or other custodian wants assurance that North Carolina courts will recognize and enforce an out-of-state custody order. G.S. 50A-305.

It is not uncommon for child custody and child support to be addressed in the same order. The North Carolina Court of Appeals recently held that registration of the child custody provisions in the order pursuant to GS 50A-305 does not result in the registration of the support provisions in the same order. The court also held that unless the support order is registered, a North Carolina court is without subject matter jurisdiction to modify or enforce the support provisions of a foreign order.

Sinclair v. Sinclair (N.C. App., Dec. 5, 2023)

Shilpa and Gregory Sinclair entered into a Property Settlement Agreement in Virginia in 2019. The Agreement included both custody and child support provisions. The Agreement was

incorporated into the divorce judgment entered by the Virginia court that same year. At the time of the court order, mother lived in Japan and father and children lived in Virgina.

Father and children moved to North Carolina in 2020. Mother filed notice of registration of foreign custody order pursuant to GS 50A-305 in North Carolina in January 2021. Father did not object to the registration request and the order confirming the registration of the foreign custody order was entered in March 2021.

In May 2021, father filed a motion to modify child support in the North Carolina action wherein the custody order had been confirmed. Following a hearing where both parties appeared and no objection to jurisdiction was raised, the trial court modified child support after concluding there had been a substantial change in circumstances.

Mother appealed the modification order but did not raise any issue regarding the subject matter jurisdiction of the North Carolina court. Addressing the issue *sua sponte*, the court of appeals held that the North Carolina court was without jurisdiction to modify the Virginia order.

Registration

The court of appeals stated:

"The registration requirements for child custody orders and child support orders issued out-of-state are different. Compare N.C. Gen. Stat. § 50A-305 (2021) ("Registration of child-custody determination.") with N.C. Gen. Stat. § 52C-6-602 (2021) ("Procedure to register order for enforcement.") and N.C. Gen. Stat. § 52C-6- 609 ("Procedure to register child support order of another state for modification."). This Court has recognized the differences in registration and modification jurisdiction for out-of-state child support orders, as governed by UIFSA, and the registration and modification of child custody orders, as governed by the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). See, e.g., Halterman, 276 N.C. App. at 76, 855 S.E.2d at 818. ("For purposes of child custody, the focus is on the residence of the children, and personal jurisdiction over a parent is not required. For purposes of child support modification and enforcement, the focus is on the residence of the obligor . . . ." (citations omitted))."

The court noted that the North Carolina Administrative Office of the Courts provides different forms for the registration of a foreign custody order, AOC-CV-660 , and the registration of a foreign support order, AOC-CV-505, to reflect the differences in the process required for each. In this case, because the mother filed only a petition to register a foreign custody order, the child support provisions were not registered.

Modification Jurisdiction pursuant to UIFSA

While the failure of mother to register the support order was sufficient to deprive the trial court of jurisdiction, the court of appeals also held that North Carolina did not have modification jurisdiction pursuant to UIFSA even if the order had been property registered.

At the time father filed the motion to modify, father and children had moved to North Carolina and mother remained in Japan. Because Virginia lost continuing exclusive jurisdiction when father and children moved to North Carolina, and because both parents did not reside in NC at the time the motion to modify was filed, modification jurisdiction is determined by G.S. 52C-6-611(a).

That section of UIFSA provides:

"[A] tribunal of this State may modify a child support order issued in another state which is registered in this State if, after notice and hearing, the tribunal finds that:

(1) the following requirements are met:

a. Neither the child, nor the obligee who is an individual, nor the obligor resides 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;

or

(2) This State is the residence of the child, or a party who is an individual, is subject to the personal jurisdiction of the tribunal of this State and all of the parties who are individuals have filed consents in a record in the issuing tribunal for a tribunal of this State to modify the support order and assume continuing, exclusive jurisdiction."

As there was no evidence in the record that mother had consented in writing to modification jurisdiction in North Carolina, and because the petitioner (the father) was a resident of North Carolina, the court of appeals held that North Carolina did not have modification jurisdiction pursuant to this statute. Absent the written and filed consent of mother, the modification request must be filed in Japan, the place of mother's residence. See blog post https://civil.sog.unc.edu/child-custody-and-support-jurisdiction-to-modify/, April 15, 2016, describing modification jurisdiction for child support, including what has been referred to as "the play-away rule" of UIFSA.

Modification, determination of income, contempt

- An obligor's involuntary decrease in income is not enough alone to establish a substantial change in circumstances.
- Where the obligor's standard of living had not changed, the trial court did not err in concluding there had been no substantial change in circumstances despite fact that father's income from employment had decreased by over 60%.
- The trial court finding that income from obligor's girlfriend was a gift to obligor rather than a loan was supported by the evidence.
- A court should employ the same definition of income for child support and for alimony.

- Regular gifts from third parties are included in the calculation of income.
- The trial court did not err in failing to consider obligor's declining health as a substantial change in circumstances where evidence established that his income had not decreased due to financial gifts made to him by his girlfriend.
- While the trial court correctly determined that gifts from obligor's girlfriend and amounts spent by husband on "his relatively high standard of living" should be included in the calculation of his income, the trial court's findings of fact did not adequately explain how the trial court arrived at the specific amount of obligor's income. Specific findings are required to allow appropriate appellate review.
- Trial court findings of fact were sufficient to support the conclusion that obligor had the ability to comply with the support and ED orders of the trial court and was therefore in civil contempt, but they were insufficient to establish obligor had the ability to comply with the purge conditions imposed by the court.

Groseclose v. Groseclose, 291 N.C. App. 409, 896 S.E.2d 155 (2023). The trial court denied father obligor's request to modify his alimony and child support obligations and held him in contempt for the failure to comply with those orders and with an equitable distribution judgment. Father/husband appealed.

Substantial change in circumstances. Father/husband/obligor first argued that the trial court erred when it concluded there had been no substantial change in circumstances to justify modification of his child support and alimony obligations. Father's evidence established that he had lost his job and had remained unemployed for a while. He found another job, but it paid much less than his original employment. He argued that his income had been reduced by 60% since the entry of the original support order through no fault of his own. The court of appeals rejected his argument, holding that a conclusion that there has been a substantial change in circumstances cannot be based only on an involuntary decrease in income. Instead, the "overall circumstances of the parties must be compared with those at the time of the original award." In this case, the trial court found that despite his reduction in income from his employment, his standard of living remained high, mostly because of gifts of income from his girlfriend. When the trial court counted the gifts from the girlfriend, along with amounts spent by husband on alcohol, voluntary deductions from his paycheck, and other expenses to support his "relatively high standard of living", findings of fact supported the conclusion that there had not been a substantial change in his income.

Calculation of obligor's income. Obligor also argued that the trial court erred in calculating his actual present income in that it included in his income amounts his girlfriend paid to him and for his living expenses. The court of appeals disagreed, holding that the trial court was correct to use the definition of income found in the Child Support Guidelines for both child support and alimony, and held that the definition includes "gifts or maintenance received from persons other than parties to the action." While husband argued that the amounts from his girlfriend were loans, the court of appeals held that the trial court findings of fact supported the trial court's conclusion that the amounts were regular, recurring gifts rather than loans.

While the trial court did not err in including amounts paid by his girlfriend in the calculation of his income, the court of appeals remanded the case to the trial court for additional findings to show how the trial court calculated the specific amount of income it found for the obligor. For

example, the trial court made a finding that the girlfriend made monthly, regular, recurring gifts in the amount of $1,412 but the findings did not show how the trial court calculated this amount. The appellate court stated "because we cannot determine how the trial court used the evidence presented to calculate Father's actual gross income, we remand for additional findings concerning this issue."

Obligor's health. The court of appeals also rejected obligor's argument that that the trial court erred in failing to consider his "worsening health" because it affects his ability to earn income. According to the court of appeals, the health of a party may be relevant when an obligor has a decrease in income. In this case, however, because the trial court concluded obligor's income had not decreased, the trial court was not required to make findings of fact concerning his health.

Contempt. The trial court held obligor in civil contempt after concluding he had the ability to comply with the support and ED orders. The trial court ordered purge conditions which required the obligor to make periodic payments of $5,000, at 30 days, 60 days, 90 days, and 120 days from entry of the contempt order. Thereafter, the obligor was required to pay $2,500 per month until all arrears were paid. The court of appeals held that the findings of the trial court were sufficient to support the conclusion that the obligor had the ability to comply with the support and ED orders, but the findings did not establish that the obligor had the present actual ability to comply with the purge conditions. The appellate court stated, "To justify conditioning a defendant's release from jail for civil contempt upon payment of a large lump sum of arrearages, the district court must find as fact that the defendant has the present ability to pay those arrearages."

Imputing income

- The trial court erred when it took judicial notice that there were "substantial opportunities in banking and finance" in the Charlotte area to support the finding that defendant father could find new employment earning as much or more than he earned at his previous job which he had lost due to the elimination of his position.
- The trial court also erred when it imputed income to defendant father when there was no evidence that he was unemployed or underemployed due to his bad faith deliberate disregard of his child support obligation.

Sternola v. Aljian, 900 S.E.2d 139 (N.C. App., March 19, 2024). Father appealed the child support order entered by the trial court requiring him to pay prospective support and setting arrears. Father had been terminated from his job in banking when his position was eliminated approximately 15 months before the child support hearing. The trial court imputed income to father after taking judicial notice that there were "substantial opportunities in banking and finance" in the Charlotte area where the parties lived, finding that he had the ability to earn "$20,000 per month or more", and finding that he had failed to seek employment in good faith.

The court of appeals vacated the trial court order, concluding that the trial court erred in imputing income to father when there was no evidence he was unemployed due to his bad faith deliberate disregard of his support obligation. Evidence showed he lost his job due to no fault of

his own, that he received a severance package for one year, and that he had submitted applications for jobs but had not been hired.

The court of appeals also held that the trial court erred when it took judicial notice that there were jobs available in the banking industry in the community, even though defendant testified that a bank in Charlotte was undergoing layoffs and restructuring. Rule 201(b) of the Rules of Evidence allow a court to take judicial notice of facts which are "not subject to reasonable dispute in that they are either (1) generally known within the territorial jurisdiction of the court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." In this case, whether and the extent to which banking jobs were readily available at the time of the child support hearing was a matter "undoubtedly subject to debate" and was not a fact to be judicially noticed by a court.

Obligation of Non-Parent Third Party to Pay Support

Green v. Carter, 900 S.E.2d 108 (N.C. App., March 19, 2024)

Blog Post, On the Civil Side,

An unmarried partner with joint legal and physical custody is not a parent and cannot be ordered to pay child support.

The North Carolina Court of Appeals recently reminded us that custody rights do not make a person a parent. So, while a person may have court-ordered equal custody with the child's biological parent, that fact alone does not mean that person can be ordered to pay child support. In *Green v. Carter*, decided by the court of appeals on March 19, 2024, the court held that "[b]ased on long-established North Carolina law, … [a person] cannot be required to pay child support unless she is the child's mother or father or has agreed formally, in writing, to pay child support." Dissent by Hampson.

The biological mother waived her constitutional right to exclusive custody.

We've seen several cases like this in the context of third-party custody. Female partner Tricosa Green and biological mother Etonya Carter had a romantic relationship. They decided to have a child together. The biological mother became pregnant using an anonymous sperm donor, and both partner and biological mother were identified to friends and family as mothers of the child. They cared for the child together until their romantic relationship ended, at which time the partner filed a custody action seeking joint custody of the child. The trial court held that partner and the child had "a parent-child relationship," and that biological mother had acted in a manner inconsistent with her protected status by holding partner out as the child's co-parent and by allowing the partner to develop this parent-like relationship with the child without indicating that the relationship was not a permanent one. The trial court concluded that biological mom had waived her constitutional right to exclusive custody of the child and found that both parties were fit and proper to exercise joint custody of the child. The trial court ordered a parenting plan which granted an equal number of days of physical custody of the child to both parties.

Biological mother thereafter filed an action for child support against partner, arguing that the partner had acted as a parent to the child since before her birth, that partner stands in loco parentis to the child and agreed in writing to support the child, and that partner "is a parent to [the child] in the same sense as the heterosexual terms 'Mother' and 'Father' are used in GS 50-13.4(b)."

The trial court agreed with the biological mother and ordered partner to pay support. The trial court concluded that "there exists pleading, proof and circumstances that warrant [the] court to hold Mother and Partner equally liable for the support of [the child]" in that partner is "a parent" to the child according to a "gender-neutral interpretation" to the child support statute.

G.S. 50-13.4(b) is "clear and unambiguous" and is not "gender neutral."

The partner appealed and the court of appeals reversed the trial court, concluding that current North Carolina law does not allow the court to order partner to pay support because she is not a mother of the child, and she did not agree in writing to pay child support.

The appellate court began by pointing out that G.S. 50-13.4(b) limits who may be ordered to pay child support and held that the language of that statute is unambiguous. That statute states in part:

> "In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child. … In the absence of pleading and proof that the circumstances otherwise warrant, any other person … standing in loco parentis shall be secondarily liable for such support. However, the judge may not order support to be paid by a person who is not the child's parent … absent evidence and a finding that such person … has voluntarily assumed the obligation of support in writing."

The court held that statute uses terms with clear meanings, 'father', 'mother', and 'parent'. According to the court, 'father' means (quoting Webster's Dictionary) the male parent, the one who "begets offspring" by "performing the fertilization function … by which the eggs of the female are made fertile."; and the term 'mother' (again quoting Webster's) means "the person who provides the egg and/or gestates the child and gives birth to the child."

Regarding the term 'parent', that court held that the term means "one that begets or brings forth offspring." Because GS 50-13.4(b) uses the specific terms 'mother' and 'father', the court held that the statute's reference to 'parent' clearly means a person who is an actual mother or father of a child.

The court then quoted *Heatzig v. MacLean*, 181 NC App 451, 458 (2008):

> "Conferring parental status outside our statutory framework [is] without legal authority or precedent. A district court in North Carolina is without authority to confer parental status upon a person who is not the biological parent of a child. The sole means of creating the legal relationship of parent and child is pursuant to the provisions of Chapter 48 of the General Statutes (Adoptions)."

The court of appeals explained that when a statute is clear and unambiguous, it must be interpreted according to the ordinary meaning of its terms.

The appellate court then noted that the General Assembly specifically provided for a gender-neutral interpretation of statutes to comply with the decision by the US Supreme Court in *Obergefell v. Hodges*, 576 US 644 (2015), when it adopted GS 12-3(16) regarding the interpretation of the terms "husband and wife" to help ensure that persons in same-sex marriages are afforded the same rights and protections as persons in heterosexual marriages. According to the court, that statute shows that the General Assembly intended a gender-neutral interpretation to apply to married persons only. Noting that the statute makes no reference to the terms parent, mother, or father, the court stated:

> "Since the General Assembly has specifically addressed the instances where a gender neutral interpretation may be used, this Court is not free to give the words "mother" and "father" in North Carolina General Statute Section 50-13.4 a gender neutral meaning or application. *See Boseman*, 364 N.C. at 545, 704 S.E.2d at 500. Mother's interpretation would re-write North Carolina General Statute Section 50-13.4, and only the General Assembly has the authority to re-write the statute."

The court of appeals also pointed out that adopting the 'gender-neutral' interpretation of GS 50-13.4(b) argued by mother would result in treating the child of a same-sex couple differently than a child in a heterosexual relationship under the same circumstances, citing cases wherein the court has held that romantic partners and step-parents in heterosexual relationships cannot be liable for support unless they have agreed in writing to support the child, despite having close relationships with the child and custodial rights. *See Duffey v. Duffey*, 113 NC App 382 (1994)(step-father only liable for support because he had agreed in a separation agreement to support the children), and *Moyer v. Moyer*, 122 NC App 723 (1996) (step-father was not liable for support because he had not agreed in writing to support the child).

Partner as a 'de facto' parent or a person acting in loco parentis??

The appellate court also rejected mother's argument that as a "de facto parent," partner is a "mother" as that term is used in GS 50-13.4(b). The dissent filed in the court of appeals agrees with mother, arguing that case law such as *Price v. Howard*, 346 NC 68 (1997) and *Mason v. Dwinnell*, 190 NC App 209 (2008) supports the conclusion that "a person who is in a domestic or intimate relationship with the biological parent – but is not a biological parent may, in fact be "transformed into a parent": a de facto parent."

The majority disagreed, stating "mother cites no legal authority for this argument, and we can find no such authority." *See Seyboth v. Seyboth*, 147 NC App 63 (2001)(step-parent is not a parent despite acting in loco parentis to the child) and *Estroff v. Chaterjee,* 190 NC App 61 (2008)(holding that NC has not adopted theories of de facto parentage or parentage by estoppel), and *Heatzig*, cited above holding that adoption is the only legal mechanism for creating a parent-child relationship.

The majority opinion goes on to state that "there is no basis for holding a person primarily responsible for child support based only on custodial rights or standing in loco parentis to a child. … At best, standing in loco parentis may support secondary liability for child support [if that person has agreed in writing to pay support]."

Without addressing but seeming to assume that partner in this case stands in loco parentis to the child, the court rejected mother's argument that both partner's signing of the paperwork when mother underwent invitro fertilization to become pregnant and when she added the child as a beneficiary to her medical insurance should be sufficient to show partner agreed in writing to support the child. The court held that neither document referenced child support.

What about the next to last sentence in Price v. Howard?

At the end of the opinion in *Price v. Howard*, the case wherein the supreme court set out the analysis to apply in custody cases involving situations like the one in *Green* where a biological parent has allowed a third party to develop a parent-like relationship with a child, the supreme court stated:

> "It is clear that the duty of support should accompany the right to custody in cases such as this one."

Price v. Howard, 346 NC 68, 84 (1997).

The dissent argues that this statement is support for the premise that persons like partner in *Green* acquire parental status and are responsible for child support.

The majority disagrees, pointing out that the court in *Price* also stated:

> "Although support of a child ordinarily is a parental obligation, other persons standing *in loco parentis* may also acquire a duty to support the child."

The majority therefore interprets the statement as simply applying the unambiguous language of GS 50-13.4(b), which limits support obligations of persons standing in loco parentis to only those who have agreed in writing to support the child.

This is an issue of public policy for the General Assembly.

In concluding the opinion, the majority states:

> The trial court's attempt to impose one obligation of a mother or father – child support – upon Partner, to go along with the benefit of joint custody already conferred upon her is understandable. It may seem only fair for Mother and Partner to share the responsibility of financial support for [the child] along with the benefits of joint physical and legal custody. It may seem just as fair to require a stepfather or male partner who stands in *loco parentis* to his partner's child to pay child support, especially if he also shares custody with the child's natural or legal parent. But here, North Carolina's statutes and established case law allow Partner to act as a parent to [the child] under Section 50-13.2 without paying child support under Section 50-13.4. *See* N.C. Gen. Stat. § 50-13.2 (stating custody may be awarded to "such person, agency, organization or institution as will best

promote the interest and welfare of the child"); *see also* N.C. Gen. Stat. § 50-13.4 ("In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child.").

We fully appreciate the difficult issues created by IVF and other forms of assisted reproductive technology, but only the General Assembly has the authority to amend our statutes to address these issues. [citing the Honorable Beth S. Dixon, For the Sake of the Child: Parental Recognition in the Age of Assisted Reproductive Technology, 43 CAMPBELL L. REV. 21 (2021)]. Protection of the children born into these situations, whether to a same-sex couple or a heterosexual couple, is a complex policy issue, but this Court does not have the role of creating new law or adopting new policies for our state."

Effective date of modification; attorney fees

- In a case where the trial court deviated from the Child Support Guidelines, the trial court had the discretion to set the effective date of the new modified order on a date other than the date a motion to modify was filed.
- Where the trial court ordered father to pay attorney fees based on its finding that he filed several frivolous discovery motions, the trial court was not required to make findings that mother was a party acting in good faith with insufficient means to defray the cost of the litigation.

Crenshaw v. Crenshaw, _ N.C. App. _, _ S.E.2d _ (N.C. App., October 1, 2024). Father filed a motion to modify support when two of the three children of the parties reached the age of 18. Mother also filed a motion to modify, requesting that support be increased due to an increase in the needs of the one child under the age of 18 and an increase in father's income. The trial court determined that it was appropriate to deviate from the Guidelines, made numerous findings about the needs of the child and the financial circumstances of the parents, and increased the father's child support obligation. The trial court ordered that the modified support order be effective January 1, 2022, instead of the date that either parent filed their motion to modify. The trial court also ordered father to pay $15,000 in attorney fees to mother.

Both parents appealed. The court of appeals affirmed the trial court, holding that the amount of support set by the trial court was supported by sufficient findings of fact that were adequately supported by the evidence. The appellate court rejected mother's argument that the trial court erred by not making the new support order effective as of the date she filed her motion to modify. The court of appeals held that, while a trial court cannot modify a support obligation as of a date before the date of the filing of a motion to modify, the court has discretion to set an effective date after a motion is filed that the trial court determines is reasonable under the circumstances. The court of appeals held that the findings in the order showed that the trial court properly considered all the factors in the case when determining the effective date and did not enter an order that was "unsupported by reason."

Father argued on appeal that the trial court order for attorney fees was improper in that the order contained no findings that the mother had insufficient means to defray the cost of litigation as required by GS 50-13.6. The court of appeals rejected this argument, concluding that the trial

court ordered the payment of fees because it found that father had filed a significant number of frivolous discovery motions, causing unnecessary expense to mother. The court of appeals held that GS 50-13.6 does not require findings regarding the ability of the party to pay the cost of litigation when fees are awarded based on a finding that "the supporting party has initiated a frivolous action or proceeding" and the amount awarded will be as the trial court deems "appropriate under the circumstances."

Divorce
Cases Decided Between
October 17, 2023, and October 1, 2024

Service of process, attacking judgment based on false swearing

- Plaintiff failed to rebut presumption that service of process in earlier divorce action was proper.
- A party seeking to invalidate a divorce judgment on the basis that the judgment was obtained by making a false allegation as to the date of separation must file a motion in the divorce action; the divorce judgment cannot be attacked in a separate civil proceeding.

Tuminski v. Norlin, _ N.C. App. _, _S.E.2d _(September 3, 2024). Plaintiff husband filed this action seeking to invalidate a divorce judgment entered in a separate proceeding initiated by defendant wife. In the earlier proceeding, the wife filed for divorce, served husband by certified mail, and claimed the parties had been separated for a year before she filed the complaint. After the divorce judgment was entered, the husband filed this action, seeking to set aside the divorce pursuant to Rule 60(b). The trial court denied his request and dismissed his complaint. The court of appeals affirmed.

Service of process in the first proceeding was by certified mail, addressed to husband's personal mailbox located in a UPS store. The return receipt was labeled as having been received by "BP/FP" [not the husband's initials] and had "COVID-19" instead of a signature. The wife filed an affidavit of service stating that a copy of the complaint had been deposited in the mail for mailing by certified mail and she attached the return receipt. The court of appeals held that pursuant to Rule 4 and GS 1-75.10(a)(4), this affidavit and the attached receipt raised the presumption of valid service. The court of appeals identified the divorce judgment as a "default judgment." The husband admitted he signed a contract with UPS to receive all his mail and that he did receive all his mail at this mailbox at that time. Because he failed to rebut the presumption of valid service, the divorce judgment was valid.

The court of appeals also agreed with the trial court that husband could not attack the divorce judgment based on his allegation that the parties had not been separated for a year at the time the case was filed. An attack on the judgment based on a claim that wife made a false allegation in the divorce complaint must be made in the original divorce proceeding and cannot be made by collateral attack.

Equitable Distribution
Cases Decided Between
October 17, 2023, and October 1, 2024

Classification, presumptions, appreciation of separate property

- Classification is a legal conclusion that must be supported with findings of fact.
- Property acquired during the marriage is presumed to be marital property. The party seeking a separate classification has the burden to overcome the presumption by establishing that the property is in whole or in part separate property.
- The trial court did not err when it concluded plaintiff rebutted the presumption that real property acquired during the marriage was marital property by showing the lots were acquired in exchange for separate property owned by him before the marriage, with no contribution of marital funds or active appreciation of separate property.
- A passive increase in the value of separate property during the marriage is separate property, but active appreciation of separate property is marital property.
- The spouse seeking to establish that appreciation of separate property is marital property must establish that appreciation occurred by showing the value of the separate property on the date of marriage and the value on the date of separation. If that can be shown, the increase is presumed marital.
- Defendant failed to show appreciation of separate property during the marriage where she failed to introduce evidence of the value of the separate property on the date of marriage.
- Trial court did not err in classifying personal property as separate property even though plaintiff identified the property as marital in his discovery responses and in his inventory affidavit where defendant did not object to the introduction of evidence during the trial supporting the separate classification of the property.

Roberts v. Kyle, Executor of Estate of Roberts, 291 N.C. App. 69, 893 S.E.2d 482 (2023). The husband filed for divorce and the wife counterclaimed for equitable distribution. Following divorce and before the ED trial, wife passed away. Her son, as executor of her estate, was substituted as defendant. Following trial, the trial court entered an equitable distribution judgment which, among other things, classified real property and items of personal property as plaintiff's separate property. Defendant appealed, arguing that the trial court erred in this classification.

Real property. Before the marriage, the plaintiff and his cousin purchased a track of land and developed it into a subdivision they called "Tar Kiln Ridge". The first lot of the subdivision was sold before the marriage. Following marriage, plaintiff acquired other lots for the subdivision in exchange for property in the track that he owned before marriage.

The trial court concluded that at the time of the sale of the first lot in the subdivision before the date of marriage, the entire track of real property became a subdivision with a value that was the sum of all the lots in the subdivision. The trial court classified all the subdivision, including the additional lots acquired during the marriage, as the husband's separate property, specifically concluding husband had rebutted the presumption that the lots acquired during the marriage were marital property.

On appeal, defendant argued that the lots acquired during the marriage were acquired through the repayment of a loan obtained after the date of marriage and with the value of the appreciation of husband's separate property after the date of marriage, which defendant claimed to be active appreciation and therefore marital property.

The court of appeals held that the findings of fact by the trial court were supported by the evidence and these findings supported the conclusion that all the lots owned by plaintiff husband in the subdivision were his separate property. Specifically, the court found that plaintiff acquired the value of the entire subdivision before the date of marriage and there was no evidence of marital contribution to that value after the date of separation. The trial court found that all indebtedness on the property incurred following marriage was paid off with plaintiff's separate funds. In addition, the court held that defendant failed to establish active appreciation of plaintiff's separate property during the marriage because defendant failed to establish appreciation during the marriage at all. To establish appreciation, there must be evidence of the value of the property on the date of marriage, and defendant failed to provide evidence of that value.

Because the additional lots acquired during the marriage were acquired in exchange for property that was completely plaintiff's separate property, those additional lots were separate property.

Personal property. On his inventory affidavit and in answers to interrogatories before the ED trial, plaintiff identified two tractors, a boat and a boat trailer, a bulldozer, and a backhoe as marital property. However, during the trial, he introduced evidence that each item of personal property was owned by him before marriage. The trial court classified the property as separate property.

On appeal, defendant argued that the trial court should have classified the items as marital property because of plaintiff's inventory affidavit and discovery responses. The court of appeals disagreed, stating that defendant did not object to plaintiff's evidence at trial that supported the separate classification and did not rebut the evidence indicating the property was separate.

Interim distribution, divisible property

- Unless the interim distribution order states otherwise, property distributed by means of an interim distribution order becomes the sole, separate property of the party to which it was distributed; the date of distribution for purposes of the valuation of that property is the date of the interim distribution order, even if the issue of valuation is held open for resolution at a later trial date.
- Any passive increase in the value of property after it is distributed pursuant to an interim distribution order is not divisible property but is the sole, separate property of the party to which it was distributed.

Lowder v. Lowder, unpublished opinion, 291 N.C. App. 310, 893 S.E.2d 276 (2023). Defendant argued that the trial court erred in classifying as divisible property the passive increase in value of marital property that occurred after the property was distributed to defendant in an interim distribution order. The court of appeals, relying on another unpublished opinion in Daly v. Daly, 255 NC App 448 (2017), held that property distributed by interim distribution

becomes the sole, separate property of the party to which it was distributed at the time of the interim distribution order. Any passive increase in the value of that property occurring between the date of separation and the date of the interim distribution order is divisible property. However, any passive increase occurring after the interim distribution will be the separate property of the spouse who received the property in the interim distribution.

Classification of debt, unequal distribution

- Trial court did not err in classifying home equity line of credit as marital debt even though the debt was secured by husband's separate property.
- Marital debt is debt incurred during the marriage for the joint benefit of the parties. The home equity line of credit was a debt incurred during the marriage to pay for the upkeep of the marital residence.
- Only one distribution factor is required to support an unequal distribution of marital property.
- The trial court is required to make "ultimate" findings of fact as to each distribution factor established by the evidence.
- The unequal distribution would not be vacated based on the trial court finding that an unequal distribution was equitable rather than finding that an equal distribution was not equitable.
- The distribution factors in this case supported the trial court's unequal distribution.

Smith v. Smith, 292 N.C. App. 443, 899 S.E.2d 1 (2024). The trial court entered an equitable distribution judgment which, along with other things, classified a home equity line of credit as marital debt and ordered an unequal division of marital property, with defendant husband receiving $217,189.44 and plaintiff wife receiving -$7,499.20. The trial court concluded that an unequal distribution was equitable.

On appeal, plaintiff argued that the trial court erred in classifying the home equity line of credit as a marital debt because it was secured by a house that was the separate property of defendant husband. The court of appeals rejected this argument, holding that the findings by the trial court that the debt was incurred during the marriage for the purpose of paying for maintenance on the marital residence were sufficient to support the classification of the debt as marital.

The court of appeals also rejected plaintiff's argument that the trial court was required to conclude that an equal distribution was not equitable rather than that an unequal distribution was equitable. The appellate court rejected the argument that certain "magic words" are required to support an unequal distribution. In this case, the findings of the trial court clearly established why the trial court concluded that equal was not equitable.

The court of appeals also held that the distribution factors identified by the trial court were sufficient to support the unequal distribution. Noting that only one factor is required for an unequal distribution, the court of appeals held that the findings that defendant contributed large sums of his separate property to benefit the marriage and to obtain the marital residence, and that he paid all expenses relating to the home after separation while wife lived in the home were sufficient to support the unequal distribution.

There is a dissent relating to the interpretation of a stipulation. The majority held that the trial court correctly applied a stipulation relating to property owned by husband before the marriage but the dissent argued that the trial court failed to enforce the stipulation.

Trust as a Necessary Party

Wenninger v. Wenninger, 901 S.E.2d 677 (N.C. App., May 7, 2024)

Blog post, On The Civil Side, May 15, 2024

Equitable Distribution: Stipulation in a Pretrial Order Makes Revocable Trust a Necessary Party

The North Carolina Court of Appeals recently voided an entire equitable distribution judgment because the trial court denied a motion to add as a party a revokable trust alleged to be a necessary party, even though the motion was made more than three months after the conclusion of the equitable distribution trial. In *Wenninger v. Wenninger*, decided May 7, 2024, the appellate court held that the equitable distribution judgment was void for lack of a necessary party because the parties in the equitable distribution proceeding stipulated that items of property titled in the name of the trust were marital property, even though the trial court refused to distribute the items because they were not owned by either party.

Wenninger v. Wenninger

A pretrial order entered by the trial court identified the parties' stipulations and allegations as to marital property. The order listed three bank accounts and one car that the parties stipulated were titled in the name of a revocable trust. The parties also stipulated that two of the bank accounts were marital property, but they disagreed over the classification of the last bank account and the car.

At the conclusion of the equitable distribution trial, the trial court announced that the property titled in the name of the trust would not be distributed in the final judgment because the property "was not owned by the parties on the date of separation" and the trust "was not a party to this lawsuit."

More than three months later, the husband filed a motion requesting that the trust be added as a necessary party. The appellate opinion makes no reference to any allegation by husband regarding why the trust property should be classified as marital property; there is no mention of a claim that a constructive trust should be imposed on the property to grant either party equitable ownership of the trust property or of any other legal theory under which the property titled in the name of the trust could be classified as marital property.

The trial court denied the motion on the basis that neither party moved to join the trust before the verdict was rendered. The trial court entered the equitable distribution judgment which did not distribute any of the property owned by the trust and husband appealed.

The lack of a necessary party renders a judgment void.

The court of appeals held that the trial court had no discretion to deny the husband's motion to add the trust as a necessary party because any judgment entered without a necessary party is void. According to the appellate court, the trial court had the obligation to join the trust "*ex mero motu*" at any point in time when the trial court determined that the trust was a necessary party. The failure to add the necessary party rendered the entire judgment void.

Why was the trust a necessary party in this case?

The court of appeals explained that "when a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with the third party's participation limited to the ownership of that property." (quoting *Nicks v. Nicks*, 241 N.C. App. 487 (2015)). According to the appellate court, the trust was a necessary party because the parties stipulated that property titled in the name of the trust was marital property in the pretrial order, and because the trial court has a "mandatory duty to classify and distribute property that all parties agree is subject to equitable distribution."

Does this mean third parties or entities must be added whenever the trial court determines property is not owned by one or both of the parties?

It is clear that when a party requests in a pleading that the court impose a constructive trust or a resulting trust on property titled in the name of a third party or an entity such as a trust or an LLC, or when a party requests that a transfer of property to a third party or entity be set aside as a fraudulent transfer so that the property can be brought into the marital estate, the third party or entity must be joined as a party before the court can litigate that claim. *See Upchurch v. Upchurch*, 122 N.C. App. 172 (1996) and *Nicks v. Nicks*, 241 N.C. App. 487 (2015)

But in the *Wenninger* case, there is no indication that any such claim was made by either party and unlike in *Nicks v. Nicks*, 241 N.C. App. 487 (2015), the court of appeals does not point to any evidence in the record that would support such a claim.

In *Weaver v. Weaver*, 72 NC App 409 (1985), Ms. Weaver purchased a piano during the marriage with marital funds. The husband claimed that the piano was marital property, but the trial court determined that the parties gifted the piano to their children before the date of separation and therefore did not distribute the piano in the equitable distribution judgment. When the husband appealed, the court of appeals affirmed the trial court, holding that evidence was sufficient to show that the children rather than the parties owned the piano on the date of separation.

Despite the allegation by husband that the piano was marital property, the court of appeals in *Weaver* did not void the equitable distribution judgment because the children were not brought into the action as necessary parties. There was no claim that the transfer to the children should be set aside, so the trial court had the authority to determine that neither party owned the piano without joining the actual owners of the property.

The only difference between *Weaver* and *Wenninger* appears to be the stipulation of the parties in *Wenninger* that the property of the trust was marital property. Even though the trial court did not distribute the property titled in the name of the trust, the court of appeals held that the fact that the parties agreed that the property was marital required the court to join the trust as a necessary party,

despite the lack of any claim by the parties that would support taking title away from the trust and vesting it in the parties.

So, I hope we don't interpret the *Wenninger* opinion too broadly. I believe *Weaver* still is good law. Absent a stipulation such as the one in *Wenninger*, there is no need to join third parties or entities unless there is a claim that will support vesting title, either equitable or legal title, in one of the parties to the equitable distribution action.

Valuation of law practice, goodwill, reopening evidence, distributive award

- When valuing a partnership practice, the trial court is to consider the partnerships "(a) fixed assets including cash, furniture, equipment, and other supplies; (b) its other assets including accounts receivable and the value of work in progress; (c) its goodwill, if any; and (d) its liabilities."
- The valuation approach adopted by the trial court was properly supported by the testimony of the expert appraiser and the trial court acted within its discretion in adopting the expert's value.
- Both enterprise and personal goodwill are marital property if acquired during the marriage. The valuation of a business must include the value of goodwill, if it is found to exist.
- A trial court order must clearly identify how it arrives at the value of goodwill.
- The trial court properly relied on the testimony of the valuation expert to support the determination of the value of the partnership.
- A delay in the entry of the equitable distribution judgment of 7 months was not such an extensive delay as to require the trial court to grant plaintiff's motion to reopen the evidence.
- The amount and manner of payment of the distributive award was adequately supported by findings regarding plaintiff's monthly income, his expenses, his earnings record, and his personal and business bank account statements.

Sneed v. Johnston, 902 S.E.2d 28 (N.C. App., May 7, 2024), temporary stay allowed 900 S.E.2d. 928 (N.C., May 30, 2024). The parties entered a consent judgment resolving all issues in equitable distribution except for the classification, valuation, and distribution of plaintiff's law firm, which was formed during the marriage.

The parties initially also entered a consent order appointing a business appraiser to value the partnership. However, after the expert gave his initial opinion of value, plaintiff stopped cooperating with him and refused to pay his fee. Defendant paid the fee and then hired the same appraiser as her own expert. The appraiser testified that the partnership had a value of $3,100,000, which included $302,436 enterprise goodwill and $2,688,321 personal goodwill. Plaintiff testified that the partnership had either a negative or zero value due to an outstanding credit line.

The trial court classified the practice as entirely marital property, valued the practice at $3,220,000 as of the date of separation, distributed the practice to plaintiff, and ordered plaintiff to pay defendant a distributive award in the amount of one-half of the date of separation value,

$1,550,000. The judgment provided that the distributive award was to be paid in monthly installments of $8,520.64 over a 15-year period. The trial court also ordered plaintiff to reimburse defendant for payments made to the court-appointed valuation expert. Plaintiff appealed and the court of appeals affirmed the trial court.

The court of appeals rejected plaintiff's argument that the trial court erred by allowing the appraiser to testify as defendant's expert after he had been appointed by the court as a neutral valuation expert, pointing out that the expert could not act as the court's appointed expert due to plaintiff's failure to cooperate in the valuation process and his refusal to pay the expert's fee. The trial court made findings that plaintiff was not prejudiced in any way by the defendant hiring the same expert, and the court of appeals agreed.

The appellate court also rejected plaintiff's argument that the expert did not use an appropriate methodology to value the partnership. A trial court must use a "sound" methodology, that includes consideration of the partnership's "(a) fixed assets including cash, furniture, equipment, and other supplies; (b) its other assets including accounts receivable and the value of work in progress; (c) its goodwill, if any; and (d) its liabilities." In this case, the expert's testimony clearly explained his reasoning for using the income approach and applying the capitalization of cash flows method to value the partnership, and the court of appeals held that the trial court acted within its discretion when it adopted his opinion as to value.

The court of appeals also rejected plaintiff's contention that the personal goodwill identified by the expert should have been classified as his separate property. The court held that the goodwill of a business must be identified and valued if it is found to exist. There is no distinction in classification between enterprise goodwill and personal goodwill, both are marital property if acquired during the marriage. The court of appeals held that the trial court clearly articulated how the value of goodwill was calculated, based on the testimony of the expert.

While a prejudicial delay in the entry of an equitable distribution judgment can require that the trial court allow parties the opportunity to provide additional evidence of changes in the marital and divisible estates, the delay of 7 months in this case was not sufficient to require the trial court to grant plaintiff's motion to reopen the evidence. The court of appeals held that there was no showing of prejudice to plaintiff that occurred due to the time it took the trial court to enter the final judgment.

Marital debt, student loans, delay in entry of judgment, distributive award

- Marital debt is debt incurred after the date of marriage and before the date of separation by either or both spouses for the joint benefit of the parties. The party seeking the marital classification of a debt has the burden of proving each element, including that the debt was incurred for the joint benefit of the parties.
- The trial court finding of fact that the mortgage on the marital home was in the joint names of the parties was a simple clerical error where the mortgage was in the name of the wife alone. The error was not significant because the name on a debt is not relevant to the classification or distribution of the debt.

- The trial court did not err in classifying wife's student loan debt as partially marital and partially separate after concluding that only that portion of the loan used to pay for the living expenses of the parties during the marriage was incurred for the joint benefit of the parties.
- The delay of nine months between the equitable distribution trial and the entry of the judgment was not sufficient to entitle the wife to a new distribution order where she failed to show any prejudice to her because of the delay.
- The trial court erred in ordering a distributive award without explicitly finding that an in-kind distribution was not equitable in this case and without finding that wife had sufficient assets from which to pay the distributive award.

Sapia v. Sapia, 903 S.E.2d 444 (N.C. App., June 18, 2024). The trial court entered an equitable distribution judgment, concluding that an equal division was equitable, distributing the marital residence and the debts encumbering the residence to the wife, and ordering wife to pay husband a distributive award. The marital home was the most significant asset in the marital estate. In a very fact specific opinion, the court of appeals affirmed the trial court's classification of the home and the marital debts, as well as the determination that an equal division was equitable. The court of appeals vacated the distributive award and remanded the case to the trial court for specific findings regarding whether the presumption in favor of an in-kind division had been rebutted by the evidence in this case and whether wife had sufficient assets from which to pay the distributive award. The court noted that, if the trial court could not make those findings and conclusions on remand, the trial court "in its discretion ... may also consider ordering sale of the marital home."

Marital debt, property gifted to children, credit for postseparation payments, distributive award

- Debt incurred by husband after the date of separation to repair the marital residence was divisible debt.
- Debt incurred during the marriage to purchase property out of foreclosure that had been owned by husband before marriage was marital debt.
- The trial court did not err in concluding vehicles purchased by the parties during the marriage had been gifted to the children of the parties and therefore were not marital property.
- The trial court erred in classifying scaffolding as marital property where the scaffolding was owned by husband before the date of marriage.
- A business debt incurred by the business on the date of separation was not marital debt because it was not incurred before the date of separation and was not related to any existing marital debt.
- The husband was entitled to credit in distribution for wife's postseparation occupation of the marital residence because he made mortgage payments on the residence following separation using his separate funds.
- The wife is entitled to credit in distribution for any postseparation payments she made on the marital residence with separate funds because the residence was distributed to husband in the final judgment.
- The trial court's extensive findings of fact regarding distribution factors were sufficient to support the distributive award ordered by the court, despite the lack of a finding by the trial court that the presumption in favor of an in-kind distribution had been rebutted.

Kerslake v. Kerslake, _ N.C. App. _, _ S.E.2d _(Sept. 3, 2024). The trial court entered an equitable distribution judgment, concluding that an unequal division was equitable, awarding husband 80% of the marital estate and ordering wife to pay husband a distribution award, The court of appeals affirmed in part, reversed in part, vacated in part and remanded the case to the trial court.

No subject matter jurisdiction to consider ED claim requested by motion in the cause

- The trial court was without jurisdiction to consider defendant's motion in the cause requesting equitable distribution filed by defendant after final judgment was entered resolving the only remaining pending claim in the case.

Phillips v. Phillips, unpublished opinion, 292 N.C. App. 549, 897 S.E.2d 181 (2024). Plaintiff filed a complaint seeking child custody. The defendant responded with counterclaims for custody, child support, equitable distribution, PSS, alimony and attorney fees. Plaintiff replied seeking affirmative relief in the claims raised by defendant's counterclaims.

The parties resolved permanent custody by a consent order. Subsequently, the defendant filed a voluntary dismissal of all her counterclaims. Approximately nine months later, the defendant filed a motion in the cause requesting equitable distribution. The trial court dismissed the claim, concluding it did not have subject matter jurisdiction to litigate a claim for equitable distribution filed by motion in a case where all pending issues had been resolved. After finding that plaintiff consented to defendant's voluntary dismissal of her original counterclaims, the court of appeals agreed the trial court had no jurisdiction to consider equitable distribution requested by a motion in the cause.

Distribution factors; use of inventory affidavit as evidence

- The trial court did not improperly consider marital fault when it found as a distribution factor that defendant wasted and devalued marital assets following separation because of his use of illicit drugs.
- The trial court could rely on plaintiff's inventory affidavit as evidence where defendant failed to participate in pretrial conferences, failed to appear for trial, and failed to object when plaintiff requested during trial that the trial court admit the affidavit into evidence and to accept the facts alleged in the affidavit. The court of appeals held that the admitted affidavits were, in effect, the pretrial orders of the court, and the trial court could accept the facts to support the findings it made in the final judgment.
- The trial court did not err by failing to include a finding in the judgment as to the total value of the marital estate when the total value could be easily ascertained based on the findings and conclusions in the judgment regarding the value of the marital property and marital debt.

Kaylor v. Kaylor, N.C. App. _, _ S.E.2d _ (October 1, 2024). Plaintiff wife filed this action for equitable distribution and defendant husband filed an answer. However, he thereafter failed to appear for any scheduling or pretrial conference, failed to file an inventory affidavit, and failed

to appear at trial. The trial court entered an equitable distribution judgment, ordering an unequal distribution in favor of wife. Defendant appealed.

Defendant argued that the trial court inappropriately considered marital fault in determining that an unequal distribution was equitable. The trial court found that, because of defendant's use of illicit drugs, he allowed the marital business to deteriorate during separation and failed to assist plaintiff in paying marital debt during separation. The trial court also found that plaintiff maintained the marital estate during separation by paying the marital debt, including paying the mortgage on the residence where defendant resided during separation. The court of appeals rejected defendant's argument, pointing to GS 50-20(c)(d) which allows the trial court to consider "acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, during the period after separation of the parties and before the time of distribution" as a factor when determining whether the estate should be divided unequally. Because the findings regarding defendant's drug use related to his failure to preserve marital property during separation, they were not an inappropriate consideration of marital fault.

Defendant also argued that findings made by the trial court regarding the classification of certain property and the value of marital debt were not supported by evidence. The court of appeals rejected this argument as well, finding that the trial court relied on allegations contained in plaintiff's inventory affidavit to support the findings of fact in the judgment. The affidavit had been introduced at trial with a request by plaintiff that the facts alleged in the affidavit be accepted. Because defendant did not object to the introduction and acceptance of the affidavit, the court of appeals held that the trial court properly treated the affidavit as a pretrial order, establishing the facts alleged therein.

PSS and Alimony
Cases Decided Between
October 17, 2023, and October 1, 2024

Spousal support by contract, cohabitation, specific performance, contempt

- The term 'alimony' is defined by GS 50-16.1A(1) to mean "a court order for the payment for the support and maintenance of a spouse or former spouse." Support payments required by a contract rather than by court order are not 'alimony' within the meaning of Chapter 50.
- The statutory definition of cohabitation found in GS 50-16.9(b) does not apply "per se" to the interpretation of the term 'cohabitation' used in a contract. Rather, the intent of the parties control to define the term.
- Because the definition of cohabitation found in case law before the enactment of GS 50-16.9(b) is sufficiently similar to the statutory definition, the fact that the trial court used the statutory definition to determine wife was not cohabitating with her boyfriend did not warrant a new trial on the issue of cohabitation.
- While GS 50-16.7(j) allows an order for alimony to be enforced by civil contempt while the alimony order is on appeal, that provision does not apply to the enforcement of a contractual obligation to pay support. Therefore, the trial court did not have jurisdiction to hold husband in contempt for the failure to pay the arrears owed under the separation agreement after he appealed the order of specific performance to the court of appeals.
- An order of specific performance is an appropriate remedy when a contract has been breached and the court determines that the remedy at law is inadequate, that the obligor has the ability to perform the obligations under the contract in whole or in part, and the oblige has performed pursuant to the contract.

Meeker v. Meeker, 292 N.C. App. 32, 897 S.E.2d 115 (2024). After separation and before divorce, husband and wife entered into a separation agreement. The agreement was not incorporated into the divorce judgment. The agreement provided that the husband would pay a monthly amount for spousal support and child support. The contract referred to the spousal support as 'alimony' and the contract provided that the spousal support payments would terminate in 2025 or upon the "death, remarriage or cohabitation" of wife. The contract did not define cohabitation. The husband paid support in accordance with the contract until he stopped paying because he believed the wife was cohabitating with her boyfriend.

The wife commenced this proceeding alleging that husband breached the separation agreement by refusing to pay spousal support. She requested an order of specific performance. The trial court determined that wife was not cohabitating, ordered that husband specifically perform the contract by paying all future payments required by the contract as they become due in the future, and determined that husband owed $113,666.70 in arrears.

The husband appealed the trial court order. While the appeal was pending, the trial court found the husband to be in civil contempt for failure to pay the arrears due under the contract. The contempt order provided that the husband could purge himself of contempt by paying $38,000 immediately and by paying $2,500 per month following entry of the contempt order until the balance due was paid in full. The husband also appealed this contempt order.

Cohabitation. The husband first argued that the trial court erred in using the definition of cohabitation found in GS 50-16.9(b) when it determined wife was not cohabitating. The court of appeals agreed that the statutory definition does not "per se dictate the proper interpretation of "cohabitation" as used in an Agreement" because that definition applies only to court ordered alimony. Instead, the court of appeals held that the "intention of the parties is the controlling guide to a contract's interpretation."

Cohabitation is defined in GS 50-16.9(b) as:

> "The act of two adults dwelling together continuously and habitually in a private heterosexual relationship" which is evidenced "by the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations."

Using this definition, the trial court determined that although the wife stayed most nights at her boyfriend's house for over two years, she did so to care for him, as he had health issues. She maintained a separate residence, slept in a separate bedroom, did not share expenses, did not benefit financially from him, and did not keep clothes at his house, and the two did not show "any public displays of affection." Based on these facts, the trial court concluded there had been no "assumption of marital duties, rights and/or obligations" between the two "that are associated with married people."

The court of appeals held that the definition of cohabitation provided by case law before the enactment of GS 50-16.9(b) is substantially like the statutory definition used by the trial judge. According to that earlier case law, cohabitation means "living together as man and wife, though not necessarily implying sexual relations. …The mutual assumption of those marital rights, duties and obligations which are usually manifested by married people." The appellate court held that, although the trial court erred in using the statutory definition, given the similarities between the two definitions, there was no need to order a new trial on the issue of cohabitation. The facts found by the trial court regarding the relationship between the wife and her boyfriend were sufficient to support the trial court's conclusion that they were not cohabitating.

Specific performance. The court of appeals held that a separation agreement usually can be enforced by an order of specific performance because "damages are usually an inadequate remedy in the context of a separation agreement." The court can order specific performance of future obligations under a contract after that contract has been breached when the remedy at law (a judgment for money damages) is inadequate, when the obligor can perform all or part of the future obligations, and the oblige has performed their obligations under the contract. In this case, the trial court erred when it failed to determine whether the husband had the ability to make the future payments due under the contract.

Contempt. When an order for the periodic payment of alimony has been appealed, GS 50-16.7(j) allows that order to be enforced by civil contempt during the appeal, despite GS 1-294 which provides that an appeal divests the trial court of jurisdiction to proceed "upon the judgment appealed, or upon the matters embraced therein." However, the court of appeals held that GS 50-16.7(j) applies only to court orders for alimony, it does not apply to orders enforcing support

provisions in a separation agreement. Therefore, the trial court in this case was without jurisdiction to enter the order of contempt to enforce the payment of arrears owed pursuant to the separation agreement.

Entry of order following recusal of trial judge

- The trial court had no authority to enter an order for alimony and child support after she entered an order recusing herself from all future hearings in the matter.
- A new trial was required where the judge who heard the evidence in the original trial recused herself before entering an order resolving the issues.

Hudson v. Hudson, 900 S.E.2d 131 (N.C. App., March 19, 2024). Following a trial on alimony and child support, the trial court directed that an order be prepared by the father's counsel. Before the order was drafted, the trial judge entered an order recusing herself from all future proceedings between the parties. After entering the order recusing herself, she signed the order for alimony and child support prepared by father's attorney.

Mother appealed and the court of appeals vacated the orders and remanded the matters for a new trial. According to the appellate court, the trial judge had no authority to enter the order for alimony and child support after recusing herself from the case.

Dependency, supporting spouse, lump sum alimony, attorney fees, contempt

- The trial court's determination of dependency was adequately supported by findings showing the wife's reasonable expenses exceeded her income.
- The trial court's determination that husband was a supporting spouse was supported by findings that his income exceeded his expenses, "even if only slightly".
- The trial court properly considered the amount husband received in equitable distribution in determining that an award of alimony was equitable.
- The trial court properly considered all factors required by GS 50-16.3A in determining that an award of alimony was equitable but failed to adequately explain why it determined that a $40,000 lump sum award was appropriate.
- Trial court findings were sufficient to support the award of attorney fees to wife because the findings showed that she had insufficient means to defray litigation and her testimony supported the amount of fees awarded.
- The trial court did not err in restraining husband's access to funds distributed to him in equitable distribution after the sale of the marital home to ensure that he had adequate funds to pay PSS arrears.
- Findings regarding husband's monthly income from his employment along with findings regarding the amount distributed to him in the equitable distribution proceeding were sufficient to support the conclusion that he was in civil contempt for the failure to pay PSS.

Haythe v. Haythe, 901 S.E.2d 833 (N.C. App., May 7, 2024)(dissent by Tyson). The trial court entered an equitable distribution judgment that in part directed that proceeds from the sale of the marital residence held in a trust account be distributed equally between the parties. An earlier order had required the husband to pay PSS, and the wife filed a motion asking that husband be held in civil for contempt for his failure to pay as required by that order. Before the hearing on contempt and permanent alimony, the trial court entered an order restraining the

husband from receiving any of the funds from the sale of the marital residence. The trial court then conducted the trial for permanent alimony and contempt, concluding that husband should pay a lump sum alimony award of $40,000 and finding husband to be in civil contempt and ordering that he pay $13,580 to purge the contempt. The trial court also ordered that the husband pay $12,262 in attorney fees for wife's attorney fees and ordered that he pay those fees from the account holding the equitable distribution proceeds. The husband appealed.

The court of appeals rejected the husband's arguments that the trial court findings were insufficient to support the conclusion that the wife was a dependent spouse and that the husband was a supporting spouse. The findings showed that the wife's reasonable expenses exceeded her income, and the husband's income exceeded his expenses. Even though the trial court found that the husband "has minimal money with which to pay alimony on a monthly basis," the court of appeals affirmed the conclusion that he was a supporting spouse because he earned more money than the wife during the marriage and his current income exceeded his current expenses, "even if only slightly."

The court of appeals also rejected the husband's argument that the trial court findings were insufficient to support the award of alimony. The appellate court held that the trial court properly made findings about the factors listed in GS 50-16.3A to support the conclusion that an award of alimony was equitable. Findings established that the wife had not worked during the marriage, that she had used her separate funds to help pay expenses and debts during the marriage, that husband abandoned the wife, that he cut off the utilities to the marital residence after he abandoned the wife without notice to wife, and that wife had been a "faithful and dutiful wife" during the marriage. However, the court of appeals agreed with the husband that the trial court order was not sufficient to show how it determined that a $40,000 lump sum award was equitable. GS 50-16.3A(c) requires that a trial court must "set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment." The court of appeals remanded this issue to the trial court for additional findings of fact.

The appellate court also rejected husband's argument that the trial court had no authority to enter the injunction prohibiting husband from receiving the funds awarded to him in equitable distribution. The court held that GS 50-20(i) gives the court authority to "order such a restraint in the interest of pending litigation," to ensure that defendant would be able to comply with any future order requiring the husband to make payments to the wife.

The court of appeals held that the award of attorney fees was adequately supported by findings that the wife had to borrow money from family to pay for counsel for the PSS hearing, that she represented herself during the equitable distribution trial because she could not afford to employ counsel, and she was able to retain counsel for the alimony trial only because of the funds she received in the equitable distribution proceeding. The amount of fees awarded was adequately supported by the testimony of the wife regarding the invoices she received from her attorney, even though the fee affidavit of the attorney was not introduced into evidence. However, the court of appeals held that on remand, the trial court must make findings to support the reasonableness of the fees charged by the attorney by findings regarding the time and labor

expended by the attorney, the skill required, the customary fee for like work, and the experience or ability of the attorney.

Finally, the court held that evidence was sufficient to support the trial court's findings establishing that husband was in civil contempt for his failure to pay PSS. The findings regarding his current monthly income and regarding the amount he received in the equitable distribution proceeding from the sale of the marital residence were sufficient to support the trial court's finding that he had the present ability to comply with the order.

Determining income; accustomed standard of living

- The trial court erred in determining that plaintiff's actual income from her business was lower than it should have been without first finding that she was acting in bad faith.
- Where trial court found that the current year's income from wife's business was not reliable to establish her actual present income from the business due to an unusual expense related to inventory, the trial court did not err when it deducted the amount of that unusual expense when it determined her actual present income from the business.
- The wife's testimony was sufficient to support the trial court's finding regarding her annual income from her part-time teaching position.
- When determining alimony, the reasonable needs and expenses of the parties must be measured in light of the accustomed standard of living during the marriage. This means that, when possible, an award of alimony should sustain the standard of living for the dependent spouse to which the parties together became accustomed during the marriage.
- Where evidence showed that, during the marriage, the parties lived in a 4300 square foot home, owned a lake house, took regular vacations, and owned five vehicles, a boat, and two jet skis, the trial court's finding that "the parties lived in a frugal manner" was not supported by the evidence.
- Based upon the evidence concerning the standard of living during the marriage and husband's ability to pay support, the trial court erred when it found that wife's reasonable expenses did not include the cost of buying a house. Her reasonable needs should be calculated based on the standard of living during the marriage rather than on her reduced standard of living following separation.
- The trial court did not err by not including an amount for investment saving in the calculation of wife's reasonable expenses when there was no evidence that the parties regularly invested during the marriage.

Sunshine v. Sunshine, 903 S.E.2d 352 (N.C. App., June 4, 2024)(dissent by Tyson). The trial court entered an alimony order finding that defendant husband committed an act of illicit sexual behavior before the date of separation, that his monthly income was $25,473 and his reasonable monthly expenses were $11,788, and that wife's income was $3,319 per month and her reasonable expenses were $5,932 per month. The trial court ordered the husband to pay alimony in the amount of $2,513 for 120 months. The wife appealed.

Determination of wife's income.

The wife first argued that the trial court erred in determining the amount she earned from her business. The trial court disallowed a labor expense incurred by the wife when it calculated the

income she earned from the business because the trial court determined it was an unnecessary expense. The trial court found that, because the wife had the time to do the work herself, she was not required to pay an employee to work for her.

The court of appeals held that the trial court imputed income to the wife when it disallowed the expense; the trial court used income it believed the wife should have earned from her business rather than income she actually earned. Because the trial court did not find that the wife was acting in bad faith, the court of appeals held that it was error to impute income to the wife.

The wife also argued that the trial court erred in disallowing an unusual inventory expense when it calculated the income she received from her business. The court of appeals distinguished this determination by the trial court from the one dealing with the labor expense. The inventory expense was an expense incurred by the wife's business in the year of the alimony hearing, but it was unusual in that it had not been incurred by the business in past years. Because it was unusual, the trial court ruled that the most recent year's business income was "temporarily lower than normal" and not reliable evidence of the actual, present income of the business. When current income is not a reliable indication of a business's actual income, the trial court can average past years or use past years to determine actual, present income. Because the trial court property determined actual income by disregarding the unusual expense from the current year to arrive at a more accurate determination of the business's usual income, the trial court did not impute income and was not required to find bad faith on the part of the wife.

Accustomed standard of living

The wife also argued that the trial court erred when it failed to allow her an expense for a home comparable to that of husband and an expense for investment saving.

Regarding her dwelling, the trial court held that her current expense to rent an apartment was reasonable and that she had no need to buy a house. The court of appeals held that when determining the reasonable needs of the parties in an alimony case, the trial court must determine reasonableness in light of the accustomed standard of living during the marriage. The appellate court held that this means that, when possible, given the current financial circumstances of the parties, the dependent spouse should be allowed to live in the manner to which the parties were accustomed during the marriage. As the husband had sufficient income to support a higher alimony award, the court of appeals held that the evidence did not support the trial court's finding that wife did not need to buy a house.

However, the court of appeals affirmed the trial court's decision not to include investment savings as an expense of wife. A trial court can include savings as a reasonable expense of either party when the parties established a pattern of saving during the marriage. As there was no evidence in this case that the parties had such a pattern during the marriage, the trial court did not err when it denied the wife's request.

Spousal Agreements
Cases Decided Between
October 17, 2023, and October 1, 2024

Duress, ratification, summary judgment

- A separation agreement is invalid and unenforceable if it is unconscionable or procured by duress, coercion, or fraud.
- An agreement procured by duress, coercion, or fraud is enforceable if the contract was ratified following execution unless the ratification occurred while the duress, coercion, or fraud was still in effect.
- Summary judgment is not appropriate when there is a genuine issue of fact regarding whether the agreement was procured by duress, coercion, or fraud, or regarding whether the agreement was ratified. "When examining whether both parties freely entered into a separation agreement, trial court should use considerable care because contracts between husbands and wives are special agreements."
- The trial court erred in granting summary judgment concluding as a matter of law that husband was not coerced into executing the separation agreement and that he had ratified the agreement, and in ruling as a matter of law that he had breached the agreement. Husband's forecast of evidence, viewed in light most favorable to him, raised an issue of fact as to whether he was under extreme stress caused by wife's threat of pursuing an ex parte Domestic Violence Protective Order against him during the time the agreement was executed and at the time he partially complied with the agreement.

Baer v. Baer, 904 S.E.2d 815 (N.C. App., July 2, 2024). The husband filed a declaratory judgment action seeking to set aside a separation agreement between him and his wife, alleging the agreement was entered into as the result of her duress, coercion, and fraud. The wife filed an answer denying his allegations and arguing that he had ratified the agreement by complying with significant portions of the agreement before filing the action seeking to invalidate the agreement. She also counterclaimed for breach of contract. The trial court entered summary judgment, ruling as a matter of law that the husband ratified the contract and ruling as a matter of law that he breached the contract.

The court of appeals reversed, holding that husband's forecast of evidence was sufficient to show a genuine issue of material fact about whether he was under significant duress from wife's threat to seek an ex parte Domestic Violence Protective Order against him if he did not agree to the terms of the contract. Husband produced an affidavit from a psychologist who stated that husband's concern over the impact of a DVPO on his career caused the husband significant anxiety and stress that interfered with his ability to negotiate the agreement and that the duress and anxiety continued during the time husband complied with some terms of the agreement. The court of appeals noted: "Unsupported or falsely verified ex parte DVPOs are perjurious, unlawful, sanctionable, and cannot be misused to obtain unfair advantages in settlement negotiations."