

Family Law Update
Cases Decided and Legislation Enacted
June 2009 through October 2009

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Court opinions can be found on the website of the N.C. Administrative Office of the Courts:

www.nccourts.org

Legislation can be found on the website of the NC General Assembly

www.ncga.nc.us

Alienation of Affection and Criminal Conversation

Legislation Enacted During 2009 Session

S.L. 2009-400 “AN ACT TO CLARIFY PROCEDURES IN CIVIL ACTIONS FOR ALIENATION OF AFFECTION AND CRIMINAL CONVERSATION.” Creates new GS 52-13 to provide three things:

1) No act of defendant shall give rise to a cause of action for either alienation of affection or criminal conversation that occurs after plaintiff and plaintiff’s spouse physically separate with the intent on the part of either one for the separation to be permanent;

2) The statute of limitation for both alienation of affection and criminal conversation is three years from the last act of the defendant giving rise to the cause of action; and

3) A cause of action for either alienation of affection or criminal conversation can be commenced only against a natural person – meaning no actions against businesses or corporations.

The legislation is effective October 1, 2009 and “applies to actions arising from acts occurring on or after that date.”

Custody

Cases Decided Between June 2009 and September 2009

Legislation Enacted 2009 Regular Session

Open-Adoption Agreements; standing for custody; Rule 11 sanctions

- Open-adoption agreement entered in Florida is not enforceable in North Carolina.
- Concept of full faith and credit does not apply to open-adoption agreements not incorporated into a court order.
- Parent whose rights have been terminated has no standing to seek custody or visitation.
- Rule 11 sanctions are not appropriate when party raises legal issue of first impression.

Quets v. Needham, _ N.C. App. _, _ S.E.2d_ (July 21, 2009)

Twin children were born in Florida. Within days of birth, plaintiff mother and defendants signed an open-adoption agreement wherein the parties agreed that defendants would adopt the twins but birth mother would retain the right to have a relationship with the children. The mother also executed a consent to adoption and to the termination of her parental rights. Within three days of signing the documents, plaintiff attempted to withdraw her consent to adoption. The Florida court litigated the issue of the validity of the consent and determined that the consent was valid and binding on plaintiff. Defendants were allowed to adopt the child. Defendants moved to NC with the child. Plaintiff birth mother filed this proceeding asking that the Florida adoption be set aside based upon the invalidity of her consent, or that she be allowed visitation with the children. The trial court denied all of plaintiff's claims and imposed Rule 11 sanctions after concluding that plaintiff's claims were not reasonably grounded in law. The court of appeals upheld the judgment of the trial court, except it reversed the entry of Rule 11 sanctions. First, the court held that the validity of the Florida adoption had already been litigated in Florida. Therefore, relitigation of the issue in North Carolina was barred by the doctrine of res judicata. With regard to the custody claim, the court of appeals held that parents whose rights have been terminated by court order have no standing as an "other person" to request custody or visitation pursuant to GS 50-13.1. In addition, the court rejected plaintiff's argument that the open-adoption agreement executed between the parties in Florida was enforceable in North Carolina and was sufficient to give her standing to file the request for visitation. The court of appeals held that the agreement was not entitled to enforcement pursuant to the doctrine of full faith and credit, because the agreement was a private contract rather than a court order. Although the Florida adoption order mentioned the agreement, that order did not incorporate the contract and the contract therefore did not become an order of the court. The court of appeals held that the doctrine of comity determines whether contracts entered pursuant to the laws of another state are enforceable in North Carolina. The doctrine of comity

prohibits the enforcement of a contract “when the contract violates the positive legislation of the State of the forum...”. Because GS 48-3-610 specifically provides that open-adoption agreements are not enforceable in this State, the court of appeals held that the trial court was correct to refuse to recognize the rights granted to plaintiff under the contract. However, according to the court of appeals, because the enforceability of an open-adoption contract entered in another state was a matter of first impression for the courts of this state, the trial court should not have imposed Rule 11 sanctions against plaintiff for filing the complaint.

Third party custody; standing of plaintiff; minor party not represented by GAL

- **Plaintiffs paternal sister and brother-in-law had standing to bring custody action against natural parents because GS 50-13.1 grants standing to “any parent, relative or other person claiming the right to custody”. As plaintiffs are relatives, they have standing.**
- **Consent order did not contain findings that natural parents had acted inconsistent with their protected status, but the order was not void because there was sufficient evidence in the record to support the conclusion that parents had acted inconsistent with their protected status.**
- **Defendant mother could not rely on fact that defendant father was a minor but not represented by a GAL at the time he consented to the custody judgment as a ground to set aside the consent order. According to the court, “[a] third party has no standing to challenge the validity of a consent judgment entered into by a minor.”**

Yurek v. Shaffer and Boyd, _ N.C. App._, 678 S.E.2d 738 (July 7, 2009)

Parties entered into a consent judgment granting plaintiffs custody of defendant’s minor child. The plaintiffs are the sister and brother-in-law of defendant father. Defendant mother subsequently filed a Rule 60(b) motion to vacate the consent judgment on the grounds that 1) plaintiffs did not have standing to file the custody complaint, 2) her consent was invalid due to undue influence, and 3) the defendant father was a minor at the time but unrepresented by a GAL as required by Rule 17. The trial court denied her motion after finding mother was not under undue influence at the time of the consent judgment and the court of appeals affirmed. The court of appeals first held that relatives have standing to bring custody actions due to the language of GS 50-13.1. However, while discussing standing, the court of appeals also addressed the issue of whether the parents had waived their constitutional right to custody by conduct inconsistent with their protected status. It is not clear why the court of appeals addresses this issue, although it appears defendant mother may have argued on appeal that the trial court was required to conclude she had waived her constitutional rights before entering the consent order. [This is a very significant question but is not clear whether the court of appeals answered it] The court held there was evidence in the record to support a conclusion that parents had waived their constitutional rights by conduct inconsistent with their protected status. This is especially interesting because the trial judge made no such finding. However, it is important to note that the court of appeals stated “a natural parent’s execution of a valid consent judgment granting exclusive care, custody and

control to a nonparent, may be a factor upon which the trial court could conclude that a parent has acted inconsistently with his or her constitutionally protected status.” The court of appeals also upheld the trial court’s determination that defendant mother was not subjected to undue influence at the time the consent order was entered. She claimed she was under the influence of marijuana at the time of execution but offered no evidence other than her testimony. Finally, the court of appeals held that although it was undisputed that the defendant father was a minor at the time of the consent judgment but he was not appointed a GAL pursuant to the provisions of Rule 17 of the Rules of Civil Procedure, defendant mother does not have standing to raise this issue on his behalf.

Modification; changes with self-evident effect on child

- **Modification order contained sufficient findings of fact to show that changes identified by trial court were changes affecting the welfare of the child even though the custody order did not specifically state how the changes effected the child.**
- **Changes regarding child’s health and parent’s involvement in child’s education were changes which have a “self -evident” effect on the child.**

Lang v. Lang, _N.C. App._, 678 S.E.2d 395 (July 7, 2009)

Trial court changed primary physical custody from mom to dad after finding that since the entry of the original custody order 1) the child had been diagnosed with ADHD and needed medication that mom refused to allow, 2) dad was more attentive to child’s progress and behavior in school while mom was less attentive due to her work and other children, and 3) dad had become more attentive to medical needs of child than mom. Mom argued on appeal that the trial court erred by failing to indicate in the order how these changes affected the welfare of the child. The court of appeals affirmed the trial court, citing *Shipman v. Shipman*, 357 NC 471 (2003), wherein the supreme court held that some changes have a self-evident impact on a child. According to the court of appeals, the changes identified in this case were changes with a self-evident effect on the child, relieving the trial court of the obligation to make particular findings stating the effect of the changes on the child. In addition, the court of appeals stated “the trial court’s consideration of the effect of these changes on the child is implicit in these three findings in the context of the whole order.”

Contempt; attorney fees for frivolous motion

- **Where trial court found plaintiff's motion for contempt was frivolous, award of attorney fees to defendant was authorized by GS 50-13.**
- **That statute also allows fees to either party, if the court finds the party acted in good faith and had insufficient means to defray the costs of the action.**

Wiggins v. Bright, _N.C. App._, 679 S.E.2d 874 (August 4, 2009)

Plaintiff filed motion for contempt, alleging defendant violated custody order by failing to provide timely notice of when she planned to exercise her summer visitation. When the matter came on for hearing, the trial court found that the custody order actually required that plaintiff provide notice to defendant concerning his plans to exercise summer visitation. In addition to dismissing plaintiff's motion for contempt, the trial judge concluded that plaintiff's motion was frivolous and that defendant acted in good faith and lacked sufficient means to defray the expense of the action. Based upon these findings, the trial judge ordered plaintiff to pay attorney fees to defendant to cover the cost of defending the contempt allegation. On appeal, plaintiff argued that the trial court had no authority to award attorney fees. The court of appeals affirmed the trial court, holding that GS 50-13.6 allows a court to award fees when the court finds that a party has filed a frivolous action. In addition, the court of appeals held that statute allows fees to be awarded to either the moving or responding party if the court finds that the party seeking fees acted in good faith and had insufficient means to defray the cost of the action.

Modification; evidence of change affecting welfare of children.

- **Party received actual notice of modification hearing and a notice of hearing mailed by the other party, responded with numerous motions filed before the hearing, and participated fully in the hearing; therefore, fact that court calendar mailed to party before hearing listed matter as on for pretrial conference only did not require continuance of modification hearing.**
- **Trial court had authority to waive requirement in local rules that parties attend mediation and a pretrial conference before a modification hearing where judge hearing motion had been assigned to the case since the date of filing, case had been very high conflict and litigious, and judge needed to finish the matter before she rotated out of family court.**
- **Trial court findings were sufficient to show changes in father and his circumstances were sufficient to support the conclusion that there had been a substantial change of circumstances affecting the welfare of the children.**

Mitchell v. Mitchell, _N.C. App. _, _ S.E.2d _ (September 1, 2009)

This is a procedurally complex case because, due to the high level of conflict between the parties, there were an abnormally high number of motions and other pleadings filed over the life of the case. At issue

in this appeal is the trial court's decision to modify custody from mom having primary physical custody to both parents having significant time with the children. Mom first argued that the trial court erred in denying her motion for a continuance of the modification hearing due to the fact that the court calendar she received from the court indicated the matter was on for pretrial conference only. The court of appeals affirmed the trial court's denial of the continuance on the basis that mom had actual notice as shown by statements she made in one of the numerous motions she filed in response to the motion for modification and she received the notice of hearing with the correct date from dad's lawyer. In addition, she presented numerous witnesses and exhibits during the actual hearing, indicating she had sufficient time to prepare. The court of appeals held that the mom "was apprised of the pendency of the action and afforded an opportunity to present her objections."

Mom also argued that the trial court erred when it violated local rules by conducting the modification hearing before the parties participated in mediation and a pretrial conference. The court of appeals disagreed, holding that although the local rules generally require both mediation and a pretrial conference before a custody modification hearing, the local rules also provided that both could be waived by the trial judge for good cause and specify state that all local rules should be "construed in such a manner as to avoid technical and unnecessary delay and to promote the ends of justice." The court of appeals noted that this case was heard in a family court district. As such, the local rules require and promote the policy of 'one-judge-one-family'. The trial judge in this case was preparing to move out of the family court rotation and needed to finish this case, which she had handled for over four years. The court of appeals held it was appropriate for the trial court to consider the need to promote the 'one-judge, one-family' policy when deciding to waive the rules regarding mediation and pretrial conferences.

Mom also argued that the evidence was insufficient to show a substantial change in circumstances affecting the welfare of the children. The court of appeals disagreed and affirmed the trial court. The change included father's increased flexibility in his work schedule, his "healthy" remarriage, and his "continued therapy and application of what he learned in therapy." The findings also were sufficient to show these changes affected the children in that the children benefited from his flexible work schedule, they developed a strong, positive relationship with the new wife, and they were impacted less by father's emotional issues given his improvement due to the therapy. In addition, the findings indicated that mom's "continued animosity" toward dad and her refusal to allow him access to medical and other information regarding the children adversely affected the kids.

Temporary order; sufficient reconvening date.

- An order is temporary if it 1) is entered without prejudice to either party; 2) states a clear and specific reconvening time in the order and the interval between the two hearings is reasonable brief; or 3) does not determine all of the issues in the matter.
- Where order entered May 2008 stated that custody would be reviewed “this summer”, the order was temporary.

Watts v. Winford, unpublished opinion, _ N.C. App. __, _ S.E.2d _ (September 1, 2009)

Trial court entered an order in May 2008 that was designated as temporary and set out where the child would attend school. The order stated that custody would be reviewed “this summer”. Defendant appealed, arguing the appeal was not interlocutory because the order was in fact a permanent custody determination since the order did not set a “clear and specific reconvening time”. The court of appeal disagreed, holding that the statement that the court would review custody “this summer” was sufficient to show a specific reconvening time. Therefore, the order was temporary and the appeal interlocutory. As temporary custody orders do not generally affect a substantial right, the appeal was dismissed.

Legislation

S.L. 2009-314 (H 1299). Effective July 9, 2009. “AN ACT AMENDING THE LAWS PERTAINING TO CUSTODY OF A MINOR CHILD BY DEFINING VISITATION TO INCLUDE VISITATION BY ELECTRONIC COMMUNICATION.” Amends GS 50-13.2 to specify that an order for custody may provide for visitation by electronic communication. Electronic communication means contact “other than face-to-face contact, facilitated by electronic means, such as by telephone, electronic mail, instant messaging, video teleconferencing, wired or wireless technologies by Internet, or other medium of communication.” Before ordering electronic visitation, the court must consider the best interest of the child, whether the equipment required to use the technology is available to the parties, and the cost of the technology. Electronic communication can supplement in-person visitation but cannot be a substitute for visitation. In addition, “the amount of time electronic communication is used shall not be a factor in calculating child support or be used to justify or support relocation by the custodial parent.”

Child Support

Cases Decided Between June 2009 and September 2009

Legislation enacted 2009 Regular Session

Child support; unincorporated agreements; retroactive support

- **When parties have an unincorporated agreement addressing child support, either party can file an action for court ordered child support. However, support must be set in amount provided in agreement unless moving party rebuts presumption that agreed amount meets the reasonable needs of the children.**
- **If presumption of reasonableness is rebutted, trial court sets prospective support in accordance with the guidelines.**
- **However, court may not award retroactive support pursuant to the guidelines, absent a showing of emergency, when the obligor has paid all amounts due according to the agreement before the court action was filed.**

Carson v. Carson, _ N.C. App. __, _ S.E.2d _ (August 18, 2009)

Parties entered into agreement providing defendant would pay 100% of all unreimbursed medical expenses and a set amount of support each month. Plaintiff filed action asking court to set child support in accordance with guidelines. Trial court found that plaintiff rebutted presumption that contract amount was reasonable by showing that the amount was insufficient to meet the reasonable needs of the child, after considering all the factors listed in GS 50-13.4(c). The trial court then set prospective support in accordance with the guidelines but also ordered defendant to pay the new amount for the three years prior to the action being filed after concluding that the amount defendant paid pursuant to the agreement was not sufficient to meet the reasonable needs of the child. The court of appeals upheld the award of prospective support and medical expenses but reversed the order for retroactive support. According to the court of appeals, case law in North Carolina prohibits ordering retroactive support when an obligor has paid all amount due under an unincorporated agreement unless there is a showing of emergency circumstances causing the custodial parent to incur expenses before that parent had the opportunity to file her action for court ordered support.

UIFSA interstate petition; validity of verification

- **UIFSA requires that petition filed in the initiating state be verified in accordance with law of initiating state.**
- **While defendant did show that the verification failed to contain information required by Florida law, defendant failed to show the verification was therefore void under Florida law.**

State ex. rel. Johnson v. Eason, _ N.C. App. _, 679 S.E.2d 151 (July 7, 2009)

Child support order was entered in Florida. Mother initiated interstate UIFSA proceeding to enforce the order in North Carolina. Mother signed the Florida petition in the presence of a notary, but the notary failed to indicate in writing how he identified plaintiff for purposes of the verification. Defendant argued that the North Carolina trial court erred by failing to dismiss Plaintiff's North Carolina petition based on the fact that the Florida petition initiating the interstate proceeding was not appropriately verified. Court of Appeals upheld the trial court, concluding that while defendant was able to show the verification lacked an element required by Florida law, he failed to show that the error was sufficient to render the verification void under Florida law.

Modification of incorporated agreement; change in circumstances must be since the time of incorporation

- **Where alleged change in circumstances to support modification was plaintiff's reduction in income and that reduction occurred prior to the date the separation agreement was incorporated into the divorce judgment, trial court was correct in entering summary judgment denying modification.**
- **Changed circumstances must occur after the last order was entered.**

Smart v. State ex rel Smart, _ N.C. App. _, 678 S.E.2d 720 (July 7, 2009)

Parties entered into agreement providing defendant would pay child support each month. Before the agreement was incorporated into the divorce judgment, defendant received a discharge from the Marine Corp and his monthly income decreased. Following incorporation, plaintiff filed a motion to modify based on his reduction in income. The trial court denied the motion and the court of appeals affirmed. The court rejected defendant's argument that he waited to file the motion to modify until after incorporation because until the order was incorporated, there was no court order for the court to modify.

Evidence to support conclusion of present actual income

- Record contained insufficient evidence upon which trial court could find defendant's present actual income.
- Findings in child support order were insufficient to support trial court's conclusion regarding actual present income.
- Guidelines require that both parties submit to the trial court "documentation of both current and past income" and trial court can impose sanctions for a party's failure to provide such documentation.

Midgett v. Midgett, _ N.C. App. _, 680 S.E.2d 876 (August 18, 2009)

Order of trial court contained finding that testimony of plaintiff mother regarding defendant's income during the marriage was credible but then divided her estimate of actual income by half before setting support. The court of appeals held that the record contained insufficient evidence to support finding of actual income of defendant at time of hearing. While wife testified about his income during various periods of time during the marriage of the parties, there was no evidence indicating the income at the time of trial or near in time to the trial. Further, the order contained no explanation as to why the trial court divided wife's estimate by half in setting the child support award. The court of appeals remanded with instructions that the trial court should allow the parties to introduce additional evidence on the issue of income. The court of appeals reminded the parties that the guidelines require both parties to submit documentation of income to the trial court and that the guidelines allow the trial court to sanction any party that does not provide appropriate documentation.

Determination of income

- Trial court did not err in denying defendant's motion to modify where defendant failed to show his actual income was less than when the support order was entered.
- Trial court appropriately used deposits and withdrawals from bank accounts to establish defendant's income.
- Trial court correctly included monthly payments deposited into defendant's accounts by "a friend" where defendant produced no evidence to support his contention that the payments were a loan that had to be repaid.
- Trial court did not err in finding defendant has the present ability to pay child support based upon evidence of his assets in the form of cars and real property which the court of appeals held "could be sold or liquidated" to pay arrears.

Eggleston v. Willingham, unpublished decision, _ N.C. App. _, _ S.E.2d _ (September 15, 2009)

Trial court denied defendant's motion to modify support obligation and held defendant in contempt for failure to pay in accordance with the order. Defendant argued on appeal that the trial court erred in concluding that his present income is more rather than less than when the order was entered.

Defendant testified that he earns only \$600 monthly as a city councilmember, but the trial court used bank statements to show deposits and withdrawals in amounts much greater. The court of appeals affirmed the trial court, rejecting defendant's contention that the trial court should not have included amounts deposited monthly by "a friend" to help him with expenses. The court of appeals stated that, pursuant to the guidelines, income includes "maintenance received from persons other than parties to the instant action." And, "maintenance is defined as financial support given by one person to another." As defendant failed to prove his allegation that the amounts were required to be repaid, the trial court did not err in including the monthly payments in defendant's income. The court of appeals also rejected defendant's argument that the trial court should not have held him in contempt because there was insufficient evidence to conclude he had the present ability to pay the arrears accrued under the order. The court of appeals disagreed, holding that the trial court findings as to defendant's assets in the form of cars and real estate, along with the income shown by the bank statements, was sufficient to support the conclusion of present ability to pay.

Legislation

S.L. 2009-335 (S 817). Effective Dec. 1, 2009, and applies to acts committed on or after that date. "AN ACT TO INCREASE CHILD SUPPORT COLLECTIONS BY PERMITTING GREATER SENTENCING FLEXIBILITY FOR A PERSON WHO COMMITS CRIMINAL CONTEMPT BY FAILING TO PAY CHILD SUPPORT." Amends GS 5A-12(a) to allow judge to impose incarceration for a period of time up to 120 days for criminal contempt based on failure to pay child support, as long as trial court suspends the sentence "upon conditions reasonable related to the contemnor's payment of child support." Statute still allows court to order incarceration up to 30 days with or without suspending the sentence.

Spousal Agreements

Cases Decided Between June 2009 and September 2009

Acknowledgement of separation agreements

- Separation agreements are agreements made in contemplation of separation and address support rights.
- Pursuant to GS 52-10.1, separation agreements are not enforceable unless acknowledged before a certifying officer.
- Postnuptial agreements that are not separation agreements are entered pursuant to GS 52-10, which does not require acknowledgment.

Sluder v. Sluder, _ N.C. App. __, 679 S.E.2d 435 (July 21, 2009)

A few months after parties separated, husband signed an agreement stating he would pay his wife “post spousal support” in the amount of \$1000 per month. Plaintiff wife brought action to enforce the contract when defendant failed to pay. The trial court held the contract was enforceable pursuant to GS 52-10 and awarded judgment to plaintiff. On appeal, defendant argued that the agreement was a separation agreement and as such, was required to be acknowledged before a certifying officer according to GS 52-10.1. The court of appeals agreed. The court held that GS 52-10 authorizes spouses to enter into contracts during the marriage. However, separation agreements must comply with the requirements of GS 52-10.1. According to the court, when an agreement is in contemplation of separation and addresses support issues, it is a separation agreement within the meaning of GS 52-10.1.

Property settlement vs. alimony

- Provision of incorporated agreement requiring defendant to pay plaintiff a certain amount of money each month was not terminated by wife’s remarriage because payments were in the nature of property settlement rather than alimony.
- Where language of agreement is unambiguous, trial court is not required to consider intent of the parties at time agreement was drafted.
- Fact that support payments are due to plaintiff for the rest of her life was not sufficient to prove the payments were intended to be alimony rather than property settlement.

Michael (Martin) v. Michael, unpublished, _ N.C. App. __, S.E.2d __ (August 4, 2009)

Parties signed a separation and property settlement that was subsequently incorporated into the divorce judgment. Plaintiff wife filed action for contempt, alleging defendant failed to pay monthly

payments required by agreement. Defendant argued his obligation to pay terminated when plaintiff remarried. The trial court disagreed, finding that the payments were property settlement rather than alimony. The trial court held defendant in contempt and the court of appeals affirmed. According to the court of appeals, when the language of the agreement is clear, the trial court should not consider the intent of the parties at time agreement was drafted. In this case, the agreement was clear because the agreement defined the payments as property settlement; the payment provision appeared in the property settlement section of the agreement; the payments were listed among the provisions dealing with the distribution of marital property; and the separation agreement section of the agreement contained an express waiver of alimony by both parties. The court of appeals acknowledged that when an agreement is ambiguous and contains no express statement of integration, there is a presumption that the agreement is not an integrated property settlement. The agreement at issue in this case did not contain an integration clause; however, the court of appeals agreed with the trial court that the agreement was clearly integrated. According to the court of appeals, if there is no ambiguity, there is no presumption that the agreement is not integrated.

Adoption

Cases Decided Between June 2009 and September 2009

Adoption; collateral attack; void vs. legally incorrect

- **Validity of adoption can be attacked by filing a Rule 60 motion in a case other than the adoption proceeding**
- **Where trial court “waived statutory provisions” and entered adoption decree allowing adoption of child by petitioner without terminating rights of natural parent, adoption may or may not be legally correct but it is not void**

Boseman v. Jarrell, _ N.C. App. _, _ S.E.2d _ (August 18, 2009)

Parties lived together in a same sex domestic partnership when child was born to defendant. When child was three years old, plaintiff filed an adoption proceeding in Durham County. Along with the adoption petition, the plaintiff filed a “Motion for Waiver of Statutory Provisions” asking that the trial court enter an order waiving the provisions of GS 48-1-106(c) and 48-3-606(9), which state that the parental rights of the biological parent are terminated upon her consent to a direct placement adoption, and asking the court to enter an order of adoption granting parental rights to plaintiff but preserving the parental rights of defendant. The trial court granted the motion and entered the adoption decree.

When the parties later separated, plaintiff filed an action in New Hanover County seeking custody of the child. Defendant responded with a request for custody and with a Rule 60(b) motion asking the court to set aside the adoption decree as void. The trial court denied the Rule 60 motion after concluding that the motion must be considered by the judge who entered the adoption order. The trial court then applied the best interest test and entered a custody order granting joint physical and legal custody to the parties. The court of appeals ruled that the trial court erred by failing to consider the Rule 60 motion. Without explaining why a Rule 60 can be filed in a case other than the case containing the judgment at issue, the court of appeals held that Rule 60 clearly gives one judge the authority to reconsider a judgment entered by a different judge. The court then held that the adoption entered in Durham County was not void. The court did not rule on the issue of whether the adoption was legally correct, holding that arguments regarding whether the adoption judge committed legal error should have been raised by direct appeal of the adoption order. According to the court of appeals, even if the judge in the adoption matter committed legal error, the judge did not act beyond the subject matter jurisdiction of the district court when it entered the adoption decree.

******NOTE:** This case has drawn attention from the media, especially in the Raleigh area. I am concerned about a statement attributed to me by the author of an article that appeared in the News and Observer on Saturday, August 22. Because of that article, I feel compelled to make it very clear that I did not express an opinion to the reporter about the merits of the legal argument made in support of waiving the statutory provisions to allow the ‘second parent adoption’ in this case. I recognize there are

conscientious and thoughtful judges and attorneys in our state who have considered this legal argument and found it to be persuasive. The court of appeals did not accept or reject the legal analysis adopted by the district court.

Alimony

Cases Decided Between June 2009 and September 2009

Civil contempt; adequate findings to support present ability to pay purge

- Georgia alimony order is enforceable in NC after registration.
- The only remedy for civil contempt is incarceration.
- Before a party can be incarcerated for civil contempt, the court must designate a purge, meaning the court must tell the contemnor exactly what he or she must do to be released from jail.
- Before incarceration, the court must find that the contemnor has the present ability to comply or to take reasonable steps to comply with the purge provision.
- Where court made findings that contemnor, at the time of the contempt hearing, held a \$2000 cashier's check, owned a boat and a 2001 Ford Explorer, and had recently liquidated \$6200 from a 401K account, the findings were sufficient to support the conclusion that contemnor had the present ability to pay a \$10,000 purge.

Tucker v. Tucker, _ N.C. App. _, 679 S.E.2d 141 (June 16, 2009)

Alimony order entered in Georgia required defendant to pay alimony in 1998. In 2006, the alimony order was registered for enforcement in NC and plaintiff filed a motion asking that the court find defendant in civil contempt for failure to pay \$14,750 in alimony. After conducting the contempt hearing, the trial court held defendant in civil contempt and found that he had the present ability to pay a purge of \$10,000. The findings in support of the purge included a finding that he owned a boat, a Ford Explorer and had recently liquidated a 401K and received a \$6200 payment. The court of appeals held these findings to be sufficient to support the purge, stating “[t]he majority of cases have held that to satisfy the present ability test defendant must possess some amount of cash, or asset readily converted to cash.” The trial court order was upheld despite the finding that defendant was unemployed at the time of the contempt hearing and despite the fact that he testified he had spent the \$6200 by the time of trial. The trial court made an additional finding that the testimony of defendant was not credible.

Property settlement vs. alimony

- Provision of incorporated agreement requiring defendant to pay plaintiff a certain amount of money each month was not terminated by wife's remarriage because payments were in the nature of property settlement rather than alimony.
- Where language of agreement is unambiguous, trial court is not required to consider intent of the parties at time agreement was drafted.

- **Fact that support payments are due to plaintiff for the rest of her life was not sufficient to prove the payments were intended to be alimony rather than property settlement.**

Michael (Martin) v. Michael, *unpublished*, _ N.C. App. _, _ S.E.2d _ (August 4, 2009)

Parties signed a separation and property settlement that was subsequently incorporated into the divorce judgment. Plaintiff wife filed action for contempt, alleging defendant failed to pay monthly payments required by agreement. Defendant argued his obligation to pay terminated when plaintiff remarried. The trial court disagreed, finding that the payments were property settlement rather than alimony. The trial court held defendant in contempt and the court of appeals affirmed. According to the court of appeals, when the language of the agreement is clear, the trial court should not consider the intent of the parties at time agreement was drafted. In this case, the agreement was clear because the agreement defined the payments as property settlement; the payment provision appeared in the property settlement section of the agreement; the payments were listed among the provisions dealing with the distribution of marital property; and the separation agreement section of the agreement contained an express waiver of alimony by both parties. The court of appeals acknowledged that when an agreement is ambiguous and contains no express statement of integration, there is a presumption that the agreement is not an integrated property settlement. The agreement at issue in this case did not contain an integration clause; however, the court of appeals agreed with the trial court that the agreement was clearly integrated. According to the court of appeals, if there is no ambiguity, there is no presumption that the agreement is not integrated.

Consent judgments; provisions of an integrated agreement cannot be modified even if payments are labeled as alimony

- **Where consent judgment specified that ‘alimony’ payments were ‘reciprocal consideration’ for the property settlement provisions of the agreement, trial court erred in granting motion to terminate the alimony payments based on wife’s cohabitation.**
- **Rules regarding consent judgments are the same regardless of whether the judgment was based on an incorporated property settlement agreement or not.**

Underwood v. Underwood, *unpublished opinion*, _ N.C. App. _, _ S.E.2d _ (September 15, 2009)

Parties entered into a consent judgment settling all pending claims regarding custody, child support, PSS and alimony, and equitable distribution. The judgment required plaintiff to make monthly payments to defendant until death or remarriage. The judgment stated that the “agreements of the parties as to the payment of alimony as set forth herein have been made and are given in reciprocal consideration for the agreements of the parties as to the Equitable Distribution and property settlements of the parties.” A number of years later, husband filed motion to modify, claiming the alimony payments should end because wife was cohabitating. The trial court agreed and terminated the husband’s obligation to pay

alimony. The court of appeals reversed, holding that when a consent judgment is an integrated agreement, payments ordered are not 'true alimony' and are not subject to modification by the court. In this case, the judgment contained an unambiguous integration clause, the statement that the payments were ordered as 'reciprocal consideration' for the property settlement. Therefore, the payments were non-modifiable property settlement rather than true alimony. The court of appeals rejected plaintiff's arguments that the case law regarding integrated consent judgments applies only to those cases where the integrated agreement was incorporated into a court order. The court held that the rules regarding integrated consent judgments are the same whether the agreement was created as a private agreement between the parties before the action was filed or whether the agreement came about only after a case was filed.

Equitable Distribution

Cases Decided Between June 2009 and September 2009

Pensions; valuation of defined benefit plans; distribution of pension; consideration of tax consequences

- Trial court did not err in rejecting defendant's contention that his state employee retirement plan should be valued based on total contributions paid into the plan by either him or his employer. State plan is a defined benefit plan, and defined benefit plans must be valued using the five-step procedure set out in *Bishop v. Bishop*, 113 NC App 725 (1994).
- Where trial court complied with most steps required by *Bishop* but order was unclear about whether trial court found present value on defendant's earliest possible retirement date before finding present value on date of separation, case was remanded to trial court for additional clarification.
- The first four steps of *Bishop* provide for method of determining a lump sum present value of the stream of payments the employee-spouse is likely to receive through his projected life expectancy, determined as of the date of separation.
- The fifth step allows trial court to further reduce this figure to "account for contingencies such as involuntary or voluntary employee-spouse termination or insolvency of the pension plan." However, further reduction at this step is within the discretion of the trial court and any reduction must be supported by evidence produced at trial.
- *Bishop* provides a generalized framework for valuing defined benefit plans, but the opinion does not prohibit the trial court from refining the basic analysis based upon evidence presented. However, the concurring opinion cautions against deviating from the express language of *Bishop* unless the trial court really understands what he/she is doing (which the trial court obviously did in this case).
- Trial court did not err in using immediate offset method of distribution where value of pension represented only 41% of total value of marital estate.
- Trial court should consider tax consequences as a distribution factor only if tax consequences will result from the ordered distribution.

Cochran v. Cochran, _N.C. App._, 679 S.E.2d 469 (July 21, 2009)

Defendant appealed order of equitable distribution that gave him sole ownership of his state employee pension plan while awarding wife other assets of similar value. Husband argued on appeal that trial court erred in valuing his pension, resulting in a value that was too high. First, husband argued that his pension should be valued based on the total contributions actually made to the plan. The court of appeals rejected this argument, holding that defined benefit plans must be valued using the five-step procedure adopted by the court of appeals in *Bishop*. According to the court, only defined contribution plans are valued based on total contributions made to an account because these are the only plans

where the benefit paid upon retirement is based on actual contributions. Next, defendant argued that the trial court failed to appropriately apply the five steps required by *Bishop*. The court of appeals thoroughly and clearly reviews each step and explains why it rejects most arguments made by defendant. Most significantly, the court of appeals rejected defendant's contention that the trial court should not be allowed to deviate at all from the literal requirements of the five step procedure set out in *Bishop*. However, the court of appeals explained that *Bishop* describes a generalized valuation process. As long as the trial court applies the general process to determine the present value of the expected stream of payments for an employee as of the date of separation, the trial court can refine the process to conform to expert testimony offered at trial. For example, the trial court did not err by adopting an expert's process of determining life expectancy on a year-by-year basis rather than finding a total number of months the employee is expected to live as of the date of separation, as did the court in *Bishop*. The court of appeals noted that the method used in this case actually resulted in a lower value and a value that both experts agreed was more accurate. All *Bishop* requires is that the trial court determine life expectancy. The concurring opinion cautions that it is important to be consistent in valuing pensions and that deviations from the specific method articulated in *Bishop* should be undertaken with extreme care.

The court of appeals also rejected defendant's contention that trial court erred in using the immediate offset method to distribute his pension rather than using the deferred distribution method. GS 50-20.1 allows a court to distribute a pension by ordering that a portion of benefits be paid to the former spouse when the employee spouse begins to receive the pension in the future (the deferred payment plan). The statute also allows the court to award the entire pension to one when there are sufficient other marital assets to award to the other spouse to "offset" the value of the pension. In this case, the court of appeals held that the immediate offset method was appropriate because the pension accounted for only 41% of the estate, even though the pension amounted to 81% of defendant's distribution. The court of appeals noted that defendant was completely vested in the state system at the time of separation, significantly reducing the risk that he may not actually receive the retirement benefit in the future.

Finally, the court of appeals rejected defendant's contention that the trial court should have considered tax consequences pursuant to GS 50-20(c)(11). That statute was amended in 2005 to provide that tax consequences should be considered if evidence shows the consequences that "would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation." The court of appeals noted that there was no evidence offered of specific tax consequences, except testimony from CPA that there would be no tax consequences to transfer of marital residence and that the retirement payments defendant will receive in the future will be taxable. However, significantly, the court of appeals cited case law from before statutory amendment and held that only those tax consequences likely to actually result from the ordered distribution may be considered by the trial court. Otherwise, according to the court, potential tax consequences are too speculative to be given weight.

Divisible property; distribution factors

- **Where trial court made a finding of the net value of real property on date of separation and net value on date of trial, and distributed property by date of trial net value, trial court sufficiently accounted for and properly distributed all marital property as well as divisible property and divisible debt, even though order made no attempt to separately label the marital and divisible components.**
- **Trial court findings regarding distribution factors were insufficiently specific to allow for appropriate appellate review.**
- **Trial court erred in considering tax consequences of distribution when there was no evidence presented of the tax consequences.**

Plummer v. Plummer, _N.C. App. _, 680 S.E.2d 746 (August 4, 2009)

After a 38-year marriage and a 9-year separation, the trial court entered an equitable distribution judgment. On appeal, plaintiff husband argued the trial court failed to properly classify and value three parcels of real property. For each parcel, the trial court made a finding of the net value on the date of separation using tax values and values of encumbrances and net value on the date of trial, using the same type of evidence. The trial court distributed the assets by net value on date of trial and made no attempt to separate the marital and divisible components. The court of appeals affirmed, holding that the date of trial value took into account all appreciation of the real property (divisible property) and any reduction in the encumbrances, which resulted from the payment of marital debt (divisible debt). The court of appeals noted that the trial court order “could have been more precise in its statement of property values,” but affirmed most of the equitable distribution judgment. The court of appeals remanded for clarification regarding the distribution of the encumbrance (a mortgage) on one parcel. The trial court specifically distributed the encumbrances on two of the parcels to the person receiving the real property but failed to specify who would receive the encumbrance on the final parcel.

The court of appeals also held that the trial court findings about distribution factors were not specific nor detailed enough to allow for effective appellate review. Although the order contained many findings of fact relevant to distribution, the judgment did not show the trial court considered the facts as distribution factors. For example, the order contained findings that parties are both in bad health but failed to clarify that it considered this as a factor. In addition, the trial court held that it considered the income and liabilities of the parties at the time of trial but the order contained no findings as to the income and liabilities. In addition, the trial court order contained a finding that the distribution “would not qualify as a tax-exempt exchange due to the length of time between the date of divorce and the date of distribution.” The court of appeals held it was inappropriate for the trial court to consider this as a distribution factor without either party introducing evidence of the tax consequences.

Distribution factors

- **Likelihood of future inheritance is too speculative to consider as a distribution factor**

Petty v. Petty, _N.C. App._, 680 S.E.2d 894 (August 18, 2009)

During their marriage, plaintiff and defendant lived with defendant's father in a house owned by the father. Although the mortgage was paid in part with marital funds, plaintiff was unable to prove an equitable interest in the real property. However, the trial court made a finding in the equitable distribution judgment that the father had agreed to leave the house to defendant husband in his will. The court considered as a distribution factor the fact that defendant would likely be the beneficiary of the equity built in the house as the result of the marital payments. On appeal, the court of appeals agreed with defendant's argument that the trial court should not have considered the potential future inheritance as a distribution factor. Calling it an issue of first impression in North Carolina, the court of appeals held that an inheritance is not property presently owned within the meaning of the equitable distribution statute and that it is subject to too many contingencies to be weighed as a factor in distribution. The court of appeals held that the contingencies include "whether defendant survives his father, whether his father discards the property or takes some action that reduces the value of the property, and whether the father changes his will."

Classification; divisible property; interim allocation; appeal; attorney fee as a liability

- **Final judgment of equitable distribution was interlocutory because issues of alimony remained pending. However, appeal was proper where trial judge issued order pursuant to Rule 54 of the Rules of Civil Procedure certifying that there was no reason to delay appeal of an order that completely disposed of one cause of action in the case, i.e. the equitable distribution claim.**
- **Interim allocation made to preserve the marital estate did not prejudice party's right to equitable distribution of the property distributed.**
- **Where parties had contracted to purchase a house and paid earnest money before separation, home was marital property even though plaintiff did not obtain a mortgage and title to the property until after separation but paid the down payment after separation with marital funds.**
- **In order for postseparation appreciation of marital property to be classified as active rather than passive, evidence must show actions of spouse actually increased the value of the property; maintenance of property alone is insufficient.**
- **Where no evidence was presented to show plaintiff's postseparation reduction of the mortgage encumbering marital property and the parties stipulated that the increase in market value of the property was due to market forces, all postseparation appreciation of the house was properly classified as divisible property.**
- **Trial court could consider defendant's attorney fee debt as a distribution factor because it is a liability within the meaning of GS 50-20(c)(1).**

Brackney v. Brackney, _N.C. App._, _S.E.2d_ (September 1, 2009)

Before separation, parties entered into a contract to build a house. The parties paid earnest money that would be forfeited pursuant to the terms of the contract if the final purchase of the newly constructed house was not completed by a certain date. Before the house was completed and the sale finalized, the parties separated. Plaintiff filed for ED and asked for an interim allocation of the contract and the newly constructed house in order to finalize the transaction and protect the marital investment. The trial court entered the order for interim allocation, providing that the property was being distributed to allow for the maintenance of the marital property and that the interim distribution was made without prejudice to defendant's right to an equitable distribution of the property. Thereafter, defendant filed a response seeking ED and alimony. The trial court entered the final order of ED before addressing the issue of alimony. Plaintiff appealed. Court of appeals held that appeal of ED judgment was interlocutory because alimony remained pending. However, trial judge had entered order pursuant to Rule 54 finding that the final judgment had been entered completely disposing of the ED issue and further finding no reason to delay the appeal of that issue. The court of appeals held that the appeals therefore was appropriate even though interlocutory.

The main issue on appeal was the classification of the newly constructed house. Plaintiff argued that because he obtained the mortgage and completed the sale after the date of separation, the house was not acquired during the marriage and therefore was not marital. The court of appeals disagreed, holding that the source of funds doctrine provides that an asset is acquired as the equity is acquired and that equity is classified according to the source of the funds used to acquire it. In this case, the source of the equity identified at trial was the earnest money paid with marital funds before the date of separation and the down payment paid after the date of separation. The down payment after separation was paid from the proceeds of the sale of another marital residence that had been sold before the date of separation. The court noted that property received after separation in direct exchange for marital property is marital property. Therefore, the house was marital at the time of purchase. The home appreciated in value during the time between separation and trial. The trial court classified all the appreciation as divisible property because the parties stipulated that the increase in market value was due solely to market forces and plaintiff offered no evidence of payments made by him during separation to reduce the mortgage encumbering the property. On appeal, plaintiff argued the appreciation should be seen as active (and therefore not divisible property) because of his actions in acquiring the mortgage and finalizing the purchase of the property. The court of appeals rejected this argument, holding that the actions of a spouse must actually contribute to the increase in value of the property in order for appreciation to be classified as active appreciation. Because his actions at most maintained the marital property and protected the marital investment, those actions were not sufficient to show the postseparation appreciation to be the result of his actions. Therefore the trial court was correct in classifying all of the postseparation appreciation as divisible property.

The court of appeals also rejected plaintiff's contention that the trial court erred in considering defendant's attorney fee balance as a liability of defendant and therefore a distribution factor. The court of appeals held that GS 50-20(c)(1) provides that the court must consider all liabilities of the parties and that there is no reason to exclude attorney fee liability.

Death of a party; reconciliation

- **GS 50-20(l)(1) provides that a claim for equitable distribution survives the death of one spouse only if the parties are living separate and apart at the time of death, whether or not the action is filed before the death.**
- **Reconciliation is determined either by 1) a determination that, as a matter of law, the parties held themselves out as husband and wife, or 2) a determination that the parties had the subjective intent to reconcile.**
- **Where there is substantial objective evidence of cohabitation as husband and wife, there is no need to examine subjective intent of the parties.**
- **Trial court did not err in dismissing equitable distribution claim pending at time of husband's death where there was substantial objective evidence parties reconciled approximately three weeks before husband died.**

Casella v. Alden, executor of estate of Casella, deceased, _N.C. App._, _S.E.2d_ (September 15, 2009)

Parties separated and both filed claims for equitable distribution and divorce. While case was pending, husband was diagnosed with untreatable cancer. Approximately three weeks before his death, wife moved into his house and both spouses told family they had reconciled. They shared a bed and wife participated in the 'intimate care' of husband along with a hospice health care worker and the son of the parties. Following husband's death, wife coordinated all funeral arrangements and participated "as a wife" in the funeral and memorial services. Executor of husband's estate was substituted for husband in the pending equitable distribution case but wife requested that the court dismiss all claims. The trial court ruled that there was sufficient objective evidence of their holding themselves out as husband and wife to support a conclusion of reconciliation. Therefore, the trial court dismissed husband's claims, finding that GS 50-20(l)(1) requires that the parties be living separate and apart at the time of death in order for a claim for equitable distribution to survive. On appeal, the court of appeals affirmed the dismissal. The case contains an extensive discussion of the law relating to reconciliation, and the court of appeals stresses that reconciliation occurs when parties hold themselves out to the public as husband and wife, regardless of subjective intent. In this case, the trial court found substantial evidence that the parties held themselves out as husband and wife, even though husband survived only three weeks following wife's move into his house. The evidence included wife's moving into the house, sharing his bed, participating in his intimate care, and fulfilling the traditional role of wife and family during the funeral and memorial service. The trial court order also found, in the alternative, that there was substantial evidence that the parties actually intended to reconcile. The court of appeals held that while there was no need to reach the issue of intent because the evidence of 'holding out to the public' was sufficient to support the conclusion of reconciliation, the court of appeals held that it was good 'judicial economy' for the trial court to include the alternative grounds for the ruling, on the chance that the appellate court disagrees with the initial ground.

Paternity

Legislation Enacted 2009 Regular Session

S.L. 2009-285 (H 1112). Applies to birth certificates of children born on or after July 1, 2009. "AN ACT TO AMEND BIRTH REGISTRATION REQUIREMENTS TO ALLOW A CHILD'S PUTATIVE FATHER TO BE ENTERED ON THE BIRTH CERTIFICATE OF THE CHILD UNDER CERTAIN CONDITIONS." Amends GS 130A-101(e) to allow the putative father to be named as father on birth certificate of child born while mother is married to another man. Putative father can be named if his paternity has been judicially determined, or if 1) mom, putative dad and husband sign acknowledgment forms, 2) all three provide social security numbers, and 3) there has been a DNA test affirming paternity of putative father. Statute requires that acknowledgment form include "information explaining in plain language the effect of signing the affidavit, including a statement of parental rights and responsibilities and an acknowledgement of the receipt of this information." Unfortunately, the statute does not specify the effect of the acknowledgment nor does it explain the effect of this acknowledgment on parental rights and responsibilities.

Divorce

Legislation Enacted During 2009 Regular Session

S.L. 2009-224 (H 1091). AN ACT TO CLARIFY LAWS PERTAINING TO CIVIL ACTIONS ON BEHALF OF AN INCOMPETENT SPOUSE AS RELATED TO DIVORCE PROCEEDINGS, effective June 30, 2009. Amends GS 50-22 to clarify that Chapter 50 actions on behalf of an incompetent spouse may be commenced, defended, maintained, arbitrated, mediated or settled by any duly appointed attorney-in-fact who has the power to sue or be sued on behalf of the incompetent, including those appointed pursuant to Chapter 32A(durable power of attorney) or 35A (incompetency proceeding), or pursuant to GS 1A, Rules 17 (guardian ad litem) or 25(b)(personal representative). EXCEPTION: Retains provision that no one other than a competent spouse may commence an action for absolute divorce.

Domestic Violence

Legislation Enacted During 2009 Regular Session

S.L. 2009-425 (S 1062). AN ACT STRENGTHENING DOMESTIC VIOLENCE PROTECTIVE ORDERS TO PROVIDE FOR THE PROTECTION OF PETS. Effective August 5, 2009. Amends GS 50B-3(a) to specify that a protective order may include a provision providing for the “care, custody and control of any animal” owned or possessed by a party or by a minor child residing in the house. In addition, a court is authorized to order a party to refrain from “cruelly treating or abusing an animal” owned or possessed by a party or by a minor child residing in the house.

S.L. 2009-115 (H115). Civil Summons. For actions and motions filed on or after Dec. 1, 2009, amends GS 50B-2 to provide that the summons issued with a 50B complaint require the defendant to answer within 10 days of the date of service. **Regarding State v. Byrd, 363 NC 214 (2009) and the crime of violating a domestic violence protective order.** Amends GS 50B-4 and 50B-4.1, effective July 24, 2009, to define the term “valid protective order” as used in those statutory sections to include ex parte orders. Therefore, under the amended statutes, violation of an ex parte 50B order is a crime.