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Domestic Relations Law Update

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Child Support

- **Child support modification order must show obligor's income at time of modification hearing.**

Armstrong v. Droessler, __ N.C. App. __, 630 S.E.2d 19 (6/06/06).

Facts: Parties signed consent order establishing plaintiff father's support obligation. At the time of the consent order, father owned a business and earned an annual income of approximately \$170,000. At the time of the consent agreement, both parties understood that father planned to sell the business and pursue his "dream" of working in the aviation field. After the consent order was entered, father did sell his business and placed the proceeds into an irrevocable trust. He filed a motion to modify claiming a substantial decrease in income. The trial court denied the motion, finding that the sale of the business was anticipated at the time of the original support order and that father intentionally placed the proceeds out of reach in the irrevocable trust despite his obligation to pay support.

Held: Remanded for further findings.

Father argued on appeal that he was entitled to a modification because he had shown a substantial and involuntary decrease in income since the time of the original support order. The majority held that the trial court could not determine whether there had been a substantial and involuntary decrease without first determining father's income at the time of hearing. The majority instructed the trial court to determine whether there had been a substantial decrease and then to determine whether the decrease was voluntary or involuntary. Because there was no change in the needs of the children, the court explained that father must show a substantial, involuntary reduction in income before the trial court can modify the original order.

Dissent: The dissent argued that the trial court's order contained sufficient findings, even though the trial court did not specifically find father's total income at the time of the hearing. The order stated that father had a "six figure income" at the time the child support order was entered. Other findings indicated that the father worked part time at some point after he sold his business and earned approximately \$30,000 per year. The dissent argued that these findings showed his income decreased significantly.

- **Property settlement reached by agreement is not an equitable distribution.**
- **It may be appropriate to determine father's present income by averaging the income he earned during the previous two years.**
- **In cases where income exceeds guidelines limit, trial courts are not required to order support in an amount consistent with the guidelines.**
- **In cases where income exceeds guidelines limit, support order must show itemized needs of the children. Lump sum conclusion is not sufficient.**
- **Order denying request for attorney fees must contain findings to show why request is denied.**

Diehl v. Diehl, ___ N.C. App. ___, 630 S.E.2d 25 (6/6/06).

Facts: Parties separated in 1997. They entered into numerous temporary agreements pending the final trial on custody and child support held in 2004. The trial court determined that the income of the parties exceeded the \$20,000 per month limit contained in the child support guidelines. Therefore, the trial court made findings about the income of the parties and the needs of the children. Based upon those findings, the trial court ordered father to pay prospective support in the amount of \$4,500 per month and a lump sum payment of \$66,960 in back support to cover support owed September 2000 through April 2003.

Held: Remanded for more findings regarding the needs of the children and the reasons for the trial court's denial of mother's request for attorney fees. Affirmed on all other issues.

The court of appeals rejected father's argument that G.S. 50-20(f) required the trial court to reconsider his child support obligation from October 2000 through December 2000 in light of a property settlement agreement entered between the parties in October 2000. The court of appeals held G.S. 50-20(f) requires that previously set child support and alimony be reconsidered upon request following an order for equitable distribution. But, according to the court of appeals, a property settlement reached by agreement of the parties is not an equitable distribution. Therefore the court held that the provisions of G.S. 50-20(f) were not implicated in this case.

The court of appeals also rejected father's argument that the trial court erred in determining his 2003 income by averaging his 2001 and 2002 income. The court of appeals held that because the evidence introduced by father to establish his 2003 income was "highly unreliable" due to inaccuracies admitted

by father, the trial court did not abuse its discretion when it averaged the earlier incomes.

The court of appeals also rejected father's argument that trial courts should use the guidelines to determine the amount of support in those cases where the income of the parties exceeds the guideline amount. The father argued that trial courts should "mathematically extrapolate" the obligation based upon the figures provided by the guidelines for other cases. The court of appeals held that in high income cases, trial courts are required to set support "on a case by case basis, considering the needs of the children and the relative ability of each parent to provide support." The court noted that previous appellate opinions have rejected the argument that obligations in high-income cases should somehow reflect the guideline amounts.

The court of appeals agreed with father's argument that the trial court failed to make adequate findings as to the needs of the children. The trial court made findings indicating the total lump sum attributed to the needs but did not make findings about the source of the lump sum. The court of appeals held that some itemization is necessary to allow review of the reasonableness of the expenses.

The mother appealed the trial court's denial of her request for attorney fees. The court of appeals remanded on this issue, instructing the trial court to explain why mother's request was denied. The court of appeals held that GS 50-13.6 requires the court to consider whether the party requesting fees 1) was acting in good faith and 2) had insufficient means to defray the cost of the litigation.

- **Appeal of child custody order does not divest trial court of jurisdiction to hear a motion relating to child support.**
- **Trial court may not retroactively increase child support set by court order without concluding there has been a "true sudden emergency that required the expenditure of funds in excess of the existing child support order."**
- **Proceeds from sale of marital home do not constitute "non-recurring income" for purposes of child support.**
- **Education grants may constitute income.**
- **Income can be imputed to party who demonstrates a "naïve indifference" to the needs of his/her children.**
- **When trial court imputes income, findings must show how trial court determined the amount imputed.**

McKyer v. McKyer, ___ N.C. App. ___, 632 S.E.2d 828 (8/15/06).

Facts: In a very procedurally complicated case, father appealed trial court's denial of his request for a retroactive modification of a child support order and the trial court's decision to impute income to him. Father had been a professional football player. After he ended his football career, he took a number of part-time

jobs and returned to school to obtain a college degree. He had custody of the two minor children for some time but custody was later transferred to mother. When the trial court set support to reflect the new custody arrangement, the court imputed income to father based upon his failure to diligently pursue his college degree and upon his failure to work more than a few hours each week at a golf course. The trial court also denied father's request to retroactively modify the amount of support mother had been required to pay to him under the support order in effect when he had custody of the children. Father argued that he was entitled to the increase based on the fact that mother received a large lump sum payment upon the sale of the marital residence.

Held: Affirmed in part; remanded for further findings on issues of income and amount of imputed income.

Father had appealed the trial court order that changed custody from him to mother. On appeal of the child support order, father first argued that the trial court should not have heard the child support matter while the custody order was on appeal. The court of appeals rejected his argument, holding that GS 1-294 prohibits a trial court from acting on a matter that is the subject of appeal but allows the trial court to proceed on matters "not affected by the judgment appealed from." The court of appeals assumed without discussion that child support is "not affected" by the custody determination.

Father also argued on appeal that mother's child support obligation should have been retroactively modified to reflect the \$249,179 lump sum payment mother received from the sale of the marital home. The court of appeals held that case law provides that child support orders may be retroactively increased only upon a showing that there had been a true, sudden emergency regarding the welfare of the children that required the expenditure of sums in excess of the existing child support order. According to the court of appeals, mother's sale of the marital home did not show such an emergency.

The court of appeals also rejected father's argument that mother's receipt of the lump sum payment upon the sale of the residence should have been classified as non-recurring income of the mother when setting father's child support obligation. The court of appeals held that only those non-recurring payments that are properly defined as "income" can be included in child support calculations. The court stated that not all non-recurring payments are "income" and held that defendant did not attempt to show whether any of this payment to wife actually amounted to income. The court noted that NC courts have not yet addressed when, if ever, conversion of an asset (such as the marital residence in this case) for cash results in income. And, due to the father's lack of evidence on this issue, the court of appeals stated: "we reserve for another day the decision about how to treat, for child support purposes, the type of "gain" received by [mother] on the sale of the [marital home]."

The trial court included as income the amounts received by father in the form of educational grants from the federal government when he returned to college. Father argued on appeal that the grants should not be characterized as

income. The court of appeals did not decide whether the grants should be included as income. Rather, the court held that more information was needed and remanded the issue to the trial court to determine whether: 1) the grants are benefits from a means-tested public assistance program (the guidelines exclude such payments from income); 2) the payments significantly reduce father's personal living expenses; and 3) there are limits on the ways father can use the funds. It is not clear from the opinion what the trial court should do after answering these questions. The opinion does not specify when and under what circumstances the grants would constitute income.

The court of appeals upheld the trial court's decision to impute income to the father. The court of appeals held that the bad faith required before income can be imputed can be shown by a 'sufficient degree of indifference to the needs of the children.' The court cited the opinion in *Roberts v. McAllister*. ___ N.C. App. ___, 621 S.E.2d 191 (2005) in which the court of appeals approved imputing income to a mother found to have shown "naïve indifference" to the needs of her children by continuing to be a stay-at-home parent rather than going to work following divorce. In this case, the father worked very little and mother paid a significant portion of her income to care for the children. However, the court of appeals held that the child support order contained insufficient findings to show the basis for the amount of income imputed to father. The opinion indicates that the order show father has the ability to make the amount imputed.

Concurring opinion by Tyson. The concurring opinion argues that father's educational grants should be included in income if they are defined as income by the federal tax code. Also, Judge Tyson argued that the trial court should not consider whether income should be imputed to father because a child support order entered in 2001 found that father was not voluntarily suppressing his income or deliberately avoiding his obligation to the children. Judge Tyson reasoned that the earlier conclusion could not be modified without a finding of changed circumstances.

Legislation

Clerk of Court's Role in Child Support Enforcement. The 2005 General Assembly enacted legislation, S.L. 2005-389 (H1376), repealing the provisions of G.S. 50-13.9 which require the clerk of superior court to maintain payment records in non-IV child support cases, to monitor compliance with child support orders entered in non-IV cases, and to initiate legal proceedings to enforce non-IV child support orders. That legislation made the repeal effective July 1, 2007. This year, the General Assembly amended that legislation to move up the effective date to January 1, 2007. S.L. 2006-264 (S 602).

Child Support Guidelines were amended to effect cases heard and decided after October 1, 2006. Summary of all changes is included in conference materials.

1. Retroactive support ("prior maintenance"). Case law provides that a trial court can award child support for up to three years prior to the filing of the child support action. According to the court of appeals, a trial court can order retroactive support in an amount that reflects the obligor's responsibility for actual expenditures made on behalf of the child during that period of time. The child support guidelines are amended to provide that the trial has discretion to either 1) base the award of retroactive support on actual expenditures as case law presently provides, or 2) apply the guidelines to determine retroactive support based on the income of the parties. The decision appears to be completely discretionary.
2. The guidelines provide that a party seeking modification can establish a substantial change of circumstances by showing that the existing order is three years old or older, and that there is a difference of 15% or more between the amount of the order and the amount that would result from application of the guidelines based upon the present income of the parties. This provision is amended to clarify that the three year period begins to run at the time the order setting the amount of support is entered. Intervening motions to modify that do not result in a new child support order do not interrupt the time period.
3. The self-support reserve is increased to \$816, and the highest combined income for the guidelines is increased from \$20,000 per month to \$30,000.
4. Guidelines provide that the amount paid by one of the parents for health insurance is added to the basic child support obligation and prorated between the parties. The amended guidelines clarify that amounts paid by a spouse of a parent for insurance also are included.
5. Section describing treatment of support obligations for other children is amended to specifically state: "The fact that a parent pays child support for two or more families under two or more child support orders, separation agreements, or voluntary support arrangements may be considered as a factor warranting deviation from the guidelines." This is not a change in the current law. The language is intended as a reminder that deviation is available in these difficult situations.

Custody

- **It is inconsistent and legally incorrect to award “joint legal custody” but provide one parent with “primary decision making authority.”**

Diehl v. Diehl, ___ N.C. App. ___, 630 S.E.2d 25 (6/6/06).

Facts: Parties are the parents of two minor children. The trial court found that while both parents were fit and proper to exercise custody, they were unable to communicate effectively regarding the children. The trial court ordered joint legal custody with mother having primary physical custody as well as “primary decision making authority.”

Held: Reversed and remanded.

The court of appeals acknowledged that neither statutes nor case law defines the term “legal custody.” However, the court held that the term implies the “right and responsibility to make decisions with long terms implications for the child’s best interest and welfare.” Because the term implies decision-making authority, the court held that it was improper for the trial court to award joint legal custody while removing all decision-making authority from father. According to the court of appeals, the trial court’s order actually awarded “sole legal custody” to mother. The court remanded the case to the trial court with instructions to resolve the inconsistency in the custody order. The court of appeals noted that it is appropriate to award joint legal custody and reserve specific types of decision making authority to one party, as long as the order is supported by findings of fact to show the reason for the order. As an example, the court cited *MacLagan v. Klein*, 123 N.C. App. 557, 473 S.E.2d 778 (1996) where the trial court awarded joint legal custody but provided father with the right to make all decisions regarding the child’s religious upbringing. The trial court supported the decision with findings showing that the child had experienced confusion and distress as a result of the parents’ disagreement over the child’s religious training.

- **Award of attorney fees and costs pursuant to G.S. 50A-312 (Part 3 of the UCCJEA) is available only when the case involves registration of an out-of-state custody order or a request for expedited enforcement of a custody order pursuant to G.S. 50A-308.**

Creighton v. Lazell-Frankel, ___ N.C. App. ___, 630 S.E.2d 738 (6/20/06).

Facts: Custody order was entered in North Carolina. Mother thereafter filed a motion for contempt, alleging father planned to violate the order by failing to return the child to her after father’s period of physical custody came to an end. The trial court decided to transfer jurisdiction of the case to Tennessee after

finding that mother had moved to South Africa and father had moved to Tennessee. Accordingly, the trial court dismissed mother's motion for contempt. Father then filed a motion requesting an award of attorney fees and expenses pursuant to G.S. 50A-312. That statute states:

"[t]he court shall award the prevailing party ... necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney fees, investigative expenses, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award of fees would be clearly inappropriate."

The trial court denied the request and father appealed.

Held: Affirmed.

Part 3 of the Uniform Child Custody Jurisdiction and Enforcement Act found in Chapter 50A contains procedures to register a custody determination from another state and procedures for the expedited enforcement of a custody determination. The court of appeals held that the fee provision contained in 50A-312 applies only to proceedings brought pursuant to Part 3 of the UCCJEA. In this case, mother filed a motion for contempt and did not seek either registration or expedited enforcement. Therefore, the court of appeals held that the trial court correctly denied father's request.

- Trial court properly exercised temporary emergency jurisdiction under UCCJEA because the custody order was designated as temporary.
- Temporary order may become permanent if NC becomes home state before another state with jurisdiction acts.

In re M.B., __ N.C. App. __, __ S.E.2d __ (9/19/06).

Facts:

Nov, 4, 2004 Child is born in New York

2005

Feb	Respondent father moves to N.C.
March 28	Respondent mother and child move to N.C. and live with relative
April 8	Mother threatens father with knife and threatens to kill M.B.
April 21	Mother makes threats against the relative and says she will leave with the child when told that she can no longer live with the relative; police are called
April 22	DSS files a neglect petition and obtains a nonsecure custody order
April/May	Parents are served and nonsecure custody is continued after several hearings

- June 1-2 Hearing conducted
- June 17 Trial court enters order:
- 1) denying father's motion to dismiss for lack of subject matter jurisdiction
 - 2) finding that court had temporary emergency jurisdiction per G.S. 50A-204
 - 3) adjudicating the child neglected
 - 4) placing the child in the "temporary legal custody" of DSS
 - 5) ordering all parties to provide information about any custody proceeding or order in New York
- July 12 Father files notice of appeal
- Sept. 22 GAL makes motion to dismiss appeal as untimely filed
- Sept. 30 Trial court grants motion to dismiss appeal
- Oct. DSS receives letter from New York indicating that there is no custody action or order in that state
- Oct. 10 Trial court enters order
- 1) finding that N.C. is the child's home state because she has been in the state for six months
 - 2) ordering that the temporary custody order entered in June is now the final order of custody
- Nov. 4 Court of appeals allows father's petition for writ of certiorari

Held: Affirmed.

The court of appeals affirmed, holding that the trial court properly exercised temporary emergency jurisdiction because of the danger to the child. The court noted that any issue of temporary jurisdiction was moot, because North Carolina had become the home state, as the trial court properly ordered in its October order, which was not appealed. Although not cited by the court of appeals in this opinion, G.S. 50A-204(b) supports the conclusion that the temporary order became "permanent" after the child resided in NC for six months and no other state with jurisdiction acted with regard to the child.

Note: It is interesting that in this case the order treated as the "temporary" order was a dispositional order, which the trial court specified was temporary. *In re Kooten*, 126 N.C. App. 764, 487 S.E.2d 160 (1997), which the court of appeals cites, holds that when the trial court is acting on the basis of temporary emergency jurisdiction in a juvenile case, it should enter only nonsecure custody orders and should proceed to adjudicate the petition on the merits only after determining that it has another basis for exercising jurisdiction. *See also In re Brode*, 151 N.C. App. 690, 566 S.E.2d 858 (2002).

When the case came before the trial court, it was not clear whether New York had exercised or was exercising jurisdiction in a matter relating to the child's custody. In either event, the risk to the child who was physically present in North Carolina clearly was a basis for the exercise of temporary emergency jurisdiction. However, it does not appear that the court was required to rely on temporary emergency jurisdiction.

1. If no order existed in New York (as turned out to be the case), the question would be whether North Carolina had jurisdiction to enter an initial child custody determination. Looking at the first two possible bases for initial child-custody jurisdiction:
 - G.S. 50A-201(a)(1). N.C. was not the child's home state when the petition was filed. New York was no longer the home state, because the child would not have been living there immediately before the filing of an action in N.Y., and although it had been the home state within the previous six months, the child was not there and no parent or person acting as a parent was residing there.
 - G.S. 50A-201(a)(2). No state had jurisdiction under the preceding home state provision, and it seems likely that the court here could have found both that the child and parents had a significant connection with this state and that substantial evidence was available here concerning the child's care, protection, training, and personal relationships. If the court made those findings, North Carolina could exercise initial custody jurisdiction without resorting to temporary emergency jurisdiction.
2. If New York had entered a child custody order, the issue would be whether North Carolina had jurisdiction to modify another state's order. Under G.S. 50A-203, if it is correct that N.C. could have entered an initial custody order, as described above, then N.C. also could modify another state's order, without even contacting that state, if it determined that neither the child, the child's parents, nor anyone acting as a parent continued to reside in New York.

Equitable Distribution

- **Rule 59 cannot be used to set aside a judgment for an error of law unless the party requesting relief objected to the alleged error during trial.**
- **Rule 60(b) cannot be used to set aside a judgment for legal error.**
- **Classification is determined on date of separation. Deeds executed during separation have no effect on the classification of real property.**
- **Evidence of the alleged donor's intent is necessary to prove a gift.**

Davis v. Davis, 360 N.C. 518, 631 S.E.2d 114 (2006).

Facts: Trial court entered partial summary judgment in equitable distribution case classifying two tracks of real property as the separate property of plaintiff wife. The property was held by both parties as tenants by the entirety on the date of separation. However, during separation and before divorce, husband executed a deed transferring all of his interest in the property to wife. The trial court held that both tracks became the separate property of the wife. Following trial, the trial court entered an equitable distribution judgment that did not distribute the tracks of real property.

Following entry of the equitable distribution judgment, defendant filed motions pursuant to Rule 59 and Rule 60 requesting the trial court to set aside the equitable distribution judgment due to errors in law. The trial court denied both motions. The court of appeals affirmed the trial court in an unpublished decision. The supreme court allowed review.

Held: Affirmed in part; reversed in part.

The supreme court held that Rule 59(a)(8) allows a trial court to reconsider a judgment for alleged errors of law. However, the rule requires that the request for reconsideration must be filed within 10 days of entry of judgment and the party requesting reconsideration must have brought the alleged errors to the attention of the trial court during the trial by proper objection. In this case, defendant filed the motion within 10 days from entry of the order, but he failed to show he had objected to any of the alleged erroneous ruling during the summary judgment hearing or during the trial.

The supreme court also upheld the trial court's denial of defendant's motion pursuant to Rule 59(a)(9), the so-called "catch-all" provision in Rule 59. According to the supreme court, rulings pursuant to Rule 59(a)(9) are within the discretion of the trial judge and only reversed on appeal upon a showing of abuse of discretion. The court held that defendant did not establish abuse of discretion in this case.

Similarly, the supreme court held that the trial court did not err in denying defendant's Rule 60(b) motion to set aside the ED judgment. Defendant's request

was based upon alleged errors of law in the judgment and, according to the supreme court, "Rule 60(b) provides no specific relief for errors of law."

However, the supreme court reversed the trial court's classification of the tracks of real property as plaintiff wife's separate property. According to the supreme court, classification is determined at the date of separation and the marital estate "freezes" on the date of separation. The property at issue in this case was held by the parties as tenants by the entirety on the date of separation and therefore was presumed to be marital property. The deeds executed after separation had no impact on the classification of the tracks.

The supreme court also rejected plaintiff wife's claims that husband had made a gift of the property to her when he executed the deeds. The court held that neither the language in the deeds nor any other evidence produced at trial showed defendant's intent to make a gift to plaintiff. [Note: The supreme court states that for purposes of classification, the marital estate "freezes" on the date of separation. If that is true, the property would be classified as marital even if wife established that husband gifted the property to her after separation. It is unclear whether the court is suggesting that the marital property could change to separate property during separation.].

- **Property held as tenants by the entirety on the date of separation is marital property. Death of one spouse after separation does not transform the property into separate property.**

Estate of Nelson v. Nelson, __ N.C. App. __, 633 S.E.2d 124 (8/15/06).

Facts: Parties separated after 59 years of marriage. Plaintiff husband filed claim for equitable distribution. On date of separation, parties owned three tracts of land acquired during the marriage and held as tenants by the entirety. While the ED claim was pending, husband died. The trial court entered an order declaring that the three tracks of real property became the sole and separate property of defendant wife upon the death of plaintiff by virtue of the right of survivorship from the tenancy by the entirety. The trial court then entered an equitable distribution order distributing the other property of the parties. Plaintiff's estate appealed.

Held: Reversed.

The court of appeals held that the trial court erred in concluding that the three tracks of real property transformed from marital property to separate property upon the death of the husband. The court of appeals held that the three tracks were properly classified as marital property because they were acquired during the marriage and owned on the date of separation. The court rejected defendant's argument that the property met the definition of separate property contained in GS 50-20(b)(2) because defendant acquired the property by

descent during the marriage. According to the majority, title to property held as tenants by the entirety vests entirely in both spouses at the time of the original conveyance. Therefore, defendant did not acquire her interest by descent.

Dissent: Judge Bryant wrote a separate opinion arguing that defendant did take her interest by descent during the marriage. Therefore, according to Judge Bryant, the trial court properly concluded that the classification of the property changed from marital on the date of separation to separate property upon the death of plaintiff.

Note: The disagreement between the majority and the dissent concerns the nature of tenancy by the entirety. However, neither the majority nor the dissent addresses the numerous appellate opinions holding that classification of marital and separate property is determined as of the date of separation. See e.g. *Davis v. Davis*, 360 N.C. 518, 631 S.E.2d 114 (2006)(quitclaim deed from husband to wife after separation did not effect classification of property held as tenants by the entirety on the date of separation; marital estate freezes on date of separation); *Stanley v. Stanley*, 118 N.C. App. 311, 454 S.E.2d 701 (1995)(same). If classification is determined as of the date of separation, the death of husband during separation should have no impact on the classification of the real property, regardless of what happens to title to the property during separation. This is the first North Carolina appellate opinion to suggest that classification of property is subject to change during separation and before the date of trial.

- **Party facing possibility of sanctions pursuant to G.S 50-21(e) for willfully delaying ED proceedings should receive notice in advance of hearing where sanctions are considered.**

Megremis v. Megremis, __ N.C. App. __, 633 S.E.2d 117 (8/15/06).

Facts: In final ED order, trial court imposed sanctions on defendant wife after concluding she willfully obstructed and delayed the ED trial. The court considered plaintiff's request for sanctions during the trial of the ED case. Plaintiff did not file a written request for sanctions and defendant did not receive written notice that sanctions would be considered during the ED trial. Trial court imposed sanction in the amount of \$27,946.

Held: Reversed.

The court of appeals agreed with defendant wife's contention that imposing sanctions without giving her notice before the hearing violated defendant's due process rights. The court acknowledged that GS 50-21(e) does not say anything about required notice and the court of appeals did not indicate how much advance notice is required. The court rejected plaintiff's argument that defendant

was given adequate notice by statements made by plaintiff's attorney during an earlier hearing on a motion to continue. During that hearing, plaintiff's counsel argued that defendant's request for a continuance amounted to willful obstruction and delay of the case. The court of appeals held that those statements were not sufficient to inform defendant that she would need to be prepared to defend against a request for sanctions during the trial.

- **All districts must create mandatory settlement procedures for family financial issues.**

“Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases.” Amended effective March 1, 2006. Until March 1, 2006, individual chief judges could decide whether to mandate settlement procedures in their district. However, Rule 1 of the rules adopted by the supreme court to implement family financial mediation was amended to provide that in all equitable distribution actions in all districts, the trial court must require parties and their counsel to attend a mediated settlement conference, or if the parties agree, one of the other settlement procedures authorized by the rule. Other procedures include neutral evaluation, judicial settlement conference, or other procedure created by local rule. Programs established in each district must comply with the provisions contained in the supreme court rules. The court can dispense with the requirement that the parties attend a settlement conference only upon a showing of good cause.

Postseparation Support and Alimony

- **Income of supporting spouse can be determined by averaging income shown on tax returns from previous years.**
- **Court should consider employment income as well as “other recurring earnings of each party from any source” when setting postseparation support.**
- **Financial affidavits prepared by the parties can be incorporated into postseparation support order to show expenses of parties.**
- **Alimony order must state reasons for the duration of the alimony award.**
- **Alimony award cannot be made binding on heirs of the supporting spouse.**

Squires v. Squires, ___ N.C. App. ___, 631 S.E.2d 156 (7/5/06).

Facts: In a case involving parties who separated after 35 years of marriage, the trial court entered a postseparation support order requiring defendant husband to pay support for plaintiff wife, and later entered an order for permanent alimony. Husband appealed.

Held: Affirmed order for postseparation support; vacated portion of alimony order and remanded alimony for additional findings of fact.

Defendant argued on appeal that the trial court failed to make sufficient findings to show his income at the time the postseparation support order was entered. He also argued that the trial court erred by finding he had income when evidence showed he had no present employment income. The court of appeals held that the trial court order was sufficient because it incorporated defendant’s tax returns from the three years before the postseparation support hearing. And, according to the appellate court, the trial court is to consider employment income as well as any other recurring income when determining support. Defendant had stopped working and receiving W-2 income, but he continued to receive an average of \$622,136 per year in income from interest, dividends, capital gains and partnerships. The court of appeals held that it was appropriate for the trial court to determine defendant’s present income by averaging the total income he received during the immediate past three years, as shown by the tax returns.

In addition, defendant argued that the postseparation order contained insufficient finding as to his reasonable and necessary expenses. The court of appeals disagreed, holding that the trial court’s incorporation of defendant’s financial affidavit into the postseparation order was sufficient. The court stated “[b]ecause postseparation support involves a relatively brief examination of the parties’ needs and assets, the court may base its award on a verified pleading, affidavit, or other competent evidence.”

Regarding the alimony award, husband argued and the court of appeals agreed that the trial court order failed to appropriately explain the reason for the duration of the alimony award. The trial court ordered that support be paid to wife until the death of one of the parties, or wife's cohabitation or remarriage. Even though the order found that wife was 58 years old, had never worked outside the home, and had no present income, the court of appeals held that the order was insufficient because it did not explicitly state why the court decided to make the award payable until death of one of the parties. The court of appeals remanded the case to the trial court for additional findings to explain the order.

In addition, the court of appeals vacated a provision in the alimony order stating that the award was binding on the heirs of defendant husband. The court of appeals held that such a provision is barred by G.S. 50-16.9(b) which provides that alimony "shall terminate upon the death of either the supporting or dependent spouse."

- **When entering a new alimony order in a case remanded to the trial court by court of appeals for additional findings of fact, the trial court cannot order a lump sum payment to cover time between original order and new order without first considering parties' claims of changed circumstances.**
- **Retirement accounts are not exempt from execution seeking to enforce an alimony judgment.**
- **Trial judge does not need to personally take offers of proof. Party has right to make a record, but judge is not required to listen to offered evidence.**

Rhew v. Felton, __ N.C. App. __, 631 S.E.2d 859 (7/18/06).

Facts: In October 1998, the trial court denied defendant wife's claim for alimony. The wife appealed and the court of appeals remanded the case for additional findings to support the conclusion that wife was not a dependent spouse. *Rhew v. Felton*, 138 N.C. App. 467, 531 S.E.2d 471 (2000). In that case, the court of appeals specified that the trial court could draft the new order without hearing new evidence. The trial court entered a new order on July 30, 2003, 2 years and 8 months after the court of appeals remanded the case. The trial court denied plaintiff's request to present evidence of changed circumstances since the first hearing in 1998. The trial court entered a new alimony order finding defendant to be a dependent spouse and ordering plaintiff to pay an amount of support based upon the evidence presented in 1998. In addition, the trial court ordered plaintiff to make a lump sum payment to defendant to account for the time between the original hearing and the new order. Following entry of order, defendant began execution proceedings on the alimony judgment. Trial court denied Plaintiff's motion to claim his IBM retirement account exempt from execution. Plaintiff husband appealed.

Held: Remanded again on alimony; affirmed other issues

The court of appeals agreed with husband's contention that the trial court should not have ordered the lump sum payment of back support without first considering husband's claims of changed circumstances since the original hearing. The court held that the instructions on remand allowed the trial court to reconsider the evidence presented at the original hearing to determine dependency and the amount of support, if any, that should be awarded given the circumstances of the parties at the time of the 1998 hearing. However, the court of appeals held that the trial court was not authorized to make the new order payable from the 1998 date without giving the parties the opportunity to show whether there had been a substantial change in their circumstances since that time.

During the hearing on remand, husband attempted to introduce evidence of changed circumstances. When the trial court decided not to consider such evidence, husband made an offer of proof for the record and requested that the trial judge personally listen to the evidence as it was put on the record. The trial court allowed the offer of proof but did not stay in the courtroom while the record was made. The court of appeals rejected husband's contention that the trial judge's failure to stay in the courtroom violated Rule 43(c) of the Rule of Civil Procedure. The court held that while that rule requires that parties be given the opportunity to put the offered evidence into the record, there is no requirement that the trial judge personally consider the offer of proof.

Court of appeals affirmed the trial court's denial of plaintiff's motion to exempt his IBM retirement account from execution. The court of appeals held that GS 1C-1601 exempts most retirement accounts but contains an exception for judgments to collect child support, alimony or equitable distribution distributive awards. Similarly, federal statute 29 USC sec. 1056(d)(1) exempts most retirement accounts from execution but contains an exception for qualified domestic relations orders.

- **Trial court cannot consider earning capacity of supporting spouse when determining alimony without a showing of bad faith.**
- **Incorporating financial affidavit of supporting spouse was sufficient to show reasonable needs and expenses of that spouse.**
- **Fact that trial court ordered postseparation support does not mean the trial court must award alimony.**

Megremis v. Megremis, __ N.C. App. __, 633 S.E.2d 117 (8/15/06).

Facts: Plaintiff husband is a physician and defendant wife was a homemaker without a college degree. The trial court ordered postseparation support but denied her request for alimony. Wife appealed.

Held: Affirmed.

Husband's evidence showed that his actual earnings had decreased due to his stress over the divorce and related litigation. Wife argued that the trial court should have considered his earning capacity rather than his actual income at the time of the alimony hearing, citing G.S. 50-16.3A(b)(a)(listing "the relative earnings and earning capacities of both parties" as one factor the court should consider in determining alimony). The court of appeals rejected wife's argument that this statute overrules case law indicating that earning capacity can only be considered when evidence shows the supporting spouse failed "to exercise the capacity to earn because of a disregard of the marital obligation to provide reasonable support."

Court of appeals also rejected wife's argument that the trial court erred in finding plaintiff's needs and expenses to be reasonable. Without indicating the nature of the needs and expenses at issue, the court of appeals held that the trial court did not abuse its discretion by accepting the needs and expenses presented by plaintiff in his financial affidavit.

Finally, the court of appeals rejected wife's assertion that the inconsistency between the trial court's ruling on postseparation support and the ruling on alimony showed an abuse of discretion on the part of the trial judge. The court of appeals stated that "a trial court's rulings regarding postseparation support are neither conclusive nor binding in the alimony context."

Domestic Violence

- **Evidence was sufficient to show defendant placed plaintiff in fear of continued harassment that rose to the level as to inflict severe emotional distress.**

Wornstaff v. Wornstaff, __ N.C. App. __, __ S.E.2d __ (9/19/06).

Facts: Plaintiff filed 50B complaint against defendant husband. At the 10-day hearing, plaintiff testified to the following facts: On one occasion, defendant came to the business owned jointly by plaintiff and defendant. Husband was escorted by a police officer. Plaintiff and defendant argued, and defendant yelled at plaintiff "Would you like to hurt me? Would you like to kill and hit me? Would that make you feel better?" He also picked up a stapler and banged it on the table. In addition, he threw a water bottle in her direction. Defendant refused to leave when plaintiff asked him to leave, and the police officer refused to force him to leave because the premises were jointly owned by the parties. Plaintiff left the business and returned the next morning. Defendant was still present. At that point, plaintiff filed the 50B complaint. Plaintiff testified that she thought defendant was "out of control," she was afraid of defendant, and she felt that he could have hit her with something. The trial court found defendant had committed an act of domestic violence by placing plaintiff in fear of continued harassment that rose to such a level as to inflict substantial emotional distress. Defendant appealed, arguing that the evidence was insufficient to support this finding, and arguing that the findings in the 50B order were insufficient to support the conclusion that an act of domestic violence had occurred.

Held: Affirmed.

The court of appeals held that the evidence was sufficient to support the finding of domestic violence. According to the court, the trial court can "draw inferences" based upon seeing and hearing the "inflections, tones and temperament of the witnesses". When the "cold record" shows that "different reasonable inferences" can be drawn from the evidence, the court of appeals will defer to the judgment of the trial court. Allowing that deference to the trial court, the court of appeals held that the evidence was sufficient to support the finding that defendant's conduct placed plaintiff in fear of continued harassment that rose to such a level as to inflict serious emotional distress.

The court of appeals also held that the findings made in the 50B order were sufficient to support the conclusion that domestic violence had occurred. The court held that the order simply needs to make the finding that plaintiff actually feared continued harassment; there is no need to find that the fear was reasonable under the circumstances.

Dissent: Tyson argued that the findings in the order were insufficient to support the conclusion that plaintiff was placed in fear of continued harassment or that plaintiff suffered substantial emotional distress.

Miscellaneous Domestic Relations Cases

- **Party is not entitled to a jury trial to determine whether agreement to arbitrate is enforceable.**

Kiehll v. Kiehll, __ N.C. App. __, __ S.E.2d __ (9/5/06).

Facts: Following separation, husband and wife entered into a “North Carolina Collaborative Family-Law Agreement.” The agreement also provided that the parties would resolve all marital issues without litigation. The agreement provided that, if the parties could not reach agreement, any unresolved issue would be submitted to arbitration pursuant to the NC Family Law Arbitration Act, G.S. 50-41 to 50-63. Wife later filed a complaint for divorce from bed and board, postseparation support and alimony, and equitable distribution. Husband filed a motion to dismiss and to compel arbitration. Wife responded that the arbitration agreement was unenforceable because she was fraudulently induced to enter into the agreement and because husband had breached the agreement. She demanded a jury trial on the issues of fraud and breach. The trial court ruled that the provisions in the family law arbitration act prohibiting a jury trial on such issues was unconstitutional and ordered a jury trial. Husband appealed.

Held: Reversed and remanded.

The court of appeals held that the family law arbitration act requires that issues regarding the enforceability of an agreement to arbitrate be summarily decided by a trial judge. The court held that the trial court incorrectly concluded that this provision violated wife’s constitutional right to a jury trial. The trial court concluded that because the right to trial by jury on issues of fraud and breach of contract existed in 1868, the General Assembly could not take away this right by legislation. The court of appeals held that the protection of the right to a jury trial extends only when the ultimate remedy sought by the action involves a “property right” and when the issues to be submitted to the jury involve the “ultimate relief” sought by the party. In this case, the trial court failed to make any findings as to whether the issue to be submitted to the jury – the enforceability of the arbitration agreement – involved a “property right.” (the court of appeals did not resolve that issue either). In addition, the question to be submitted to the jury did not involve the ultimate relief sought by wife, which was the resolution of her family law claims.