Family Law Update

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Imputing Income

- "Bad Faith" Rule:
  - Child support and alimony must be determined using ACTUAL PRESENT income unless evidence supports finding that party has acted in deliberate disregard of the duty to support children or voluntarily has reduced income without considering how he/she would meet the child support obligation
  - Use EARNING CAPACITY or minimum wage only if order contains a finding of 'bad faith'

Imputing Income

- *Andrews v. Andrews* (child support)
  - Good-faith religious conviction does not excuse parent's disregard of support obligation
- *Bugge v. Bugge* (child support)
  - 3 year/15% presumption does not support modification if income change is result of parent's disregard of support obligation
- *Works v. Works* (alimony)
  - Cannot impute minimum wage to unemployed parent without first finding 'bad faith'

"Bad faith"

- *Works v. Works*. Court can impute if wife:
  - Refused to seek or accept employment
  - Willfully refused to secure or take a job
  - Deliberately not applied herself to a business or employment
  - Intentionally depressed her income to an artificial low
- *Cf. Wolf v. Wolf*, 151 NC App 523(2002)
  - Imputed income based on evidence that party was fired from job due to conduct reasonable person would know would result in loss of job
- *Cf. Roberts v. McAllister,* 174 NC App 369(2006)
  - 'Naïve indifference' to needs of children established by evidence that mom decided to remain a 'stay-at-home' mom when needs of kids could not be met by income of other parent
- *Cf. Pataky v. Pataky,*160 NC App 289 (2003)
  - No bad faith shown by dad's decision to return to school where he made arrangements for care of children before quitting his job

Custody Modification

- *Balawejder v. Balawejder*
  - Need evidence and findings of circumstances at time of original order if original order contains no findings about circumstances
- *Wolgin v.Wolgin*
  - Okay to put time limits on evidence
    - Evidence Rule 611(a)
  - Modification appropriate where order showed how parents' inability to communicate and make joint decisions affected the children

Custody Jurisdiction: Simultaneous Proceedings

- If action is pending in another state at time NC action is filed, NC court has no jurisdiction if other state is acting "substantially in conformity" with the UCCJEA.
  - GS 50A-206
- *Jones v. Whimper*
  - NC judge is not required to contact judge in other state to determine whether other state is acting in conformity with the UCCJEA

Custody Jurisdiction: Modification

- TPR is a 'modification' if custody has been adjudicated in another state
  - *In the Matter of J.A.P.*
- NC has modification jurisdiction only if:
  - Everybody has left the original state and NC has initial determination jurisdiction, OR
  - Original state determines it no longer has jurisdiction and NC has initial determination jurisdiction

Equitable Distribution 401k Funds

- Classified and distributed pursuant to GS 50-20.1 (pension statute)
- Coverture fraction applies to determine marital portion
  - *Curtis; Allen v. Allen,* 118 NC App 455 (1995)
- Award includes gains & losses on prorated portion of the benefit vested on date of separation
  - GS 50-20.1(d)
- But cannot include contributions, years of service or compensation that accrue after the date of separation
  - GS 50-20.1(d)
- Passive increases/decreases in value of marital portion is divisible property that must be identified and distributed
  - *Bodie v. Bodie*

Equitable Distribution

- Valuation
  - Always make sure judgment identifies date of separation value of every marital asset
    - *Williamson v. Williamson*
  - When valuing a business, judgment must identify the 'sound valuation methodology' used by the trial court
    - *Williamson; Taylor v. Taylor*
- Postseparation payments
  - Before giving any kind of 'credit', identify source of funds used to make the payments and identify benefit to marital estate
    - *Williamson; Bodie v. Bodie*

Chapter 50C
Civil No-Contact Orders

- Unlawful conduct is:
  - Nonconsensual sexual behavior, or
  - Stalking
  - By someone 16 or older
- Stalking is on more than one occasion:
  - Following, or
  - Harassing
- Harassing requires the specific intent to:
  - Place person in fear for personal safety, or
  - Cause emotional distress
- If specific intent is to cause emotional distress, plaintiff must prove actual substantial emotional distress
  - *Ramsey v. Harman,* 191 NC App 146 (2008)

50C Orders

- Evidence of actual substantial emotional distress is not necessary if harassment is done with specific intent to cause fear for personal safety
  - *St. John v. Brantley*
- 50C order is void if complaint was not properly verified
  - *Fansler v. Honeycutt*

Chapter 50B
Domestic Violence Protective Order

- Consent domestic violence protective order without finding of fact/conclusion of law that defendant committed an act of domestic violence is void *ab initio.*
  - *Kenton v. Kenton*
- "Court's authority to enter a protective order or approve a consent agreement is dependent upon a finding that an act of domestic violence occurred."
  - *Bryant v. Williams,* 161 NC App 444 (2003)
- "Defendant committed an act of domestic violence" is a conclusion of law rather than a finding of fact.
  - *Kennedy v. Morgan*

Kenton consent order

- "Parties agree to the entry of this order without express findings of fact regarding the behavior of either party."
- "Parties waive conclusions of law."
- Defendant "shall not commit any acts of abuse or make any threats of abuse."

Kenton v. Kenton

- Stipulated conclusion that defendant committed an act of domestic violence should be sufficient to create valid consent order. [???]
- Validity of consent order can be raised in collateral proceedings.
  - *See Boseman v. Jarrell,* 364 NC 537 (2010)(order that is void *ab initio* is a legal nullity and has no effect in a collateral proceeding)
- Rule 60(b)(4) allows court to set aside invalid consent DVPO and proceed on underlying 50B claim.
  - *See Bailey v. Gooding,* 301 NC 205 (1980)(setting aside judgment pursuant to Rule 60(b) meant case would proceed to trial on merits raised in the pleadings).

Kennedy v. Morgan

- Trial court findings of fact were not sufficient to support conclusion that defendant committed an act of domestic violence by harassing plaintiff.
- Finding that parties had a "long history of abuse" was too vague to support conclusion of domestic violence.

Constitutional Amendment

- Effective May 23, 2012, Article 14, sec. 6 of NC Constitution states:

"Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State. This section does not prohibit a private party from entering into contracts with another private party; nor does this section prohibit courts from adjudicating the rights of private parties pursuant to such contracts."

Explanation by Constitutional Amendments Publication Commission

"The term "domestic legal union" used in the amendment is not defined in North Carolina law. There is debate among legal experts about how this proposed constitutional amendment may impact North Carolina law as it relates to unmarried couples of the same or opposite sex and same sex couples legally married in another state, particularly in regard to employment-related benefits for domestic partners; domestic violence laws; child custody and visitation rights; and end-of-life arrangements. The courts will ultimately make those decisions."

Ohio Marriage Amendment

- "Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effect of marriage."
  - Ohio Const. Art. XV, sec. 11

State v. Carswell, 871 NE2d 547 (Ohio 2007)

- Ohio marriage amendment did not make domestic violence statute unconstitutional.
- Constitutional amendment was intended to prevent the creation or recognition of a legal status that approximates marriage through judicial, legislative, or executive action.
- Domestic violence statute intended to protect victims from violence from close family members or residents of the same household.
- Clear distinction between creating a quasi-marital relationship (as banned by the amendment) and merely creating a classification for a limited purpose.
- Domestic violence statute simply identifies a particular class of persons entitled to protections – it does not create a relationship of any kind.

Specific Performance

- An equitable remedy for breach of contract.
- Allowed only when the remedy at law is inadequate.
- Remedy at law is inadequate when recovery of money damages would require successive lawsuits.
- Specific Performance only ordered to extent defendant has ability to comply.
- Contempt is available when defendant fails to comply with order of specific performance.

Praver v. Praver

- Trial court can impute income to determine defendant has ability to comply with order of specific performance if court finds defendant has deliberately depressed his income or dissipated assets.
- No findings required to show legal remedy inadequate for prospective monthly payments due under contract.
- Findings are required to show legal remedy inadequate for past due arrears.

Setting Aside Paternity Judgment

- S.L. 2011-328 created new statutes
  - GS 49-14(h): setting aside paternity judgment
  - GS 110-132(a2): setting aside affidavits of paternity
  - GS 50-13.13: setting aside child support orders
- Applies to motions or claims for relief filed after January 1, 2012
- Two separate sections to new law:
  - Setting aside paternity judgments and acknowledgements
  - Setting aside existing child support orders

Paternity Judgments and Acknowledgements

- Without regard to time limitations in Rule 60(b), judgment or affidavit can be set aside if:
- Fraud, duress, mutual mistake or excusable neglect, AND
- Genetic tests prove he is not the father
  - No new provision about payment of costs for testing
  - GS 8-50.1(b1) provides moving party pays costs but court can allocate as court cost
  - State must pay for indigent parents
    - *Little v. Streater,* 452 US 1 (1981)

Paternity

- NC court does not have jurisdiction to set aside paternity determination entered in another state
  - GS 52C-3-314
    - Comment: 'basic' principles of res judicata prohibit court from collaterally attacking paternity judgment entered in another state
  - *Reid v. Dixon,* 136 NC App 438 (2000)
    - Trial court cannot question validity of paternity determination made by another state

Terminating Child Support

- Request to set aside obligation must be filed within one year of date party knew or should have known he was not the father
- Except:
  - Time tolled during military deployment, and
  - Everyone with a claim can file before January 1, 2013

Child Support Obligation Ends if……

- Party files verified motion alleging he has never acknowledged paternity
  - GS 50-13.13(b)(defining acknowledgment; includes legitimation)
- And, paternity judgment or acknowledgement was set aside under new law, *OR*
- Party shows:
  - Genetic testing disproving paternity, AND
  - No previous public acknowledgement of paternity
    - (or he only acknowledged because he believed it was true)

Support Obligation

- Suspended while motion pending, but support being paid to mom is NOT suspended
  - Unless a IV-D case ?????
- Arrears are not affected
  - If fraud, can order mom to repay amounts received since motion filed

Child Support
GS 50-13.13

- GS 8-50.1(b1) governs procedure, admissibility and presumptions regarding genetic testing
- Costs paid by moving party but if motion is granted, court may order mom to pay
- Court can award attorney fees if it finds the moving party did not act in good faith