# Family Law Case Update
## Cases Decided Between October 1, 2005 and June 1, 2006

**North Carolina Association of District Court Judges**
**Summer Conference**
**June 15, 2006**
**Holiday Inn SunSpree**
**Wrightsville Beach, N.C.**

**Cheryl Howell**
**School of Government**

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**Equitable Distribution**
**Cases Decided Between October 1, 2005 and June 1, 2006**

**Lauterbach v. Weiner, 620 S.E.2d 317(N.C. App., October 18, 2005). Offer of Judgment, Civil Procedure Rule 68.**
**Held.** Plaintiff was not entitled to recover costs pursuant to Rule 68 of the Rules of Civil Procedure because the offer of judgment made by plaintiff was not an offer to resolve the entire equitable distribution claim.
**Discussion.** Before the equitable distribution trial, plaintiff served upon defendant an offer of judgment pursuant to Rule 68. The offer would have allowed plaintiff to retain possession and ownership of the marital residence in exchange for her paying a distributive award to defendant for his share of the equity. The offer did not address any marital property or debt other than the marital residence. Defendant did not respond to the offer. A trial was held and a final order of equitable distribution was entered. Plaintiff received 69% of the marital estate and defendant received 31%. Plaintiff thereafter requested costs and attorney fees for expenses incurred by plaintiff following the offer of judgment, arguing that the judgment finally obtained by defendant was not more favorable than the offer she made pursuant to Rule 68. The trial court denied the motion, concluding that Rule 68 does not apply to actions for equitable distribution. The court of appeals affirmed the trial court but did not reach the issue of whether Rule 68 applies to equitable distribution cases in general. Rather, the court held that in order for the provisions of Rule 68 to apply, the offer made must be for the entry of a "final" judgment. Because the offer in this case did not address the division of the entire marital estate, the court of appeals held that it did not constitute an offer of final judgment.
**Held.** Even if plaintiff had made an appropriate offer of judgment and the final judgment was not more favorable to defendant than the offer, plaintiff would not be entitled to recover attorney fees as part of the costs awarded pursuant to Rule 68.
**Discussion.** Plaintiff requested attorney fees as part of the cost she was seeking pursuant to Rule 68. The court of appeals held that attorney fees would not be recoverable because no other statute provides for the payment of attorney fees in ED cases.

**Rowland v. Rowland, 623 S.E.2d 287(N.C. App., Dec. 20, 2005). Civil service retirement.**
**Held.** Trial court erred when it determined that wife's civil service retirement account was her separate property.
**Discussion.** During the marriage, wife worked for the Social Security Administration as a civil service employee. During the entire period of employment, she was exempt from social security coverage because she elected civil service coverage in lieu of social security. The trial court held that the civil service pension was separate property but the court of appeals disagreed. The appellate court reasoned that because 5 U.S.C. sec. 8345(j) provides that civil service pensions can be distributed to former spouses pursuant to a court order in connection with a divorce or separation, and because N.C. G.S. 50-20(b)(1) does not specifically exclude civil service retirement accounts from equitable distribution, the pension must be classified as marital to the extent it was earned during the marriage.

**McIntyre v. McIntyre, 623 S.E.2d 828(N.C. App., January 17, 2006). Interlocutory appeal.**
**Held.** Court of appeals dismissed appeal of ED judgment because claim for alimony remained pending in the trial court.
**Discussion.** Court of appeals held that the ED judgment was an interlocutory order not subject to appeal due to the fact that other claims from the original complaint were unresolved in the trial court. The court rejected appellant's argument that equitable distribution judgments affect a substantial right, holding that earlier appellate opinions have established that they do not. The court of appeals noted that the trial judge had not certified the issue of ED for appeal as allowed by Rule 54 of the Rules of Civil Procedure. Rule 54 allows a trial judge to certify there is no reason to delay the appeal of an order or judgment that finally resolves one claim in a case.

**Warren v. Warren, 623 S.E.2d 800(N.C. App., January 17, 2006). Classification; distributive award; divisible debt.**
**Held.** Trial court correctly classified real property as marital where title was transferred to the parties during the marriage as tenants by the entirety.
**Discussion.** Husband inherited real property from his father during the marriage. Husband and his brother transferred title to husband and wife as tenants by the entirety. Court of appeals held that trial court correctly concluded that husband failed to rebut the presumption that the transfer was a gift to the marriage. Testimony of the wife that she did not think the transfer was a gift was not sufficient to rebut the presumption of gift because the wife was not competent to testify about the intent of the donor. In addition, husband's testimony that he did not intend the transfer to be a gift was insufficient as a matter of law to rebut the presumption because numerous appellate cases have held that the testimony of the donor spouse alone is not enough to rebut the plain language of the conveyance.
**Held.** Trial court erred in ordering a distributive award without making a specific finding that the presumption in favor of an in-kind distribution had been rebutted.
**Discussion.** Trial court ordered an equal distribution, but awarded majority of property to husband and ordered husband to pay wife a distributive award in the amount of $20,322. Court of appeals remanded case to trial court for additional findings to show that presumption in favor of an in-kind distribution had been rebutted. Appellate court rejected argument that justification for distributive award was apparent in the order, holding that the trial judge must make the call as to whether the presumption has been rebutted in a particular case.
**Held.** Trial court erred in distributing a car to the daughter of the parties after finding that the daughter was the owner of the car on the date of separation.
**Discussion.** Trial court found that daughter of the parties owned the car. Therefore, according to the court of appeals, the trial court had no authority to distribute the car to the daughter in the equitable distribution order. Trial court can distribute only the marital and divisible property of the parties.
**Held.** Trial court erred in failing to classify husband's postseparation payments on a marital debt as divisible debt.

**Discussion.** Parties had an equity line of credit with a balance of $17,738 on the date of separation. Husband paid $4,320 in finance charges or interest on this debt with postseparation funds. Court of appeals held that on October 11, 2002, the General Assembly amended GS 50-20(b)(4)(d) to provide that postseparation decreases in marital debt should be classified as divisible property. Therefore, according to the court of appeals, payments made by husband after October 11, 2002 should have been classified as divisible property. However, the court of appeals distinguished an increase in the debt that occurred when wife borrowed an additional $7,500 during separation. According to the court of appeals, this new debt was not marital because it was incurred after separation. Therefore, any increase in that debt due to interest and finance charges, and any decrease due to postseparation payments, could not be classified as divisible debt. But the court of appeals stated that husband's payments on this debt incurred by wife during separation "should be taken into account" by the trial court on remand.
**Held.** Trial court erred in failing to make findings relating to evidence introduced concerning distribution factors.
**Discussion.** Trial court determined that an equal distribution was equitable but did not make findings about distribution factors shown by the evidence. Court of appeals remanded to trial court for findings as to all distribution factors established by the evidence, holding that such findings are necessary whether the trial court ultimately decides to enter an equal or an unequal distribution.

**Martin, Adams v. Roberts, 628 S.E.2d 812(N.C. App., May 2, 2006). Judgment liens.**
**Held.** Trial court erred in concluding that judgment lien against husband did not attach to his portion of property conveyed to former wife as a result of an order for equitable distribution.
**Discussion.** During their marriage, defendant and Sheila Roberts held property as tenants by the entirety. Also during the marriage, plaintiff Adams obtained a civil judgment against defendant. Following the docketing of the judgment, defendant and wife Sheila divorced. They entered into a consent order of equitable distribution. As part of the distribution, defendant was required to convey his interest in the real property formerly held by the parties as tenants by the entirety to his former wife Sheila. Eventually, he conveyed his interest by General Warranty Deed to Sheila. Plaintiff sought execution of her judgment lien against the portion of the real property now owned by Sheila that had belonged to defendant before the conveyance. Trial court denied plaintiff's request after concluding that Sheila took the property free of plaintiff's judgment lien. The court of appeals reversed. According to the court of appeals:

1. The judgment lien against defendant did not attach to the real property as long as it was held by defendant and Sheila as tenants by the entirety because the judgment was against defendant only.
2. The tenancy by the entirety was destroyed when the judgment of divorce was entered, and a tenancy in common was created.
3. Plaintiff's judgment lien attached automatically to defendant's interest in the property as soon as the tenancy by the entirety was destroyed.
4. When Sheila took title to the property, the judgment lien followed and attached to that portion of the property that had been defendant's undivided one-half interest in the property.

5. Plaintiff has the right to execute on the property to satisfy her judgment against defendant.

**Held.** Consent order requiring husband to convey his interest in real property formerly held by the parties as tenants by the entirety did not constitute a conveyance of that real property.

**Discussion.** Court of appeals held that the equitable distribution consent order did not operate as a conveyance, resulting in the destruction of the tenancy by the entirety (the tenancy was not destroyed until the divorce judgment was entered). The court acknowledged that court orders can constitute a conveyance if the order clearly states that it is intended to be a conveyance, contains a legal description of the real property, and is recorded with the register of deeds. However, in this case, the order clearly required that defendant make a subsequent conveyance.

**Postseparation Support and Alimony**
**Cases Decided Between October 1, 2005 and June 1, 2006**

**Stark v. Ratashara-Stark, 628 S.E.2d 471(N.C. App., May 2, 2006). Subject matter jurisdiction.**
**Held.** Order of alimony vacated where record on appeal showed that defendant failed to file a claim for alimony before the entry of an absolute divorce between the parties.
**Discussion.** Plaintiff filed complaint seeking divorce. Defendant filed answer that contained a statement that "the claims for alimony and equitable distribution are to be reserved." Thereafter, the trial court entered an absolute divorce. Several months later, defendant filed an amended answer and counterclaim requesting equitable distribution and alimony. Plaintiff filed an answer that did not raise an issue concerning the trial court's authority to adjudicate the claims. Trial court tried the claims and entered an alimony order. On appeal, plaintiff argued many issues dealing with substance of alimony order but did not object to the claim on the basis that defendant had not filed the request for alimony before the divorce was entered. The court of appeals held that matters of subject matter jurisdiction can be raised at any time and can be raised for the first time by the appellate court. According to the court of appeals, GS 50-11 provides that these claims must be filed before the entry of divorce. Therefore, a trial court does not have subject matter jurisdiction to adjudicate claims for alimony and equitable distribution that were not filed before a judgment of absolute divorce is entered. Defendant's statement in her original answer that the issues were "reserved" was insufficient to grant jurisdiction to the court when the issues had not in fact been pled. The court of appeals also noted that the failure to properly plead the claims cannot be waived by either party either expressly or by their conduct in participating in the trial of the claims.

**Child Support**
**Cases Decided Between October 1, 2005 and June 1, 2006**

**State ex. rel. Gillikin v. McGuire, 620 S.E.2d 899(N.C. App., November 1, 2005).**
**Deviation; denial of request to reimburse past paid public assistance.**
**Held.** Trial court erred in deviating from child support guidelines without making findings about the reasonable needs of the child.
**Discussion.** Complaint requested adjudication of paternity, child support, medical coverage and reimbursement to the State for public assistance paid on behalf of the minor child. After determining paternity, the trial court found that neither parent was employed due to disability and that both were receiving social security disability income. The trial court also found that the child was receiving social security payments due to the parents' disability and was covered by Medicaid for health insurance. The trial court ordered defendant to pay a minimum amount of support, deviating from the amount specified in the child support guidelines. Court of appeals held that deviation is appropriate when the trial court determines that 1) the guideline amount does not meet or exceeds the reasonable needs of the child, or 2) when application of the guidelines would be unjust or inappropriate. In either case, the trial court must make findings related to the reasonable needs of the child and the ability of the parents to pay support. While the order in this case contained findings about the ability of the parents to pay support, the court of appeals remanded the case to the trial court because the order did not contain findings regarding the reasonable needs of the child.
**Held.** Trial court erred in making prospective support payments due from the date of judgment rather than the date the complaint for support was filed without making findings to support deviation.
**Discussion.** Trial court set prospective support to begin one month following the entry of the child support order. The court of appeals held that prospective child support pursuant to the guidelines begins at the time the complaint seeking support is filed. A trial court may order prospective support to begin at a time other than the date the complaint is filed only after concluding that deviation is appropriate because 1) application of the guidelines would not meet or exceed the reasonable needs of the child, or 2) application of the guidelines would be unjust or inappropriate. Any deviation requires that the trial court make findings regarding the reasonable needs of the child and the ability of the parents to pay support.
**Held.** Trial court did not err in denying plaintiff's request for reimbursement of past paid public assistance.
**Discussion.** Trial court denied plaintiff's request for reimbursement after finding that during the 15 year time period at issue, the mother named several other people as potential fathers of this minor child. The trial court concluded that under such circumstances, it would not be fair to hold defendant responsible for the public assistance received by mother on behalf of the child. Holding that a trial court has discretion to consider "equitable factors" when determining whether to order reimbursement of public assistance, the court of appeals upheld the decision of the trial court.

**Uhrig v. Madaras, 620 S.E.2d 730(N.C. App., November 1, 2005). UIFSA - Registration of foreign order.**

**Held.** Trial court did not err in denying request to register 1989 child support order entered in Washington.

**Discussion.** In 1986, Washington entered a child support order directing plaintiff to pay support to defendant in the amount of $25 per month. All parties thereafter left Washington. Defendant and children moved to Tennessee. In 1988, parties entered a consent judgment in Tennessee granting plaintiff custody and ordering defendant to pay support in amount of $50 per month. Plaintiff and children left Tennessee and returned to Washington. Defendant remained in Tennessee. In 1989, Washington amended the Tennessee order to increase defendant's support obligation to $872 per month. Defendant did not make an appearance in the Washington action. In 1991, Tennessee refused to enforce the 1989 Washington order and set defendant's support obligation at $44 per week. Sometime after 1991, defendant moved to North Carolina.

Plaintiff filed Notice of Registration of the 1989 Washington order in North Carolina. Defendant filed a response stating that the Washington order should not be registered because it was superseded by the 1991 Tennessee order. The trial court held that the 1991 Tennessee order was the one controlling order under UIFSA and therefore denied registration of the 1989 Washington order. The court of appeals affirmed.

According to the court of appeals, UIFSA applies to determine whether the order should be registered even though the orders at issue were entered before the effective date of UIFSA in North Carolina. The court held that UIFSA applies to all requests for registration filed on or after the effective date of the act, January 1, 1996.

The court of appeals then held that the 1991 Tennessee order was the one controlling order because it was entered when Tennessee had continuing exclusive jurisdiction pursuant to UIFSA and it had not been superseded or amended by any other order. The court further held that 1989 Washington order was not entitled to full faith and credit because Tennessee had exclusive continuing jurisdiction at the time the Washington order was entered. According to the court of appeals, Washington lost continuing exclusive jurisdiction when all parties left the state following the original order in 1986. Tennessee obtained jurisdiction by consent of the parties in 1988, and Tennessee continued to have exclusive continuing jurisdiction until defendant left the state to move to North Carolina.

**Note from John Saxon**: The *Uhrig* decision is correct in holding that UIFSA and the FFCCSOA apply in determining the continued enforceability of child support order entered before these statutes were enacted and that under UIFSA and FFCCSOA there can be one and only one "controlling" child support order. However, the decision incorrectly concludes that these statutes apply "retroactively" to determine the initial validity of child support orders that were entered before these statutes were enacted or the validity of an order that was entered before these statutes were enacted and modified a child support order entered by a sister state's court. In this case, the Tennessee and Washington orders were entered prior to the enactment of UIFSA and FFCCSOA and their initial validity (as well as the authority of the Washington order to modify the Tennessee order) is governed by the law that was in effect at the time those orders were entered, not by UIFSA or FFCCSOA. UIFSA and FFCCSOA, therefore, could not have precluded the Washington court from entering the 1989 child support order against father

or "modifying" the Tennessee order. Assuming that both the 1989 Washington order and the Tennessee order were validly entered, application of UIFSA and FFCCSOA "controlling order" rules in the 2003 UIFSA registration proceeding should have resulted in a determination that the Washington order, not the Tennessee order, was the controlling child support order since at the time of the "controlling order" determination (in 2003) the Tennessee court no longer had continuing exclusive jurisdiction while the Washington court had continuing exclusive jurisdiction based on the continued residence of the mother and children in Washington. And, in any case, enforcement of the vested child support arrearages under the Washington order (assuming it was validly entered) is governed by the full faith and credit requirements of the U.S. Constitution, not UIFSA's and FFCCSOA's "controlling order" provisions. *See State ex rel. Jones v. Jones*, 623 S.E. 2d 272 (N.C. App., Dec. 20, 2005)(below).

**Roberts v. McAllister, 621 S.E.2d 191(N.C. App., November 15, 2005). Deviating from the guidelines; imputing income; consideration of income of new spouse.**
**Held.** Trial court did not err in deviating from guidelines in setting prospective child support.
**Discussion.** Parties share legal and physical custody of three children. Defendant is remarried and has three additional children with new wife. Plaintiff is married and has one additional child with new husband. Defendant earns $40,000 per year. Plaintiff does not work and her husband earns $300,000 per year. Trial court ordered plaintiff to pay defendant child support in the amount of $800 per month. The trial court concluded that plaintiff's obligation would be minimal pursuant to the guidelines due to the fact that she was unemployed. The trial court then determined that it was appropriate to deviate from the guidelines based upon the finding that the guideline amount would not meet the reasonable needs of the three children and the finding that plaintiff had an estate that would allow her to contribute more than the guideline amount to the support of the children. The court of appeals upheld the deviation concluding that the findings in the order were sufficient to show the reasonable needs of the children and the ability of each parent to meet the financial needs of the children. The trial court made findings that plaintiff possessed financial assets such as money held in joint accounts with her new husband. In addition, the trial court found that plaintiff had no financial needs of her own as she and her new husband had agreed that he would be totally responsible for all financial needs of her and their child. The court of appeals held that while a trial court cannot base child support on the income of the new spouse who has no support obligation to the children, the trial court can consider the income of the new spouse when determining the reasonable financial needs of the parent.
**Held.** Trial court did not err in imputing income to plaintiff.
**Discussion.** To determine the appropriate amount of support, the trial court imputed income to plaintiff in the amount of minimum wage. Plaintiff argued on appeal that it was error for the trial court to impute income merely because she was voluntarily unemployed. The court of appeals held that the trial court appropriately imputed income after concluding that the plaintiff's "naïve indifference" to the children's need for support amounted to "intentional and willful avoidance and showed a deliberate disregard of her responsibility to support her children."

**Held.** Case was remanded to trial court because findings were not sufficient to show the basis for the amount of support ordered by the court.
**Discussion.** The trial court deviated from the guidelines, imputed income to plaintiff and set support at $800 per month. While the trial court made many findings about the needs of the children and the financial circumstances of both parents, there were no findings to explain how the trial court arrived at the $800 figure.

**Swanson v. Herschel, 622 S.E.2d 159(N.C. App., December 6, 2005). Findings to support amount of arrearage.**
**Held.** Evidence offered during child support hearing and findings made in child support order were not sufficient to show that the trial court properly calculated amount of arrearage.
**Discussion.** Plaintiff offered a spreadsheet prepared by her attorney that simply listed an amount of support due for each of the past several calendar years. The trial court set out those amounts in the order and found that those amounts established the arrears owed by defendant. Court of appeals remanded for further evidence and findings, holding that the simple statement of amounts due was not sufficient to allow the appellate court to review whether the determination of arrearage was correct. Dissent by Judge Hunter.

**State ex rel Jones v. Jones, 623 S.E.2d 272(N.C. App., Dec. 20, 2005). Enforcement of foreign order.**
**Held.** Trial court erred when it refused to enforce past-due support owed under a Florida order for child support.
**Discussion.** 1994 Florida order split custody of children and required father to pay $500 per month in child support. Father moved to North Carolina. 1995 North Carolina URESA order determined that under North Carolina child support guidelines father did not owe prospective child support to mother and that arrearages under Florida order should not be enforced at that time because Florida order had been appealed. 1997 North Carolina order determined that father's child support arrearages under Florida order should be offset by mother's obligation to reimburse father for children's medical and dental expenses. In 2003, the Florida order was registered for enforcement in North Carolina pursuant to UIFSA. North Carolina court confirmed registration, determined that father owed more than $51,000 in child support arrearages under the Florida order, and ordered father to satisfy arrearages via payments of $500 per month. North Carolina court, however, subsequently refused to enforce the registered Florida order. Child support agency appealed on behalf of mother. Reversed and remanded.

The court of appeals rejected the argument that the 1994 version of the FFCCSOA precluded the North Carolina court from entering a "de novo" child support order that did not modify or supersede the Florida child support order. Since the FFCCSOA did not affect the validity of the 1995 North Carolina order, its validity and effect must be determined by other applicable laws that were in effect at the time the order was entered. Since North Carolina's version of UIFSA did not become effective until January 1, 1996, the validity and effect of the 1995 North Carolina URESA order was governed by URESA, not UIFSA. Under URESA, a "de novo" URESA order did not have the effect of modifying a prior child support order entered by a sister state's court. The North Carolina order, therefore, did not modify or supersede the Florida order and there are

therefore two valid child support orders-the North Carolina URESA order and the 1994 Florida child support order. When there are two or more valid child support orders and a party seeks enforcement of either of the orders, UIFSA's and FFCCSOA's "controlling order" rules apply to determine which of the orders is entitled to prospective enforcement. But when a party seeks enforcement of vested child support arrearages that have accrued under a valid, unmodified order prior to the date a court makes a "controlling order" determination, a court must enforce those arrearages under the full faith and credit clause of the U.S. Constitution without regard to UIFSA's and FFCCSOA's "controlling order" rules. [Although the appellate court did not find it necessary to determine whether the North Carolina or Florida order was the "controlling order" under UIFSA and FFCCSOA, it appears that the Florida order, rather than the North Carolina order, would have been entitled to recognition as the controlling child support order in 2003 assuming that the Florida order was valid when entered, was not validly modified by the 1995 North Carolina URESA order, and that the Florida court retained continued, exclusive jurisdiction based on the continued residence of the mother and one or more of the children.]

**Ugochukwu v. Ugochukwu, 627 S.E.2d 625(N.C. App., March 21, 2006). Contempt; application of foreign law**

**Held.** Trial court did not err by not applying the substantive law of England to determine whether plaintiff failed to comply with child support order entered in that country.

**Discussion.** Parties were divorced in England and an order for custody and child support was entered in that county. Parties agreed that the English order required plaintiff to pay an amount that equaled $1,252.50. Plaintiff paid the support until 2002 and then began to make payments of various lesser amounts than required by the order. Plaintiff admitted that he did not make the required payments, but argued that earlier payments made in excess of the ordered amount constituted “advance” payments of support. Plaintiff argued that pursuant to the law of England, such advance payments are appropriate. The trial judge held that the excess payments were gifts to the defendant and children, and did not excuse plaintiff from making the payments required by the child support order. The court of appeals affirmed, holding that while it is the substantive law of the issuing state or country that governs interpretation of the rights and responsibilities of the parties under a child support order, North Carolina rules of procedure require that any person arguing the applicability of foreign law has the burden of bringing the law to the attention of the trial court and of giving reasonable written notice of the law before any hearing during which the foreign law will be argued. The court cited GS 8-4 and Rule 44 of the NC Rules of Civil Procedure. Because the plaintiff in this case failed to give the required notice and produce the foreign law to the trial judge, the trial judge was correct in applying the law of North Carolina to determine the issues in the case. The court of appeals rejected the argument that the court and the other party were put on notice of the foreign law issue when defendant submitted the English order along with her motion for contempt.

**Held.** Findings were sufficient to support the conclusion that plaintiff has the present ability to pay the purge conditions of the contempt order.

**Discussion.** Trial court ordered plaintiff to pay $1,100 per month for five months and thereafter to pay $200 per month until the total arrears of $10,415 is paid in full. While evidence showed that plaintiff’s annual income varied significantly from year to year, the

trial court made findings based upon his financial affidavit that he contributed $1,624 monthly to an optional 401K plan and that he contributed $1,000 per month to his church.

**Guilford County v. Davis, N.C. App., S.E.2d (May 2, 2006). Wage withholding. Held.** Trial court erred in denying plaintiff's request for wage withholding order. **Discussion.** Child support enforcement office, on behalf of mother, brought action against defendant for reimbursement of past-paid public assistance and for order of prospective child support. Trial court ordered reimbursement and on-going support but denied plaintiff's request for automatic wage withholding. Court of appeals remanded to trial court, holding that GS 110-136.3 requires that the trial court enter a wage withholding order in every IV-D case. The statute leaves no discretion to the trial court. In a footnote, the court of appeals stated that a IV-D case is defined as any case in which "services have been applied for or are being provided by a child support enforcement agency established pursuant to Title IV-D of the Social Security Act" (42 USC sec. 666).

**Custody**
**Cases Decided Between October 1, 2005 and June 1, 2006**

**Black v. Black, 620 S.E.2d 924(N.C. App., November 1, 2005). Amendment of judgment to reflect statements made by judge in court.**
**Held.** Trial court erred in amending custody order to include visitation provision that judge announced in open court at conclusion of trial but did not include in final custody order.
**Discussion.** Custody order entered in 2001 provided defendant with overnight visitation on Wednesday of each week. At the conclusion of custody trial, the judge announced in open court that the overnight mid-week visitation would end when the child started kindergarten. However, the final written order did not specify that the mid-week visitation would end. When the child started kindergarten, the custodial parent refused to allow the mid-week visitation and the non-custodial parent filed a motion for contempt. Custodial parent filed a motion asking the trial court to amend the custody order to include the termination provision. The trial court granted the motion and the non-custodial parent appealed. The court of appeals held that the rules of civil procedure do not allow for the amendment of a judgment under these circumstances. Rule 59 would allow the trial court to amend the judgment, but only within 10 days of the entry of the order. Rule 60(a) allows the correction of clerical mistakes. However, the court of appeals held that this modification affected the substantive rights of the parties and therefore was not a clerical amendment. Finally, the court of appeals held that Rule 60(b)(6) does not allow amendment at all. Rather, it allows the court to relieve a party of the effects of a judgment under certain circumstances.

**Swanson v. Herschel, 622 S.E.2d 159(N.C. App., December 6, 2005). Contempt after child turns 18.**
**Held.** Issue of whether plaintiff's actions constituted willful contempt was moot because child turned 18 while appeal was pending.
**Discussion.** Order provided that defendant father was to have temporary custody of 17 year old son. While son was visiting mother, he indicated a desire to stay with her. Mother enrolled son in school. Father filed motion for contempt and trial court held that mother was not in willful contempt. Father appealed, and court of appeals held that issue was moot because the son turned 18 while the appeal was pending. Opinion does not address whether motion was for civil or criminal contempt. The opinion simply states that the issue was moot because a determination of the issue "cannot have any practical effect on the existing controversy."

**Karger v. Wood, 622 S.E.2d 197 (N.C. App., Dec. 6, 2005). Modification; connection between change and effect on child.**
**Held.** Trial court properly denied defendant's motion to dismiss plaintiff's motion to modify custody order where plaintiff's evidence was sufficient to support the trial court's conclusion that there had been a substantial change of circumstances affecting the welfare of the child.

**Discussion.** Mother was diagnosed with a brain tumor shortly after the birth of the child and was unable to care for the child without supervision. Defendant father was awarded primary physical custody of child at that time. Four years later, mother filed for modification of custody. At trial, evidence showed that: 1)mother's medical condition had improved and she was fit to care for the child; 2) defendant lost his job as the result of an affair with a married woman; 3) the affair caused defendant to separate from his third wife who had been a significant caretaker of the child; 4) defendant spent the night with the married woman on several occasions with the child present in the house; 5) defendant's new job required that he take the child to school very early and leave the child at school late in the evening; and 6) the child's grades at school had suffered over the past year before the motion was filed. Defendant filed a motion to dismiss pursuant to Rule 41 at the close of plaintiff's evidence. The trial court denied the motion and thereafter ordered joint legal custody to the parties with primary physical custody to mother. On appeal father argued that the evidence presented by mother at trial and the findings made by the court did not establish the connection between the changes and the effect of those changes on the child. The majority of the court of appeals held that the finding that the child's grades had suffered was sufficient to establish the nexus between the changes that had occurred since the original order was entered and the effect on the child. Dissent by Tyson.

**Greer v. Greer, 624 S.E.2d 423(N.C. App., Jan. 17, 2006). Presumptions between parents.**

**Held.** The trial court erred in basing custody decision in part on a finding that "the law of nature dictates that early in the life of the child, the mother has a distinct advantage in the opportunity to care for the child."

**Discussion.** Trial court made numerous findings to support a custody order providing for the joint legal and split physical custody of a two-year old child. Two findings concerned the general relationship between mothers and young children. The findings stated that the trial judge believed that the "very nature of the age and gender of the minor child" placed defendant father at a "disadvantage" with regard to custody and that "the natural law of birthing and breast-feeding gives the mother a distinct advantage to parent a newborn." On appeal, father argued that these findings showed that the trial court applied the now abolished "tender years doctrine," which provided that mothers of young children should be given custody as long as they are fit. The court of appeals agreed and remanded the case to the trial court for reconsideration of best interests without application of any presumption in favor of either parent.

**Held.** Trial court erred in taking judicial notice of "the natural bond that develops between infants and a mother, especially when the mother breast-feeds the infant."

**Discussion.** Court of appeals held that it is error to take judicial notice of any subject that "is open to reasonable debate." The court stated that G.S. 50-13.2(a), which provides that between natural parents "no presumption shall apply as to who will better promote the interest and welfare of the child," shows that there is reasonable debate as to the validity of the statements made by the trial court. The court of appeals pointed out that it is appropriate to make findings as to the benefits of breast-feeding for an infant or of a bond with a particular parent when those findings are based upon evidence presented during a custody trial.

**Everette v. Collins, 625 S.E.2d 796(N.C. App., February 21, 2006). Grandparents.**
**Held.** Trial court did not err in granting joint legal custody to parents with primary physical custody to dad while specifically approving "current placement" of child in the home of paternal grandmother.
**Discussion.** Mother had been primary caretaker of child until she became debilitated due to a serious illness. Father was in the military stationed in Iraq. Father and paternal grandmother filed for custody. Trial court found that mother was unable to care for the child due to her medical condition, and ordered primary physical custody to dad with visitation to mother. The trial court dismissed the grandmother's claim for custody, finding that she had not alleged or shown that mother had waived her constitutional right to custody. Nevertheless, the trial court's final order "approved of the current placement of the child with the paternal grandmother" due to the unavailability of the father. The court of appeals rejected mother's argument that the "placement" order violated her constitutional right to custody. According to the court of appeals, the order by the trial court did not offend the mother's constitutional rights because it did not grant the grandmother "any custodial rights." *See In the matter of H.S.F.*, 628 S.E.2d 416(N.C. App., April 18, 2006)(summarized in Janet Mason's Juvenile Case Update)(court of appeals discusses the decision in *Everette v. Collins.* Court in *H.S.F.* holds that awarding physical custody to one person and "placement" with another is inherently inconsistent. However, the court explained that in *Everette* the trial court and the court of appeals were merely expressing approval of father's decision to place child with grandmother while he was away from home).

**Doyle v. Doyle, 626 S.E.2d 845(N.C. App., March 7, 2006). Consideration of domestic violence; collateral estoppel**
**Held.** Trial court erred in making findings relating to an incident of domestic violence that contradicted findings made by another judge in an earlier 50B proceeding between the parties.
**Discussion.** Plaintiff father filed this custody action and defendant mother counterclaimed for custody. While this matter was pending, an altercation occurred between the parties that resulted in each filing 50B claims against the other. An order was entered in the 50B proceeding finding that defendant mother had committed an act of domestic violence against plaintiff father and that plaintiff did not commit an act of domestic violence against defendant. During the custody trial, both sides presented evidence concerning the incident. The judge in the custody trial made findings stating that she disagreed with the conclusions of the 50B judge, and found that plaintiff was the perpetrator of domestic violence and that defendant was the victim. The final custody order granted joint legal custody with primary physical custody to defendant mother. The court of appeals remanded the case to the trial court after concluding that the doctrine of collateral estoppel prohibited the trial judge from re-litigating the issue of domestic violence previously determined by the judge in the 50B action. The court of appeals held that while GS 50-13.2 required the custody judge to consider all acts of domestic violence between the parties, that statute did not authorize the judge to reconsider issues litigated and resolved in an earlier case between the same parties concerning the same incident. The court of appeals rejected defendant's argument that the doctrine of

collateral estoppel does not apply because the 50B order was a temporary order. According to the court of appeals, because the 50B order could have been appealed, it is considered "final" for purposes of collateral estoppel. The court also rejected defendant's argument that GS 50B-3(a1)(4) allows trial courts to re-litigate issues regarding domestic violence. The court of appeals pointed out that GS 50B-3(a1)(4) provides only that the trial court in a Chapter 50 proceeding is not bound by any finding made in a 50B order regarding custody. However, that statute does not allow a chapter 50 judge to reconsider whether an act of domestic violence occurred and which party committed domestic violence.

**In the Matter of H.S.F., 628 S.E.2d 416(N.C. App., April 18, 2006). In chambers interviews of children.**
**Held.** Father's failure to object to in chambers interview of child was an "informed acquiescence" to the interview.
**Discussion.** A juvenile case with many other issues summarized in Janet Mason's juvenile case update. However, judge interviewed minor child in chambers after father indicated that he would like to call the child to testify. Mother and GAL consented to the in chambers interview but father neither consented nor objected. On appeal, he argued that the trial court erred in interviewing the child outside of the courtroom without the consent of both parties. Court of appeals held that because father had the opportunity to object but did not, the trial court acted properly in presuming that he consented to the interview.

**Separation and Property Settlement Agreements**
**Cases Decided Between October 1, 2005 and June 1, 2006**

**Jackson v. Jackson, 360 N.C. 56, 620 S.E.2d 862(2005), adopting dissent in 169 N.C. App. 46, 610 S.E.2d 731 (2005). Vague agreements; parol evidence**
**Held.** Trial court erred in voiding an entire agreement for vagueness and uncertainty where intent of the parties could be determined from the plain language of the agreement, and any ambiguities creating questions of fact could be resolved with parol evidence.
**Discussion.** Wife brought action for specific enforcement of separation agreement. Husband counterclaimed for specific performance but also requested that the agreement be voided because the terms were too vague to enforce. The trial court voided the agreement and the court of appeals agreed. The court of appeals rejected plaintiff's argument that the trial court should have considered the intent of the parties to interpret the agreement, holding that the degree of vagueness in this particular agreement would have required the trial court to supply material terms to the contract. While the parol evidence rule allows a trial court to consider evidence of intent in order to interpret ambiguous terms, the court of appeals held that the rule does not allow a trial court to create terms that were not agreed upon at the time the agreement was signed. Dissent argued that the terms were not too ambiguous to be interpreted, and the supreme court adopted the dissenting opinion. Taking the provisions one by one, the dissent interpreted the meaning of each by "inferring" the meaning of the provisions from the language used in the agreement. According to the dissent adopted by the supreme court, when an agreement shows a clear intention to create binding obligations, the specific intentions of the parties can be inferred from the language of the agreement. Ambiguous terms can be explained or interpreted using parol evidence.

**County of Jackson v. Nichols, Nichols and Nichols, 623 S.E.2d 277(N.C. App., Dec. 20, 2005). Enforcement of agreement when agreement anticipates preparation of additional documents.**
**Held.** Trial court did not err in granting summary judgment in favor of former husband and his current wife (James Nichols and Kimberly D. Nichols).
**Discussion.** Separation agreement between James Nichols and his first wife, Kimberly A. Nichols, divided a tract of land between the two. The agreement stated that for a period of ten years, neither party would sell their portion of the track without first offering to sell the land back to the other. The agreement provided that if one sold the property without offering it first to the other, the breaching party must pay the entire purchase price to the other. However, the agreement also stated that a separate "right of first refusal agreement" would be executed on the same date as the separation agreement. No such additional agreement was ever signed. Both parties executed deeds to each other to accomplish the division provided by the agreement.

Mr. Nichols subsequently married Kimberly D. Nichols. Kimberly A. then sold her portion of the property back to James and Kimberly D. Soon thereafter, and within the 10 year period following the separation agreement, Jackson County entered into a contract with James and Kimberly D. to purchase the entire track for $1.5 million. James did not offer the property to Kimberly A. and Kimberly A. filed action in district court to

enforce the agreement. District court held that James had breached the agreement. Thereafter, James and Kimberly D. refused to go through with the sale to the county.

Jackson County sued all of the Nichols seeking to enforce the contract for sale of the land. Kimberly A. filed a crossclaim against James seeking to enforce the separation agreement. Superior court granted James' motion for summary judgment and the court of appeals affirmed.

According to the court of appeals, the right of first refusal set out in the separation agreement was merely an agreement to agree. The court held that the language of the contract itself and the conduct of the parties following execution of the agreement showed that neither intended to be bound by this provision in the agreement until the subsequent right of first refusal agreement was executed. Despite the amount of detail in the separation agreement regarding the terms of the right of first refusal and the consequences for the breach of that provision, the agreement clearly stated that a subsequent document would be drawn to create the right of first refusal. In addition, Kimberly A. executed two deeds subsequent to the execution of the separation agreement, one to effectuate the original division of the track and one when she sold her section back to James and his new wife. Both deeds were general warranty deeds containing the statement that the property was not subject to any encumbrance. The court of appeals held that because a right of first refusal is an encumbrance on property, the fact that wife executed the two general warranty deeds proved she did not intend the right of first refusal to be enforceable.

**Fucito v. Francis, 622 S.E.2d 660(N.C. App., Dec. 20, 2005). Declaratory judgment actions.**

**Held.** Trial court had no subject matter jurisdiction to hear a declaratory judgment action seeking interpretation of a separation agreement that had been incorporated into a divorce judgment.

**Discussion.** Parties entered into a separation agreement providing for the payment of a distributive award over time. The agreement was incorporated into the parties' divorce judgment. Subsequently, the parties disagreed over the terms of the distributive award. Plaintiff former husband filed a declaratory judgment action in district court asking the court to interpret the agreement and declare the rights of the parties. The trial court interpreted the ambiguous agreement and ordered former wife to comply with the terms found by the trial court. On appeal, former wife argued that the trial court has no subject matter jurisdiction to hear a declaratory judgment action relating to an agreement that has been incorporated and the court of appeals agreed. The court of appeals held that the declaratory judgment statute, G.S. 1-254, allows a court to interpret contracts. While most consent judgments are treated as contracts and can be the subject of declaratory judgment actions, consent judgments in domestic cases are treated as court orders in all respects. Court orders are not appropriate subjects for a declaratory judgment action. The opinion points out that the appropriate remedy in this case would be a contempt proceeding alleging that former wife is not complying with terms of the order.

**Dawbarn v. Dawbarn, 625 S.E.2d 186(N.C. App., February 7, 2006). Postnuptial agreements; public policy; statute of limitation; fiduciary duty**

**Held.** Property agreement between the spouses executed during the marriage did not violate public policy.

**Discussion.** Nine years before the parties separated, defendant confronted plaintiff about his extramarital affair. As a result of that conversation, plaintiff agreed to execute an agreement transferring almost all of the property acquired during the marriage to defendant as her "sole and separate" property that she would own, free of any claim by plaintiff including equitable distribution. Defendant hired an attorney to assist with drafting and executing the agreement, but plaintiff did not consult with a separate attorney. Following separation, plaintiff filed this action requesting that the agreement be voided on the grounds of undue influence, fraud, breach of fiduciary duty, lack of consideration, and contravention of public policy. The trial court granted summary judgment in favor of defendant and the court of appeals affirmed. The court of appeals cited GS 52-10(a), which provides that contracts between spouses during marriage, with or without consideration, are valid and enforceable as long as the agreement does not violate public policy. The court held that while agreements that encourage parties to separate are a violation of public policy, the agreement at issue in this case did not provide incentive for one party to end the marriage. All property was transferred immediately upon execution of the agreement, and no term of the agreement was linked to separation in any way.

**Held.** Trial court properly concluded that 3 year statute of limitation on claims of fraud, duress and undue influence began to run at the time the agreement was executed.

**Discussion.** Plaintiff argued that he executed the agreement due to defendant's threats to sue the person with whom he engaged in the extramarital affair. According to plaintiff, defendant's threats amounted to fraud, duress or at least undue influence. Court of appeals held that each of these claims is subject to a three year statute of limitation that begins to run when the fraud, duress or undue influence is committed. In this case, the conduct was alleged to have occurred at the time the agreement was executed. Because more than nine years passed between the time of execution and the filing of the lawsuit, the trial court was correct in granting summary judgment in favor of defendant on these claims.

**Held.** Defendant wife did not owe plaintiff husband a fiduciary duty at the time of the execution of the agreement even though the parties were married, because defendant had employed an attorney to assist with drafting the agreement.

**Discussion.** Plaintiff argued that defendant breached her fiduciary duty to defendant by having the agreement executed and by waiting more than nine years to seek to enforce it. The court of appeals held that while there is a fiduciary relationship between a husband and wife, that fiduciary relationship ends when one or both spouses is represented by legal counsel. Therefore, the fiduciary duty between plaintiff and defendant ended when defendant hired the lawyer to assist with the drafting and execution of the agreement. In addition, the court of appeals held that even if the fiduciary duty remained in tact, that duty only requires that a spouse make full disclosure of all relevant information before entering into an agreement. In this case, there was no allegation that defendant had failed to disclose anything.

**Kornegay v. Robinson, 625 S.E.2d 805(N.C. App., February 21, 2006). Premarital agreement; voluntariness**

**Held.** Trial court erred in granting summary judgment for defendants where there was a material issue of fact as to whether plaintiff voluntarily entered into the premarital agreement.

**Discussion.** Premarital agreement provided that both parties retained their separate property and waived all rights to the property of the other, including inheritance rights. Following the death of husband, plaintiff filed this declaratory judgment action against estate of husband requesting that the prenuptial agreement be invalidated. Trial court entered summary judgment in favor of defendants after finding no material issue of fact as to the validity of the agreement. Court of appeals reversed, finding that plaintiff's allegations raised a genuine issue of fact concerning whether plaintiff voluntarily entered into the agreement. The court of appeals held that the following allegations, if found to be true, would support a finding that the agreement was not entered into voluntarily.

1. Plaintiff signed the agreement "while in route to the wedding."
2. Plaintiff believed that the agreement would apply only in the case of divorce.
3. She signed the agreement within 10 minutes of receiving it and no one explained it to her.
4. Plaintiff has only a high school education.
5. She was not represented by counsel at the time of execution.
6. Husband did not disclose all of his assets to her at the time of signing and she was unaware of the full extent of his real estate holdings.

**Divorce and Annulment**
**Cases Decided Between October 1, 2005 and June 1, 2006**

**Pickard v. Pickard, 625 S.E.2d 869(N.C. App., February 21, 2006). Annulment**
**Held.** Trial court properly dismissed plaintiff's claim for annulment after concluding that plaintiff was barred by the doctrine of judicial estoppel from attacking the validity of the marriage.
**Discussion.** Plaintiff and defendant had been married for eleven years when plaintiff filed complaint seeking annulment of the marriage based upon his assertion that the marriage ceremony was not conducted by a properly ordained minister. The trial court found that the ceremony had been performed by a Cherokee shaman or "medicine man." In addition to his status as a shaman, the man possessed a certificate stating he was ordained as a minister in the Universal Life Church. The trial court found that the shaman was not a properly ordained minister and therefore concluded that the ceremony had not been properly solemnized as required by law. However, the trial court dismissed the annulment claim after concluding that plaintiff was estopped from denying the validity of the marriage because of statements he made in an earlier court proceeding wherein he adopted defendant wife's daughter. In the adoption proceeding, plaintiff made numerous statements in pleadings and affidavits alleging that he was married to defendant. The court of appeals agreed with the trial court and held that the doctrine of judicial estoppel precluded plaintiff from contesting the validity of his marriage after he had alleged the validity of the marriage in the other court proceeding.

**Agbemavor v. Keteku, N.C. App., S.E.2d (May 16, 2006). Service of process; findings of fact.**
**Held.** Trial court erred in failing to make findings of fact regarding service of process after defendant filed request for findings pursuant to Rule 52.
**Discussion.** Plaintiff filed complaint for absolute divorce. Plaintiff attempted service at a number of addresses and then used service by publication. Before the summary judgment hearing, defendant filed a Rule 12 motion objecting to personal jurisdiction due to improper service of process and requesting that if the court found that service was proper, the order contain findings of fact to support the conclusion. The trial court found service to be proper but did not make factual findings. Court of appeals remanded, holding that the request pursuant to Rule 52 required that the trial court make findings and resolve factual issues relevant to the conclusion that service was appropriate. The court of appeals noted that Rule 52 does not apply to require findings to support a motion for summary judgment upon request, but is applicable to Rule 12 motions.

**Miscellaneous Family Law Cases**
**Cases Decided Between October 1, 2005 and June 1, 2006**

**McCutchen v. McCutchen, 360 N.C. 280, 624 S.E.2d 620(2006), *reversing* 107 N.C. App. 1, 612 S.E.2d 162 (2005). Alienation of affection; statute of limitations**
**Held.** Trial court erred in dismissing claim for alienation of affection on the basis that plaintiff waited more than 3 years after she separated from her husband before filing the claim against defendant.
**Discussion.** Trial court dismissed claim after concluding that, at the latest, a cause of action for alienation of affection must accrue on the date plaintiff separates from her spouse. In this case, plaintiff filed her claim more than 3 years after her separation from her husband. However, plaintiff alleged that she and her husband had genuine love and affection even after separation and that they engaged in marital counseling until a few weeks before husband filed for divorce. Wife alleged that defendant's conduct after separation contributed to the ultimate alienation of her husband's affection even though the misconduct began before the separation. The court of appeals agreed with the trial court, holding that a cause of action for alienation of affection must accrue at the latest at the time of separation. Supreme Court disagreed, holding that the claim accrues whenever the alienation is complete. The court noted that as long as parties are still married, they may retain the requisite love and affection for one another despite separation. The court stated that the determination of when alienation was complete generally will be a question of fact for a jury.
**Held.** The case of *Pharr v. Beck*, 1476 N.C. App. 268, 554 S.E.2d 851 (2001) was wrongly decided by the court of appeals and is expressly overruled.
**Discussion.** In *Pharr*, the court of appeals held that claims for alienation of affection must be based on pre-separation conduct. Evidence of postseparation conduct is admissible only to corroborate pre-separation events. The court of appeals in *McCutchen* relied in part on *Pharr* when it decided that the statute of limitations on the claim must begin to run no later than the date of separation. The supreme court held that the *Pharr* decision was inconsistent with opinions issued by the court of appeals both before and after that decision. According to the supreme court, alienation of affection can be based on conduct of a defendant both before and after the separation of the spouses.

**Fox v. Gibson, 626 S.E.2d 841 (N.C. App., March 7, 2006). Alienation of affection and criminal conversation; personal jurisdiction**
**Held.** Trial court did not err in denying defendant's motion to dismiss for lack of personal jurisdiction.
**Discussion.** Plaintiff's complaint alleged criminal conversation and alienation of affection against defendant. Defendant resides in Georgia and claimed that she never had sexual relations with plaintiff's husband in North Carolina. However, plaintiff's husband executed an affidavit stating that defendant had numerous phone conversations with him while he was in North Carolina, exchanged many emails with him in North Carolina, and had sexual relations with him in North Carolina. The court of appeals held that these allegations were sufficient to allow the North Carolina court to exercise jurisdiction pursuant to the long-arm statute found in GS 1-75.4(3)(causing injury in this state

through an act or omission occurring within the state). In addition, these allegations along with the facts that Georgia has abolished the torts of criminal conversation and alienation of affection and that traveling to North Carolina to litigate would not be overly burdensome to defendant due to the proximity of Georgia to this state, were sufficient to meet the 'minimum contacts' requirement of due process.

**Carson v. Carson, 628 S.E.2d 439(N.C. App., April 18, 2006). Settling record on appeal.**
**Held.** Appeal dismissed because appellant failed to comply with Rule 11 of Rules of Appellate Procedure.
**Discussion.** Appeal of an order of equitable distribution and alimony. Appeal dismissed in part due to respondent's improper request that trial court settle the record on appeal. Court of appeals stated that the trial court's role in the settling of the record on appeal changed significantly with the amendment of Rule 11 on May 6, 2004. According to that rule, the trial court is allowed to settle issues only if a party "contends that materials proposed for inclusion in the record or for filing therewith … were not filed, served, submitted for consideration, admitted, or made subject to an offer of proof …[at the trial level]" Appellant in this case requested the trial court to order that an Affidavit for Attorney Fees not be included in the record because of appellant's contention that the Affidavit was not relevant to the issues on appeal. The court of appeals held that because this was not a proper issue for the trial court pursuant to the new provisions of Rule 11, the trial court should not have been requested to settle the record.