Family Law Update
Cases Decided Between
October 1, 2012 and June 4, 2013

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Postseparation Support and Alimony
Cases Decided Between October 1, 2012 and June 4, 2013

Interlocutory appeal while attorney fee claim remains pending

- Appeal of alimony order was an inappropriate interlocutory appeal where attorney fee claim remained pending in the trial court.
- When all substantive issues have been decided, trial court can certify alimony order for immediate appeal pursuant to Rule 54(b) while claim for attorney fees remains pending.

Duncan v. Duncan, 732 S.E.2d 390 (NC App, Oct. 2, 2012), discretionary review allowed, 736 SE2d 186 (NC Jan. 2013). Defendant attempted to appeal trial court order for alimony and equitable distribution before trial court resolved plaintiff's pending claim for attorney fees. The court of appeals dismissed the appeal as an inappropriate interlocutory appeal. The appeal was interlocutory because the attorney fee claim remained pending. The court of appeals held that the appeal would be appropriate if the trial judge had certified the matter for immediate appeal pursuant to Rule 54(b). Because the trial court had not made that certification in this case, the appeal was dismissed.

Cohabitation; retroactive alimony

- Findings of fact support trial court conclusion that wife did not engage in cohabitation.
- Trial court does not need to consider subjective intent of parties regarding cohabitation unless there is a conflict in the evidence concerning the objective facts.
- Trial court has discretion to award alimony back to the date of separation rather than only back to the date the alimony claim is filed.

Smallwood v. Smallwood, _N.C. App._, _S.E.2d_ (May 21, 1013). In determining whether a dependent spouse has engaged in cohabitation, a trial court must consider the totality of the circumstances to determine whether there has been a "voluntary mutual assumption of those marital rights, duties and obligations which are usually associated with married people." The court of appeals does not engage in a de novo review of a trial court's determination regarding cohabitation. Instead, the appellate court reviews only whether there was competent evidence sufficient to support the trial court's conclusion regarding cohabitation. This review standard means, according to the court of appeals, that "the mere presence of certain, isolated factors does not automatically mandate a finding of cohabitation." Rather, it is within the discretion of the trial court to determine whether the facts indicate cohabitation. In this case, the court of appeals held that trial court's findings supported its conclusion of no cohabitation where the objective facts showed: boyfriend stayed at wife's house five to seven nights each week, he sometimes helped prepare meals and sometimes cared for her dogs, they ate out together several times each week, went on overnight trips together, attended church together and kissed each other goodbye, but he maintained his own residence, did not keep clothes or a toothbrush at wife's residence, did not pay any of wife's expenses, did not shower or bathe at wife's residence, and did not refer to her as his wife. The court of appeals also rejected husband's argument that the trial court should have considered the subjective intent of wife and boyfriend, holding that there was no conflict over the objective facts of the relationship. The court of appeals also upheld the trial court's decision to make the alimony award payable from time of separation until time PSS order was entered, and then from time PSS award ended forward in time. The court of appeals rejected

husband's argument that while retroactive alimony was authorized before the alimony statutes were amended in 1995, the 1995 version of the statute does not allow retroactive alimony. The court of appeals held that nothing in the present alimony statute prohibits retroactive support.

Equitable Distribution

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Military retirement and disability pay

- Trial court did not err in ordering plaintiff to compensate defendant for military retirement pay plaintiff gave up when he elected to take military disability instead of his retirement pay.
- While the trial court cannot divide the federal disability benefits between the parties or require plaintiff to pay defendant a portion of the disability payments, the trial court can enforce the previous property distribution order by requiring plaintiff to compensate defendant for the retirement income defendant lost when plaintiff converted his retirement to disability.

Hillard v. Hillard, 733 S.E.2d 176 (N.C. App., Oct. 2012). Trial court entered an ED judgment in 1994 ordering plaintiff to pay defendant a portion of his military pension when he began to receive it upon retirement. In 2008, the parties entered a consent judgment amending the original ED order, specifying defendant was entitled to 50% of plaintiff's military retirement points. When plaintiff retired, he elected to covert his retirement pay to tax-free disability pay. In 2010, defendant filed a motion to amend the ED judgment asking that the trial court order plaintiff to pay defendant the amount she would have received had plaintiff not converted his retirement to disability and the trial court amended the judgment to require plaintiff to pay defendant directly the amount she would have received in retirement pay. Plaintiff argued on appeal that federal law prohibits a trial court from distributing military disability pay. The court of appeals agreed but held that the trial court did not order plaintiff to pay a portion of the disability pay. Instead, the trial court ordered plaintiff to compensate defendant for the amount of retirement pay she was awarded by the original ED order. According to the court of appeals, because the trial court allowed the amount to be paid "from any source the military spouse chooses," the trial court did not violate federal law prohibiting the distribution of disability benefits.

Division of Real Property

- Trial court did not err in subdividing marital real property without making inquiry as to whether either party could shoulder existing debt on the real property and buy-out the other rather than splitting the property in-kind. There is no requirement that a trial court make such a finding to support a division.
- Similarly, the trial court did not err in dividing the real property between the parties even though there was uncontroverted evidence that the property was more valuable intact.

Copeland v. Copeland, unpublished opinion, _N.C. App._, _S.E.2d_ (December 18, 2012). The marital residence of the parties consisted of a house situated on a 25.39 acre tract of land. The trial court divided the marital property by awarding the house and one acre of land to wife and the rest of the property to husband. On appeal, husband argued that the case of *Edwards v. Edwards*, 152 NC App 185 (2002), allows such an in-kind division of a tract of land only if the trial court finds that one spouse does not have the financial ability to buy-out the interest of the other. The court of appeals held that while the court of appeals in the *Edwards* case approved of the trial court's consideration of the fact that neither party in that case could pay off the interest

of the other, that opinion does not limit the trial court's discretion to divide the property in-kind and does not require that the trial court make a finding of fact on that issue. In addition, husband argued that the case of *Troutman v. Troutman*, 193 NC App 395 (2008), holds that a trial court may not divide a tract in-kind if evidence shows the tract is more valuable intact. Again, the court of appeals held that the court in *Troutman* approved of the trial court's consideration of such evidence but did not hold that trial courts must make such findings before deciding to subdivide tracts of real property.

Classification of gift from parents; value of country club membership; postseparation decrease in value of investment account; distributive award payable in excess of six years

- When property is acquired from the parents of one spouse during the marriage, a gift to that spouse is presumed. Other spouse has burden of rebutting presumption.
- Trial court erred in classifying as marital property a grand piano received during marriage from parents of one spouse without concluding the presumption had been rebutted based on evidence presented.
- Trial court did not err in valuing country club membership at the cost for a divorced spouse to rejoin the club on the date of separation even though evidence showed the membership had no "cash value".
- Trial court erred in ordering distributive award payments to be made for longer than 6 years past the date of divorce without making appropriate findings of fact to keep the payments from being considered taxable income to the receiving spouse.
- As postseparation decrease in value of marital property is presumed to be divisible property, trial court is required to classify a decrease in value of an investment account as divisible property unless the court makes findings of fact to show the postseparation actions of one party caused the decrease in value.

Gould v. Gould, unpublished opinion, 736 S.E.2d 649 (N.C. App., January 15, 2013). The court of appeals addressed a number of issues relating an ED judgment in this unpublished opinion but only the ones with possible broader implication are addressed here.

1). The appellate court remanded for further evidence to support the trial court's classification of a grand piano as marital property. The piano had been received by wife during the marriage from her parents. The court of appeals held when property is acquired during the marriage from the parents of one spouse there is a presumption that the property is a gift to that spouse. To prove the property marital, the other spouse has the burden of proving the transfer was for consideration or that the gift was intended for both spouses. In this case, the only evidence supporting the trial court's classification of the piano as marital did not appear in the record on appeal. Therefore, the court of appeals instructed the trial court to make further classification findings on remand.

2). The court of appeals upheld the trial court's determination of value of a country club membership based on evidence that, on the date of separation, a divorced spouse could "re-purchase" a membership for $2000. The trial court adopted this value despite evidence that the membership itself had no cash value.

3). The court of appeals also remanded the issue of the distributive award to the trial court for further findings of fact. The ED judgment ordered that an award of $78,738.65 be paid in monthly installments of $1,312.31 for a period of approximately 5 years from the date of the ED judgment but more than 6 years from the date of divorce. The court of appeals held payment schedules lasting longer than 6 years from the date of divorce must be supported with findings indicating that "legal or business impediments, or some overriding social policy, prevent completion of the distribution within the 6-year period." Such findings are required because the payments will be viewed as ordinary taxable income by the IRS rather than as a nontaxable transfer incident to divorce absent such findings by the trial court and GS 50-20 prohibits the court from ordering cash payments that will be treated as taxable income.

4). Finally, the parties owned an E-Trader account with a date of separation value of $228,032 and a date of trial value of $651. The trial court distributed the account to husband at a value of $206,102 without making specific findings and conclusions about the classification of the postseparation decrease in value. The court of appeals held that the decrease in value is presumed to be divisible property. The party seeking to avoid the divisible classification has the burden to show how much of the decrease was due to the postseparation action of either spouse. The court of appeals directed the trial court on remand to make findings of fact as to whether and to what extend the decrease in value was due to passive market forces and how much was due to the actions of one of the parties.

Burden of proof in classification; value based on lay testimony; distribution factors

- Trial court improperly allocated burden of proof in classifying bank accounts opened during the marriage. Because evidence showed both separate and marital funds were deposited during the marriage, misallocation of burden of proof could not be harmless error.
- A property owner's opinion regarding the value of the property is admissible if witness can give some basis for his opinion.
- The trial court should identify the statutory factor authorizing consideration of facts as distribution factors. So when trial court made findings as to one party's contributions of separate property to the marriage, the judgment should have identified that such a fact is considered as a distribution factor pursuant to GS 50-20(c)(12).

Finney v. Finney, _N.C. App._, 736 S.E.2d 639 (N.C. App., January 15, 2013). The trial court concluded that two bank accounts opened during the marriage were the separate property of husband after concluding wife "did not meet her burden of proving the accounts were marital." The court of appeals held that the trial court clearly misallocated the burden of proof because the account were acquired during the marriage and owned on the date of separation. These two facts established the accounts should be presumed to be entirely marital property and the burden was on the husband to prove the extent to which the accounts were separate property. Evidence showed that while the accounts originally were opened with funds inherited by husband, marital funds had been added throughout the marriage. The court of appeals upheld the trial court's valuation of the marital residence based on husband's opinion as to the value. The court of

appeals held that an owner of real property can offer opinion evidence of value as long as the owner shows knowledge of the value and a basis for his opinion. In this case, husband knew the value because he had been engaged in the process of selling the property and his opinion was based on his consultation with a local realtor regarding the sale. Finally, wife argued on appeal that the trial court erred in considering the contribution of separate funds by husband and wife's offer to contribute separate funds to the marriage pursuant to distribution factor GS 50-20(c)(8)["any direct contribution to an increase in value of separate property which occurs during the course of the marriage"]. The court of appeals held that such facts can be considered pursuant to GS 50-20(c)(12), the 'catch-all factor' and ordered the trial court on remand "to clarify to which statutory factor its findings apply."

Tracing separate property

- Wife successfully traced amounts held in two bank accounts on date of separation to inheritance received by her years before separation by testifying that while she had opened and closed various accounts with the inherited money over the years of the marriage, marital funds never were comingled with the inherited funds.

Congdon v. Congdon, unpublished opinion, 741 S.E.2d 514 (N.C. App., April 16, 2013). Court of Appeals upheld trial court classification of bank account as separate property of the wife. Although the account had been opened during the marriage, thereby implicating the marital property presumption, wife rebutted the presumption by testifying that she inherited a large sum of money from her grandfather during the marriage and used that money to open a bank account in her name. While the original account was closed when the parties changed residences and new accounts were opened and closed throughout the years of the marriage, wife testified that none of the accounts ever held anything other than the inherited money and interest earned thereon. The court of appeals rejected husband's argument that this testimony alone was insufficient to trace the money existing on the date of separation to the inherited money.

Distribution factors

- ED judgment must make findings of fact concerning every distribution factor about which evidence is presented, even if the trial court ultimately concludes that an equal distribution is equitable.

Hinkle v. Hinkle, _N.C. App._, _S.E.2d_ (May 21, 2013). Parties listed contentions for an unequal distribution in the pretrial order entered before beginning of ED trial. Trial court ultimately concluded that an equal distribution was equitable but made no findings about most of the distribution factors argued by both parties. The court of appeals remanded for a new distribution. According to the court of appeals, the trial court must make findings as to all factors supported by the evidence, even if the trial court concludes that an equal distribution is equitable.

Custody

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Findings of fact needed to support conclusion of best interest; incarcerated parent

- Trial court custody order denying visitation to incarcerated parent did not contain sufficient findings of fact to support trial court conclusion that "facilities of incarceration are not suitable environments for minor children [to visit]."

Bobbitt v. Eizenga, unpublished opinion, _N.C. App._, _S.E.2d_. Incarcerated father filed custody action against mom seeking visitation with minor child. Despite making a finding of fact that father was in a facility with a room designated for the exclusive purpose of allowing inmates to visit with their minor children in an environment suitable for children, the trial court nevertheless concluded that the facility was not a suitable environment for minor children. Based on that conclusion, the trial court denied visitation to the father. The court of appeals remanded the matter to the trial court, holding that the trial court made no finding of fact that would support the conclusion that the facility was an inappropriate place for father to exercise visitation with the child.

Jurisdiction

- In determining whether court in another state has jurisdiction under 50A-206 (simultaneous proceedings provision), an NC court must determine whether the court in the other state "has substantially the same type of jurisdiction that we have," rather than "whether the statutory prerequisites for determining custody jurisdiction were substantially complied with in a given case."
- The requirements of GS 50A-110 regarding communication between courts apply to all communications, regardless of whether the communication is required by the UCCJEA.

Jones v. Whimper, 736 S.E.2d 170 (N.C., January 25, 2013), affirming but vacating portions of, 727 SE2d 700 (N.C. App. 2012). Trial court dismissed custody proceeding after concluding New Jersey was exercising jurisdiction in a custody proceeding concerning the same child filed prior to the North Carolina action. Applying the simultaneous proceedings provision in GS 50A-206, the North Carolina trial court determined that because the New Jersey court was acting "substantially in accordance with the UCCJEA," the North Carolina proceeding must be dismissed for lack of subject matter jurisdiction. The court of appeals affirmed the trial court after concluding that New Jersey did have home state jurisdiction at the time the New Jersey proceeding was filed and after rejecting the argument that the North Carolina trial court had erred by failing to give the parties an opportunity to present arguments regarding jurisdiction after communicating with the judge in New Jersey, as required by GS 50A-110. Concluding that the trial court conducted the proceeding in "substantial compliance" with the UCCJEA, the court of appeals affirmed the dismissal. The supreme court affirmed the result of the court of appeals but vacated portions of the opinion. First, the supreme court clarified that when applying the simultaneous proceedings provision in GS 50A-206, the trial court must determine whether the court acting in the previously filed proceeding is exercising "substantially the same type of jurisdiction as we have," and not whether that court is following all statutory procedures "for

determining child custody jurisdiction." In other words, the North Carolina court was required to dismiss the case after determining New Jersey was exercising home state jurisdiction. The North Carolina court could not, for example, look further at the detail of the proceedings in New Jersey and exercise jurisdiction if there appeared to be procedural errors in the New Jersey case. The supreme court appeared to be concerned with the implication in the language of the court of appeals opinion that a court would not be acting in "substantial compliance" with the UCCEA if the communication provisions of section 110 of the Uniform Act were not followed. Second, the supreme court disagreed with the court of appeals opinions holding that the provisions of 50A-110 regarding communications between judges apply only when the communication is discretionary. The supreme court held that the UCCJEA supports no such distinction and trial courts must follow the provisions of GS 50A-110 any time there is a communication between judges regarding a jurisdictional decision.

Jurisdiction

- Trial court order was insufficient to invoke the subject matter jurisdiction of the court when it contained no findings of fact to support the conclusion that North Carolina had jurisdiction pursuant to the UCCJEA.
- To invoke emergency jurisdiction pursuant to GS 50A-204, the trial court order must make findings of fact to support emergency jurisdiction and any order entered must contain an ending date because emergency jurisdiction is temporary only.

In the Matter of E.J., 738 S.E.2d 204 (N.C. App., February 5, 2013). Juvenile petition was filed alleging juvenile was neglected and dependent. Trial court determined that there had been an earlier child protection proceeding involving the same child in New Jersey. The trial court made contact with the New Jersey judge and entered a nonsecure custody order stating that the NC court was exercising temporary emergency jurisdiction until such time as the New Jersey judge determined whether New Jersey would continue to exercise jurisdiction. Thereafter, the North Carolina court entered an adjudication order, concluding North Carolina had jurisdiction pursuant to the UCCJEA. The court of appeals agreed with mom's contention on appeal that the trial court lacked subject matter jurisdiction to enter the adjudication order. According to the court of appeals, even if the trial court had grounds to exercise emergency jurisdiction at the time the nonsecure custody order was entered, emergency jurisdiction is temporary and requires very specific findings of fact. The trial court failed in this case to appropriately invoke jurisdiction when it did not make findings of fact to show the emergency sufficient to support the exercise of jurisdiction and when it did not place a termination date on the temporary order. In addition, while acknowledging that a trial court may use emergency jurisdiction to enter a nonsecure custody order, the court of appeals held that a trial court may not adjudicate when the only ground for jurisdiction is emergency jurisdiction (*but cf In re M.B.*, 179 NC App 572 (2006)(okay to adjudicate neglect using temporary emergency jurisdiction when state with jurisdiction had not acted with regard to the child).

Findings of fact to support best interest determination; use of terms "legal custody" and "physical custody"

- Findings of fact must resolve factual disputes between the parties which relate to welfare of the child
- Quality of findings matter more than quantity of findings
- Findings of fact must support conclusion of best interest
- Custody order should specify which party has "legal custody" and which party has "physical custody" rather than simply stating which party has "care, custody and control" of a child at any particular time.

Carpenter v. Carpenter, 737 S.E.2d 783 (February 5, 2013). In custody case between parents, trial court awarded "primary care, custody and control" to mom and "secondary care, custody and control" to dad and set detailed schedule for each party to exercise "care, custody and control" of child. The court of appeals remanded to the trial court after concluding that while the order contained 81 findings of fact, the findings of fact did not resolve the primary factual disputes between the parents. The significant issues regarding the child's welfare were mom's allegations of excessive use of alcohol by dad, conflicts in the parenting styles of the parties, and the child's anxiety. There were numerous findings regarding each of these issues but the findings did not resolve whether dad drank in excess, whether there was a conflict in the parenting styles, and whether either of those issues caused the child to suffer from anxiety. Rather, according to the appellate court, the findings "merely recited the evidence" offered on each point. The court of appeals held that these issues needed to be resolved and other findings were needed to show whether and to what extent the drinking and parenting style conflicts impacted the welfare of the child and the ability of each parent to care for the child. In addition, the court of appeals held that the decree that mom have "primary care, custody and control" of the child and dad have "secondary care, custody and control" was confusing because that language failed to clarify whether the parties had joint physical and legal custody or whether the physical and legal custody rights and responsibilities were allocated in some other way.

Electronic Visitation

- While GS 50-13.2 allows the trial court to supplement visitation with electronic communications between a parent and child, such electronic communication is not visitation. Trial court cannot limit a parent's visitation to electronic communication without findings of fact to support a denial of visitation rights to a parent.
- GS 50-13.2 is a general provision which applies to all custody proceedings and not just Chapter 50 custody proceedings.

In the Matter of: T.R.T., 737 S.E.2d 823 (N.C. App., February 19, 2013). After concluding child was a neglected juvenile, the juvenile court placed child in custody of DSS and allowed mother visitation via Skype, a software application that allows video communication between individuals using an internet connection, webcam, and computer or mobile device with a microphone or speakers. The disposition order did not allow mother any face-to-face visitation with the child but did not make findings required by GS 7B-905. The court of appeals agreed with mother's argument that electronic communication is not and cannot be a substitute for face-

to-face visitation. GS 50-13.2 specifically allows visitation to be supplemented with appropriate forms of electronic contact between parent and child, but only when the trial court complies with the fact finding requirements of the statute (electronic visitation is available, affordable and in the best interest of the child) and only to supplement actual in-person visitation. The court of appeals also rejected the argument of DSS that GS 50-13.2 applies only to Chapter 50 custody determinations, holding instead that the statute is a general statute that applies to all custody determinations.

Temporary orders; modification; visitation

- Trial court erred in concluding temporary order had become a permanent order with regard to primary custody but not with regard to visitation.
- Temporary order cannot convert to a permanent order if it grants primary physical custody to one parent but does not resolve the visitation rights of the other parent.
- Temporary order did not become permanent when parties had a date set for trial of the custody claim and the parties returned to court several times on issues relating to visitation.
- Permanent custody order is res judicata as to facts existing at the time the order is entered. Therefore, in addressing a motion to modify, the trial court must consider only facts and circumstances occurring after the entry of the last custody order.
- A trial court may not award one parent exclusive control over visitation rights of the other parent.

Woodring v. Woodring, _N.C. App._, _S.E.2d_ (June 4, 2013, replacing for technical reason only opinion filed on May 7, 2013). In June 2010, the parties entered into a consent temporary custody order which granted father three specific dates for visitation with the children and provided that otherwise, the children would be with the mother. A permanent custody trial was scheduled for July, 2011. In May 2011, father filed a motion seeking visitation with the children before the custody trial. At a hearing in July 2011, the trial court determined that the June 2010 order had, by operation of time, become a permanent order with regard to primary custody but not with regard to visitation since dad's visitation rights had not been resolved beyond the three specific visitation dates set out in the order. On July 14, 2011, the trial court entered an order leaving primary physical custody with mom, joint legal custody with both parties, and setting a specific visitation schedule for dad. When mom did not comply with the visitation provisions and refused to allow dad to see the children, dad filed a motion to modify in August, 2011. In determining whether there had been a change in circumstances, the trial court considered the June 2010 order as the last permanent order rather than the order entered July 14, 2011. The trial court made findings of fact regarding changes occurring after June 2010 and concluded there had been a substantial change of circumstances. Primary custody was awarded to dad and the order directed that "mom's visits with the children shall be at the discretion of the father, to be supervised by the father or an appropriate adult as determined by the father."

The court of appeals reversed and remanded after concluding that the trial court erred when it concluded that the June 2010 order became a permanent order due to the passage of time. According to the court of appeals, the 2010 order clearly was a temporary order because it left

the issue of father's visitation rights unresolved. The order did not convert to a permanent order because the permanent custody hearing was scheduled by the parties less than 12 months after the entry of the 2010 temporary order. In addition, the court of appeals held that the parties were in court on various issues relating to custody three time between the entry of the temporary order and the date of the July, 2011 hearing. Because the time between entry of the temporary order and the setting of the trial on permanent custody was "reasonably brief" and the parties clearly were engaging in the litigation process, the temporary order did not convert to a permanent order. In addition, the court of appeals stated that "a temporary order that does not set an ongoing visitation schedule cannot become permanent by operation of time" due to the fact that one parent cannot be deprived of visitation rights without written findings of fact supporting the denial of all contact with a child. The court of appeals held that the last permanent custody order was the order entered July 14, 2011. Therefore, the trial court erred in considering evidence of changes in circumstances before the entry of that order. According to the court of appeals, the last permanent order is res judicata as to all circumstances occurring before the date of that order. In addition, the court of appeals held that the trial court erred when it gave father exclusive control over mom's visitation with the children. The court held that such a complete delegation of authority to one parent is never appropriate.

Legislation

S.L. 2013-27 (H 139). Adopting the Uniform Deployed Parents Custody and Visitation Act; GS 50A-350 through 376. Effective October 1, 2013, but does not affect validity of any temporary custody order entered before that date. *Repeals GS 50-13.7A*, the existing statute dealing with custody cases wherein one or both parents is subject to military deployment and replaces it with new Uniform Act, creating new Article 3 of Chapter 50A.

In addition to adopting the Uniform Act, the session law amends G.S. 50-13.2 to add new section (f) to state that "[i]n a proceeding for custody of a minor child of a service member, a court may not consider a parent's past deployment or possible future deployment as the only basis in determining the best interest of the child. The court may consider any significant impact on the best interest of the child regarding the parent's past or possible future deployment."

The new Uniform Act provides that a deploying parent must provide notice of pending deployment to the other parent no later than 7 days after receiving notice of the deployment, unless circumstances of the service prohibit deploying parent from doing so. As soon as reasonably possible after receiving notice of deployment, both parents are required to share with the other their plan for fulfilling that parent's share of custodial responsibility during deployment. The act allows the parties to enter into temporary custodial agreements to provide for custodial responsibilities during deployment. If a court has entered a custody order relating to the parties, the temporary agreement must be filed in the court action. The agreement is

enforceable but terminates following the return of the parent from deployment. The Act allows agreements to delegate caretaking responsibilities to nonparents and specifies that the parties cannot modify court ordered child support obligations by the agreement.

The Act also provides for an expedited court proceeding to address deployment in situations where parties are unable to reach a voluntary agreement. Trial court is authorized to enter temporary orders only; permanent custody orders may not be entered in the absence of a deployed parent without the consent of the deployed parent. In these temporary orders, the court may address custody during deployment and is specifically authorized to grant "caretaking authority" to nonparents. Authority granted to nonparents is limited to only that which is authorized to the deploying parent under an existing custody order or, if there is no custody order, is limited to the amount of time the deploying parent "habitually cared for the minor child" before deployment. A court entering a temporary deployment order also may enter a temporary order for child support.

Child Support

Cases Decided Between October 1, 2012 and June 4, 2013

Modification; appointment of counsel for contempt

- Trial court properly dismissed obligor's motion to modify where his evidence failed to establish that his substantial change in income was not voluntary and in good faith
- Trial court did not err in refusing to appoint counsel for obligor at contempt hearing where trial court concluded obligor was not indigent.

Young v. Young, 736 S.E.2d 538 (N.C. App., Dec. 18, 2012). Obligor father filed motion to modify support based on his loss of employment. Trial court dismissed his motion after concluding he did not meet his burden of proof to show a substantial change in circumstances. Father argued on appeal that the trial court erred by dismissing his motion based on the conclusion that he had not tried hard enough to find a new job without also including a finding that he was acting in bad faith disregard of his child support obligation. The court of appeals disagreed, holding that an obligor seeking modification has the burden of proving a substantial and involuntary decrease in income to establish a substantial change in circumstances. In this case, the court of appeals upheld that trial court determination that obligor failed to establish that the decrease in his income was involuntary where evidence showed he applied for only 5 jobs over the course of one year, he failed to apply for seasonal work, failed to show he applied for work outside of his field of expertise, chose to move to a rural area with fewer job opportunities and failed to report income he had received from some work with the Navy. The obligor also argued that the trial court erred in denying his request for appointed counsel for the contempt hearing. The court of appeals held that appointment is not necessary where a trial court determines an obligor is not indigent, as in this case.

Imputing income; non-recurring income; medical and dental insurance; private school

- Trial court erred in imputing income to both parents without finding each had acted in bad faith.
- If court finds bad faith and imputes income, amount imputed is based on a parent's individual earning capacity and not on the decree of bad faith found by the trial court.
- Trial court was not required to count as income father's inheritance of a one-time payment of $368,487. Trial court has discretion in determining whether to include nonrecurring income when determining child support.
- Trial court order requiring mom to maintain health and dental insurance for the children was insufficient where it did not contain findings of fact that the insurance was available to mom at a reasonable cost, but fact that insurance was available only through mom's husband did not preclude trial court from finding the insurance was available at a reasonable cost.
- Decision whether to include private school expenses as part of guideline child support is a discretionary one for the trial court but coverage of private school does not require deviation from the guidelines.

Ludlam v. Miller, 739 S.E.2d 555 (N.C. App., February 5, 2013).

1) In calculating guideline child support, trial court imputed income in the amount of minimum wage to both unemployed parents. Court of appeals reversed the trial court because the child support order did not clearly find that the parents were deliberately depressing their income or otherwise acting in bad faith. Also, the court of appeals held that the order indicated the trial court may have considered the decree of bad faith on the part of each party in determining how much income to impute. The trial court order stated that while the conduct of the parties did not justify imputing income at the level of their previous salaries, the trial court nevertheless found it appropriate to impute minimum wage. The court of appeals held that the amount of income imputed to a parent found to have acted in bad faith must be based on a determination of the parent's present earning capacity and should not be impacted by the trial court's determination of that parent's degree of bad faith.

2) The trial court did not include as income a lump sum payment husband had received from his mother's estate in the amount of $368,487. Husband had received that payment sometime in 2009 and the present child support action was filed in February 2010. The court of appeals affirmed the trial court's decision not to include the payment as nonrecurring income, stating that while the guidelines provide that a trial court "may" include nonrecurring income, there is nothing in guidelines or case law requiring a trial court to do so.

3) The appellate court found that the trial court should have made findings that health and dental insurance was available to mom at a reasonable cost before ordering that she maintain coverage for the kids. However, the court rejected mom's argument that the fact that the insurance was available to her only through her new husband's employer meant the requirement of coverage could not be supported. The court of appeals held that the guidelines clearly anticipate that health and dental coverage may come from the employment of a step-parent rather than the parent. The court notes also, however, that the step-parent is not responsible for premiums to cover the children and cannot be ordered to provide coverage for the children.

4) The court of appeals rejected mom's argument that trial court should have included costs for private school for the children in the child support calculation because the parties had agreed upon separation that the kids should attend private school. Mom argued that the trial court erred in concluding that deviation was required before the court could order coverage of private school expenses. The court of appeals noted that the trial court order indicated the trial court "mistakenly believed" deviation was required but that the mistake was harmless error because the trial court clearly determined the private school expenses were not reasonable under the circumstances.

Spousal Agreement

Cases Decided Between October 1, 2012 and June 4, 2013

Order of specific performance as part of contempt order

- Trial court "incorporated" separation agreement into a court order when trial court ordered party to "specifically perform" property related provisions of a contract as part of a contempt order in a child support matter

Young v. Young, 736 S.E.2d 538 (N.C. App., Dec. 18, 2012). Parties executed separation agreement providing for child custody and child support as well as property provisions. As part of the property provisions, plaintiff agreed to make mortgage payments. The parties incorporated the custody and support provisions but did not incorporate the property provisions. As part of a contempt order entered due to plaintiff's failure to pay child support pursuant to the incorporated provisions, the trial court ordered plaintiff to pay the mortgage as required by the separation agreement. When plaintiff did not pay, the trial court held him in contempt. On appeal, plaintiff argued that the trial court had no authority to enforce provisions of an unincorporated agreement by contempt. The court of appeals agreed that there is no authority to use contempt to enforce an unincorporated agreement but held that the child support contempt order in this case "properly ordered Plaintiff's specific performance of his agreement to make mortgage payments under the Separation Agreement, thereby incorporating this provision going forward."

Specific Performance

- Language in contract stating parties are entitled to specific performance as a remedy for any future breach is not sufficient to relieve party from burden of establishing grounds for remedy of specific performance.
- Party seeking remedy of specific performance must show 1) the remedy at law is inadequate, 2) the defendant can perform, and 3) the party seeking specific performance has performed in accordance with the contract.
- Fact that defendant did not file an answer did not relieve plaintiff of burden of establishing grounds for specific performance.

Reeder v. Carter, 740 S.E.2d 913 (N.C. App., April 2, 2013). Parties entered into separation agreement and property settlement stating that both parties agreed that "an order of specific performance enforceable by contempt is an appropriate remedy for a breach by either party." Plaintiff wife thereafter filed a complaint alleging breach of contract and seeking specific performance related to provisions requiring defendant husband to pay the mortgage, child support and a marital debt. Defendant did not file an answer. The trial court denied specific performance after concluding plaintiff had failed to show that the remedy at law was inadequate and had failed to show defendant could perform. On appeal, plaintiff argued that the provision in the contract relating to specific performance was binding on defendant and was sufficient to relieve her of the burden of proving the required elements for specific performance. The court of appeals disagreed, holding that parties may not "contract around an established legal standard." Similarly, the court of appeals also rejected plaintiff's contention that she was not required to

prove the elements of specific performance because she had requested specific performance in her complaint and defendant had failed to file an answer. Acknowledging that Rule 8 of the Rules of Civil Procedure provides that factual allegations alleged in a complaint are admitted if not specifically denied by defendant in an answer, plaintiff's complaint in this case did not allege the specific facts required to support the remedy of specific performance. While plaintiff alleged she was entitled to specific performance, she did not allege specific facts sufficient to support a finding that defendant has the ability to perform pursuant to the contract.

Domestic Violence

Cases Decided Between October 1, 2012 and June 4, 2013

Inappropriate admission of hearsay evidence; Judicial Notice of criminal case

- Case had to be remanded for new trial where trial court allowed inadmissible hearsay regarding medical diagnosis of plaintiff's injury and thereafter made a finding of fact based upon that hearsay evidence.
- Trial court erred in admitting evidence of disposition of criminal case arising out of same incident at issue in the civil case because the criminal matter had ended with a PJC. Because a PJC is not a final judgment, there was no reason for the trial court to consider the PJC in the civil matter.
- Trial court can take judicial notice of matters contained in court files, as long as court explains reason the court record is relevant to the proceeding.

Little v. Little, 739 S.E.2d 876 (N.C. App., April 16, 2013). Trial court entered a DVPO after concluding defendant had committed an act of domestic violence by attempting to choke plaintiff and causing neck strain. Over defendant's objection on hearsay grounds, plaintiff testified at trial that she had been diagnosed with neck strain by medical personal. In addition, the trial court took judicial notice of the court file in a criminal case arising out of an assault charge against the defendant arising out of the same incident. The court of appeals reversed and remanded for a new trial after concluding that plaintiff's testimony about the medical diagnosis was impermissible hearsay. While it is generally presumed trial court disregards inappropriate evidence in bench trials, the trial court in this case made a finding of fact supporting the entry of the DVPO based upon the hearsay statement. In addition, the court of appeals held that while it is appropriate for a trial court to take judicial notice of information in a court file, the trial court may not do so without indicating the relevance of that matter to the civil case. While collateral estoppel may apply in some cases to make the final judgment in a criminal case determinative of an issue in a civil case, in this case there had been no final criminal judgment because the defendant received a PJC. Without collateral estoppel, the court of appeals held there was no obvious reason for the court to take judicial notice of the criminal file. The court of appeals, however, did reject defendant's argument that the trial court inappropriately "procured evidence for plaintiff" when the trial judge left the bench to retrieve the criminal file from the clerk's office.

Evidence of harassment

- Trial court erred in concluding defendant committed an act of domestic violence based on harassment where there was no evidence of substantial emotional distress.

Fairbrother v. Mann, unpublished opinion, 738 S.E.2d 454 (N.C. App., February 19, 2013). Trial court entered a DVPO in Chapter 50B proceeding initiated by plaintiff mother against defendant father after concluding father committed an act of domestic violence by placing plaintiff in fear of continued harassment by installing a video camera in the bathroom used by the parties' two minor daughters. The camera was discovered and removed before any filming of the

girls actually took place. According to the court of appeals, the trial court erred in concluding defendant had committed an act of domestic violence by causing fear of continued harassment because mother did not offer any evidence at trial that either she or the daughters suffered substantial emotional distress as a result of defendant's conduct.

Divorce and Annulment

Cases Decided Between October 1, 2012 and June 4, 2013

Proving void marriage; burden of proof

- Because a second marriage is presumed to be valid, the person seeking to have it annulled must prove it is not valid.
- Where attack on second marriage is based on allegation that first marriage was not terminated by divorce, party seeking the annulment of second marriage must prove that the first marriage was not terminated by divorce.
- Where order granting annulment made findings that parties presented conflicting evidence about the divorce terminating the first marriage, and the trial court did not find – due to the conflicting evidence – that a valid divorce had not been obtained, trial court should not have granted the annulment.

Simpson v. Avila, unpublished opinion, _N.C. App._, _S.E.2d_ (June 4, 2013). Plaintiff husband filed action for annulment based on his allegation that wife's first marriage had not been terminated by divorce at the time plaintiff and defendant married. During the trial on the merits of the claim, defendant wife produced four separate documents, each of which she alleged to be a copy of her divorce judgment entered in Mexico. The four documents each contained a different date for the granting of the alleged divorce. The trial court concluded that because the evidence of divorce ending wife's first marriage was conflicting, wife failed to prove her first marriage had ended before she married plaintiff. The trial court therefore granted plaintiff's request for an annulment.

The court of appeals remanded to the trial court after concluding that the trial court misapplied the burden of proof. The court of appeals cited *Mussa v. Palmer-Mussa*, 731 SE2d 404 (NC Supreme Court, 2012), and explained that the marriage between plaintiff and defendant is presumed valid because both parties agreed that they were married in a proper ceremony. This agreement between the parties meant that wife's burden of proof was met. The burden then shifted to plaintiff to prove that 1) defendant had been married before she married plaintiff, and 2) her first marriage was not ended by divorce or death. The court of appeals held that the trial court finding of fact that defendant and another man had married in Mexico before defendant married plaintiff indicated plaintiff had met the first prong of his burden of proof. However, the trial court finding of fact that the evidence about whether and when a valid divorce had been entered was conflicting indicated that the trial court concluded plaintiff had failed to meet his burden of proof on the second prong. The court of appeals remanded to the trial court for additional findings of fact regarding whether plaintiff succeeded in proving no divorce had been entered terminating plaintiff's first marriage before she married plaintiff.

Miscellaneous

Cases Decided Between October 1, 2012 and June 4, 2013

Role of Rule 17 GAL appointed for an incompetent party

- A GAL appointed by the court for an incompetent party pursuant to Rule 17 of the Rules of Civil Procedure serves in a role of substitution rather than assistance.
- The presence and participation of a Rule 17 GAL appointed for an incompetent party is necessary for a court to proceed in a matter.

In the Matter of P.D.R., L.S.R., J.K.R., 737 S.E.2d 152 (N.C. App., Dec. 18, 2012). A juvenile case fully discussed in the Juvenile Law update. Issue was role of GAL appointed for mother in an abuse, neglect and dependency proceeding and a TPR. Court of appeals compared possible alternative roles of a GAL appointed pursuant to GS 7B-1101.1, a statute which requires appointment for both an incompetent parent and for a parent with diminished capacity. In reconciling the juvenile statute with the provisions in Rule 17 of the Rules of Civil Procedure, the court of appeals explains the role of a GAL appointed in a civil case pursuant to Rule 17 GAL for a party whom the trial court has determined is incompetent. According to the court of appeals, the role of a GAL appointed for an incompetent party pursuant to Rule 17 is one of substitution rather than assistance. This means the GAL stands in the place of the litigant, participates in the proceeding as the party would, and makes decisions necessary to obtain a favorable result for the party.

Setting aside another judge's discretionary ruling in a case based on changed circumstances

- While general rule is that one judge may not overrule an order entered in a case by another judge, a judge may set aside an interlocutory discretionary order upon a showing of changed circumstances
- Where another judge entered an order sealing the court file in a case, a second judge had authority to enter an order unsealing the file upon a finding of changed circumstances

France v. France, 738 S.E.2d 180 (N.C. App., Dec. 31, 2012). A trial judge entered an order, upon the consent of both parties, sealing the file in a domestic relations case. A second trial judge denied the parties' subsequent request that all courtroom proceedings also be closed to the public. Thereafter, the local newspaper intervened in the action and moved that the court set aside the order of the first judge sealing all court records. The second judge granted the motion of the newspaper, finding there had been a substantial change in circumstances since the entry of the order sealing the records. The changes included the fact that one party had filed a motion asking to rescind the agreement which required that the parties ask the court to seal court records and close all proceedings to the public, the fact that the newspaper had intervened and asked that all information about the case be open to the public, and the fact that the trial judge had ruled the proceeding should be open to the public. The court of appeals held that trial judges have the authority to overrule an earlier discretionary ruling made in the case by another judge when the trial court concludes there had been a substantial change in circumstances. The appellate court held in this case that the fact that the second trial judge ruled that the courtroom proceedings

should be open to the public was a change alone sufficient to allow reconsideration of the first order sealing all court records.