

**Family Law Case Update
Cases Decided October 2, 2007 through May 20, 2008**

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Office of the Courts: www.nccourts.org.**

Custody

Cases Decided Between October 2, 2007 and May 20, 2008

Joint Legal Custody; Parenting Coordinators

- There is no presumption in favor of joint legal custody. However, it must be considered by the trial court upon request by either party. GS 50-13.2.
- If trial court allocates decision-making authority between the two parents, trial court must make specific findings of fact to support the “split” of joint legal custody.
- Findings must show why split of legal custody is in the best interest of the child.
- Parenting coordinator can be appointed only if trial court makes findings that 1) the case is a high-conflict case, 2) the appointment is in the best interest of the child, and 3) the parties have the ability to pay for the coordinator.

Hall v. Hall, 655 S.E.2d 901 (N.C. App., February 5, 2008).

Trial court ordered primary physical custody to mom and secondary physical to dad. The trial court awarded joint legal custody but provided that mom would have primary decision-making authority regarding all issues except sports and extracurricular activities. Those issues were to be decided jointly by the parties, with a parenting coordinator making the decision in the event the parties were not able to agree. Dad appealed.

The court of appeals affirmed the trial court decision regarding physical custody, holding that the findings of fact were supported by the evidence and that the findings of fact supported the conclusion that the custody arrangement imposed by the court met the best interest of the child. However, the court of appeals remanded the case to the trial court for further consideration of the allocation of legal custody.

The court of appeals held that, as a general matter, trial courts have discretion to distribute decision-making authority to one party rather than another based upon the facts of a specific case. However, when a trial court awards joint legal custody, the court may “deviate from pure joint legal custody only after making specific findings of fact.” The findings must show why a deviation is in the best interest of the child. By way of example, the court of appeals stated “past disagreements between the parties regarding matters affecting children, such as where they would attend school or church, would be sufficient, but mere findings that the parties have a tumultuous relationship would not.”

The trial court also appointed a parenting coordinator to make future decisions when the parties are unable to reach agreement. The court of appeals held that GS 50-91(b) allows the appointment of a coordinator, but only when the trial court makes the findings that 1) it is a high conflict case, 2) appointment of the coordinator is in the best interest of the child, and 3) the parties have the ability to pay the cost of the coordinator. While the record showed evidence to support each finding in this case, the court of appeals held that the trial court must make the findings.

Modification; Grandparents

- When custody has been granted to grandmother in previous custody order, mother was not entitled to constitutional protections in modification proceeding.
- Mother's changed circumstances will not support modification of custody order unless there is evidence showing impact of change on the welfare of the child.

Warner v. Brickhouse, 658 S.E.2d 313 (N.C. App., April 1, 2008)

Custody order was entered giving grandmother primary custody and visitation to mother. Thereafter mother filed a motion to modify, seeking primary custody or at least increased visitation. Mother appealed trial court order denying her request for modification. On appeal, mother argued trial court had erred by 1) entering the initial custody order without finding mother had waived her constitutional right to custody, 2) failing to apply the parental presumption in her favor during the modification proceeding, and 3) failing to find that the substantial improvement in mother's life constituted a substantial change in circumstances.

Court of appeals held that mother could not attack initial custody order and the failure of the trial court to find mother unfit or otherwise not entitled to constitutional protections because mother had failed to appeal the custody order when it was entered. Further, once a custody order has granted custody or visitation rights to a non-parent, the constitutional presumption in favor of a parent does not apply in a proceeding seeking modification of that order. Rather, the party seeking modification must first show a substantial change in circumstances affecting the welfare of the child and then the trial court must apply the best interest of the child standard to determine whether the original order needs to be modified. In this case, the mother showed change and improvement in her own life but failed to offer any evidence about the impact or potential impact of that change on the child. The court of appeals held that when "the effects of mother's changed circumstances on the child's welfare were not 'self-evident,' mother had the burden to show evidence directly linking the change in her circumstances to the welfare of the child."

Modification

- Trial court did not err in denying mother's request to relocate herself and the children to the state of Washington; trial court made appropriate findings to show the court had properly considered best interest of the children regarding the move.
- Order failed to show substantial change of circumstances sufficient to allow trial court to modify father's visitation with children.

Frey v. Best, 659 S.E.2d 60 (N.C. App., April 15, 2008)

Parties entered a consent order that granted mother primary physical custody of three children and granted father regular and frequent visitation. Mother filed motion requesting permission to relocate to the state of Washington with the children in order to be closer to her family. Father filed motion to increase his visitation time. The trial court first concluded that mother's desire to relocate the children to the state of Washington was a substantial change in circumstances affecting the welfare of the children. As plaintiff did not assign error to this conclusion, the court of appeals did not review the trial court findings on that issue. The court of appeals did review the trial court findings regarding the welfare of the children with regard to the move and held the findings were sufficient to support the trial court conclusion that the move

would not be in the best interest of the children. The trial court found mother was motivated by her desire to be closer to her family in order to receive help and support from them in caring for the children, and also to put distance between she and her husband because of the ever increasing level of acrimony between them. However, the trial court also made detailed findings about the good relationship between the father and the children, as well as the good relationship between the father's family and the children. The trial court concluded that the move to Washington would have an adverse effect on the children.

Despite the fact that the trial court concluded that the mother's desire to move to Washington constituted a substantial change of circumstances affecting the welfare of the child, the court of appeals held that the trial court erred in modifying father's visitation without finding father had demonstrated a substantial change in circumstances regarding his visitation with the child. The new visitation order therefore was remanded to the trial court for additional findings to show the substantial change that would in turn allow the trial court to consider father's request for increased visitation.

Third Party Custody; Same Sex Partners. Two cases: *Estroff* and *Mason*

- Biological or adoptive parent has constitutional right to care, custody and control of child. Trial court cannot apply best interest test to determine custody or visitation without first concluding by clear, cogent and convincing evidence that parent has waived his/her constitutional right by conduct inconsistent with his/her protected status.
- Whether parent has acted in a manner inconsistent with his/her protected status is a determination that must be made on a case by case basis.
- Fact that persons litigating custody cannot marry, or that third party seeking custody cannot adopt the child due to the fact that she is of the same sex as the parent, has no significance in the legal analysis regarding whether the parent has waived constitutional protection. The same standard applies regardless of the nature of the relationship between the parties.
- Specific question to be answered is whether the parent acted inconsistently with her fundamental right to exclusive custody, care and control of her child and her right to make decisions concerning the care, custody and control of that child.
- Parent may waive constitutional protection if the parent has voluntarily chosen to create a family unit and to permanently cede to a third party a sufficiently significant amount of parental responsibility and decision-making authority to create a parent-like relationship between the third party and her child.
- A trial court should consider both the conduct and the intent of the parent in determining whether the parent voluntarily created a permanent parent-like relationship between the third party and the child.
- When examining a parent's conduct, the focus is not on whether conduct consisted of "good acts" or "bad acts." Rather, the gravamen of "inconsistent acts" is the volitional acts of the parent that relinquish otherwise exclusive parental authority to a third party.
- The fact that the third party provides caretaking and financial support, engages in parent-like duties and responsibilities, and has a substantial bond with the children does not necessarily support the conclusion that a parent has waived protected status.
- When a trial court determines that a natural parent has waived her constitutionally protected status, it does not mean that the third party is entitled to the rights of a legal parent. It simply means a trial court can apply the best interest of the child standard to determine custody.
- North Carolina has not recognized the doctrines of parent by estoppel nor of de facto parent.

Estroff v. Chaterjee, -- N.C. App. -- , -- S.E.2d -- (May 6, 2008)

Plaintiff and defendant lived together as same sex domestic partners for a number of years. They held themselves out to friends and family as having an intimate relationship. Defendant decided to have a child and became pregnant through artificial insemination. During the pregnancy and after the birth of the twins, the women lived together in the same home and both women provided care and financial support for the children. When the children were approximately one year old, defendant ended her relationship with plaintiff and moved to another residence with the children. Defendant allowed liberal visitation for awhile but eventually reduced plaintiff's access to the children. Plaintiff filed for joint custody of the children or at least visitation. The trial court dismissed her complaint after concluding that defendant had not waived her constitutional right to care, custody and control of the children.

The court of appeals affirmed, holding that whether a parent has waived her constitutional protections by conduct inconsistent with her protected status is a determination that must be made on a case by case basis. The court of appeals acknowledged that a parent may waive protected status by voluntarily creating and consenting to a parent-like relationship between a third party and her children, if the intent is to create a permanent relationship and to share parental rights and responsibilities with that third party. The court of appeals held that the trial court applied the correct standard and made findings sufficient to support the conclusion that defendant in this case did not intend to create such a permanent relationship between defendant and her children and therefore did not waive her protected status as a parent.

The court of appeals pointed out that the issue is not about whether plaintiff has a relationship with the children or whether the parent misled or otherwise mistreated the third party. The issue also is not whether there is a bond between the third party and the children, or whether the third party has provided financial support or caretaking to the children. Instead, trial court must be able to conclude by clear, cogent and convincing evidence that the parent intended to cede a portion of her parental rights to the other party on a permanent basis.

In this case, the trial court made findings that defendant made the decision to have a child on her own; plaintiff did not agree to become a parent but rather agreed to allow defendant to raise a child in their jointly owned home and in the context of their relationship. While plaintiff represented to family and friends that the two women were "co-parents", defendant refused to allow plaintiff to be referred to as "mom" and told plaintiff that she intended to be the child's only parent. The trial court found that defendant did not agree and "never would have" agreed to bestow upon plaintiff or any other person parental or custodial rights with regard to her children.

The court of appeals also denied review of plaintiff's claims to be recognized either as a parent by estoppels or as a de facto parent. According to the court of appeals, these arguments could not be addressed because "those doctrines have not yet been recognized in North Carolina"

Mason v. Dwinnell, -- N.C. App. -- , -- S.E.2d -- (May 6, 2008).

Identical to case of *Estroff* above with regard to legal issues and analysis, but with opposite result based on differences in facts of case.

Plaintiff and defendant were same sex domestic partners for eight years. During that relationship, defendant decided she wanted to become pregnant and plaintiff decided that while she did not want to become pregnant, she did want to have a family with plaintiff. Before defendant became pregnant, plaintiff and defendant held a commitment ceremony attended by their family and friends. The couple then together researched options for conceiving a child and

decided to use an anonymous sperm donor with physical characteristics similar to those of plaintiff. Plaintiff accompanied defendant to all doctor visits as she attempted to become pregnant and then to all prenatal care appointments during her pregnancy. At the birth of the child, the couple requested that plaintiff's name be listed as a parent on the birth certificate, but the hospital refused. The baby was given the surnames of both plaintiff and defendant. The couple named godparents for the child and held a baptismal ceremony for family and friends where both parties were recognized as parents of the child and both plaintiff's and defendant's parents were recognized as grandparents. The couple shared all child care responsibilities and shared joint responsibility for all household and child care expenses.

When the child was three years old, plaintiff and defendant signed a "Parenting Agreement" wherein the parties stated that they had "jointly decided to conceive and bear a child, that plaintiff would adopt the child if the laws of North Carolina allowed her to do so, that both parties acknowledged plaintiff to be a "de facto parent" to the child, and that each party agreed that the child's relationship with plaintiff "should be protected and promoted to preserve the strong emotional ties between plaintiff and the child." Further, the agreement specified that "all major decisions regarding the child, including but not limited to, residence, support, education, religious upbringing and medical care shall be made jointly by the parties." In addition, defendant executed a Health Care Power of Attorney authorizing plaintiff to seek medical care for the child, and all school forms and forms for extracurricular activities listed plaintiff in the space designated for "father". Plaintiff paid private school expenses for the child and plaintiff's parents established a trust fund for the child, as the parents had done for all of their other grandchildren.

The parties separated when the child was seven (maybe eight) years old. They shared custody by alternating weeks for a while, until defendant began restricting plaintiff's access to the child. Plaintiff filed action for custody. Trial court determined, based on facts set out above, that defendant had waived her constitutional right to exclusive care, custody and control of the child by creating what was intended to be a permanent parent-like relationship between plaintiff and the child. The court then conducted a best interest analysis and awarded joint legal and physical custody of the child to both parties. The court of appeals affirmed.

The court of appeals based the decision on the constitutional principles described above in the summary of the *Estroff* opinion. According to the court of appeals, the facts in this case as found by the trial court established by clear, cogent and convincing evidence that while defendant did not completely relinquish custody to plaintiff, "she fully shared it with plaintiff, including sharing decision-making, caretaking, and financial responsibilities for the child." The findings established that defendant "intended – during the creation of this family unit – that this parent-like relationship would be permanent, such that she induced plaintiff and the child to allow that family unit to flourish in a relationship of love and duty with no expectation that it would be terminated." The court of appeals explained that while defendant had the constitutionally-protected right to "maintain a zone of privacy" around her and her child, "she nonetheless voluntarily chose to invite plaintiff into that relationship and function as a parent from birth on, thereby materially altering her child's life. She gave up her right to unilaterally exclude plaintiff by choosing to cede to plaintiff a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with her child."

The court of appeals rejected defendant's argument that the trial court effectively enforced the "Parenting Agreement" executed by the parties. The defendant argued that such

agreements between same sex partners are void as against public policy. The court of appeals disagreed, holding that the trial court did not enforce the “Parenting Agreement” executed by the parties. Rather, the agreement only provided significant evidence of the defendant’s intent with regard to the amount of authority she was ceding to plaintiff.

As in *Estroff*, the court of appeals in *Mason* declined to address plaintiff’s arguments regarding the theory of “parent by estoppel” due to the conclusion by the court that this case could be resolved appropriately using established principles of the law regarding child custody.

Equitable Distribution

Cases Decided Between October 2, 2007 and May 20, 2008

Premarital Agreements; Waiver of Equitable Distribution

- Where agreement is ambiguous with regard to waiver of right to equitable distribution, trial court must determine intent of parties at time agreement was signed.
- When agreement is subject to more than one reasonable interpretation, it is ambiguous.
- While an agreement containing a general waiver of all “marital rights” in the property of the other spouse is sufficient to waive equitable distribution, a waiver of interest in property owned at the time of marriage and a “free-trader” agreement is not sufficient to waive equitable distribution.

McIntyre v. McIntyre, 654 S.E.2d 798 (N.C. App., January 15, 2008)

Parties executed a premarital agreement in 1986 (before 1987 adoption of the Uniform Premarital Agreement Act GS Chapter 52B). The agreement stated that each party waived all right, title and interest in the real estate and personal property of the other, and provided that each party would be able to purchase, sell, encumber, etc. real and personal property throughout the marriage “as though still unmarried and without the consent of the other.”

Both parties requested equitable distribution following separation, although plaintiff subsequently dismissed his claim. Plaintiff raised the agreement as bar to defendant’s claim for ED. The trial court held that the agreement was valid but that it did not waive ED rights. The court of appeals agreed. First, the appellate court held that the language of the agreement was ambiguous with regard to the issue of waiver. According to the court, both parties offered “reasonable” interpretations, meaning the language did not bar ED as a matter of law. However, the court of appeals held that the trial court’s findings of fact supported the trial court’s conclusion that the parties did not intent to waive ED at the time the agreement was signed. This finding was supported by evidence from both parties that plaintiff was primarily concerned with protecting the property he was bringing into the marriage and with making sure he continued to be able to “buy, sell, and trade property as if he were single.” These findings supported the trial court’s conclusion that the agreement was in the nature of a “free-trader” agreement rather than a complete waiver of marital property rights.

Assertion of Claim for Equitable Distribution

- Oral motion is insufficient to assert claim for equitable

Webb v. Webb, 656 S.E.2d 334 (N.C. App., February 5, 2008)

Plaintiff filed for absolute divorce and equitable distribution. Defendant filed an Answer requesting that no divorce be entered. Defendant appeared at the divorce hearing and orally requested property distribution. Following the entry of divorce, plaintiff dismissed his claim for equitable distribution. Defendant thereafter filed a motion to compel plaintiff to file his equitable distribution inventory affidavit. The trial court denied the motion to compel on the basis that no claim for equitable distribution was pending. The court of appeals agreed, rejecting defendant’s contention that her oral motion during the divorce trial was sufficient to assert her claim.

Postseparation Support and Alimony Cases Decided Between October 2, 2007 and May 20, 2008

Modification of Alimony

- Cessation of child support payments may provide grounds for modifying alimony under appropriate circumstances.
- To determine whether a change of circumstances has occurred, trial court must consider all factors listed in GS 50-16.3A.
- Generally, the changed circumstances necessary for modification must relate to the financial needs of the dependent spouse and the ability of the supporting spouse to pay.
- Expenses and financial obligations relating to serving as the custodial parent of a minor child must be considered in setting amount and duration of a support award, as well as when considering needs of dependent spouse.
- Substantial decrease in income of supporting spouse does not necessarily constitute changed circumstances; modification not justified if supporting spouse continues to have the ability to pay the alimony as ordered.
- Trial court can consider contribution of new spouse when determining reasonable needs of either the dependent or the supporting spouse.

Harris v. Harris, 656 S.E.2d 316 (N.C. App. , February 5, 2008)

Trial court granted motion of plaintiff dependent spouse to increase alimony, based on fact that she no longer received child support payments after minor child reached majority and on fact that defendant supporting spouse's income had increased. Defendant argued on appeal that it was improper for trial court to consider the termination of child support as grounds to modify alimony. The court of appeals acknowledged that "it is the policy of our state that awards for alimony and child support be separately stated," and held that the cessation of child support payments does not always justify an increase in alimony. However, the trial court can consider the financial impact of the cessation of payments on the dependent spouse. The consideration in this particular case was appropriate because the original support order specifically attributed one-half of all of plaintiff's living expenses to the child and did not include those amounts in determining the reasonable needs of plaintiff in setting the original amount of support. When the child reached majority and the child support payments stopped, plaintiff became responsible for the full amount of the living expenses. In addition, the total amount of living expenses had increased since the time of the original order, and the trial judge hearing the modification request determined that all of plaintiff's current living expenses were reasonable.

Trial court denied defendant's motion to decrease alimony and the court of appeals affirmed. The court of appeals rejected defendant's argument that he was entitled to a reduction due to a decrease in his income. Court of appeals held that modification should be denied as long as he actually has the ability to pay alimony as ordered. The findings of the trial court established that defendant had made all payments required by the original order and that he continued to have the ability to pay. The court of appeals also rejected defendant's contention that the trial court erred by considering the responsibility of his new spouse for household expenses. The court of appeals held that while a trial court may not include the income of a new spouse when calculating the income of a supporting

spouse, the trial court can and should consider the income received by the new spouse when determining the reasonable needs and expenses of the supporting spouse.

Modification of Alimony

- The changed circumstances necessary for modification must relate to the financial needs of the dependent spouse and the ability of the supporting spouse to pay.
- Trial court can consider contribution of new spouse when determining reasonable needs of either the dependent or the supporting spouse.

Pierce v. Pierce, 655 S.E.2d 863 (N.C. App. , February 5, 2008)

Trial court granted motion of dependent spouse (plaintiff) to increase alimony, based on findings that although her actual reasonable expenses had decreased since the original order, her overall financial situation had worsened due to the fact that she had depleted all money allocated to her by the equitable distribution judgment entered following the divorce of the parties and her credit card debt had increased. In addition, the trial court found that defendant's financial situation had improved in part due to the fact that his girlfriend lived with him and shared expenses. The trial court found that while defendant had been unable to meet all of plaintiff's reasonable needs at the time of the original order, he was able to meet those needs at the time of the modification request.

The court of appeals affirmed the judgment, holding that all findings were supported by the evidence and that the findings supported a conclusion that circumstances had changed since the original alimony order. The majority noted that the trial court had determined all current expenses and debt listed by plaintiff were reasonable. Dissent argued that plaintiff's financial problems were caused by her financial irresponsibility and therefore should not justify increased alimony.

Cohabitation

- Summary judgment was not appropriate where evidence raised genuine issues of fact regarding whether party receiving alimony engaged in cohabitation

Craddock v. Craddock, 656 S.E.2d 716 (N.C. App., February 19, 2008)

Trial court granted plaintiff's motion for summary judgment on claim for breach of separation agreement. Both plaintiff and defendant agreed defendant had failed to pay alimony as provided in agreement, but defendant claimed he had no obligation to pay as plaintiff had engaged in cohabitation. Trial court granted plaintiff's motion for summary judgment after concluding plaintiff had not cohabitated. Court of appeals held that summary judgment was improper due to conflicting evidence about the specifics of the relationship between plaintiff and her companion. The parties agreed that for the past five years, plaintiff and her friend dated and ate meals together at her home on weekends, traveled together on over-night vacations, spent holidays together and engaged in monogamous sexual activity. However, there was conflicting evidence about whether the two maintained separate residences and whether the friend operated a business out of plaintiff's home. According to the court of appeals, "when there is conflicting evidence of cohabitation, the parties are entitled to present evidence of subjective intent."

The court of appeals also stated that the analysis of cohabitation articulated in the case of *Rehm v. Rehm*, 104 NC App 490 (1991) was "subsequently adopted by our Legislature in GS 50-16.9." Therefore, according to the court of appeals, cohabitation is defined as the "mutual

assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations.”

Amount and Duration of Award

- Alimony order must contain findings of fact “explaining” the amount, duration and manner of payment of an alimony award.

Hartsell v. Hartsell, 657 S.E.2d 724 (N.C. App., March 4, 2008)

Trial court ordered plaintiff to pay alimony to defendant in the amount of \$650 per month. On appeal, plaintiff argued that the findings of fact in the alimony order were insufficient to support the award. The court of appeals held that all findings were sufficient, except the order failed to “explain” the reason the trial court concluded \$650 was the appropriate amount of alimony. The only finding in the trial court order was a statement that “considering the factors listed above, the plaintiff is the supporting spouse, and has the means and ability to contribute \$650 to the maintenance and support of plaintiff.” Court of appeals remanded for further findings about why the court decided on that particular amount and why the trial court ordered the amount paid “until the death or remarriage of defendant.”

The court of appeals rejected plaintiff’s argument that the order contained insufficient findings as to the accustomed standard of living of the parties. The appellate court held that the following finding by the trial court was sufficient:

“During the marriage of the parties, the parties enjoyed a comfortable lifestyle, but lived beyond their means. The parties traveled frequently to the beach. The defendant resided in a large home with the plaintiff and the children. The home was located near the defendant’s parents. The minor children participated in many activities, in school, the community, and the church. The parties kept a higher standard of living than they could afford.”

Modification

- Change in income of one party is not enough alone to support finding of substantial change in circumstances; order also must contain findings as to current reasonable expenses of the parties
- Order must be based on actual present income unless findings establish basis to impute income
- When original alimony order is set by agreement of the parties and does not contain detailed findings of fact, trial court considering modification must make findings of fact as to circumstances at time of original order as well as at the time of modification in order to support conclusion regarding changed circumstances.

Frey v. Best, 659 S.E.2d 60 (N.C. App., April 15, 2008)

Parties entered a consent order that required defendant to pay plaintiff \$1,150 in alimony. Husband filed motion to modify and trial court reduced alimony to \$0 based on increase in plaintiff’s income. Court of appeals held that trial court is required make findings not only about the income of the parties but also about the current reasonable needs of the parties in order to support a conclusion of changed circumstances. In addition, the court of appeals held the trial court erred in determining defendant had the ability to earn income in the amount he had in the past without making an ultimate

finding as to defendant's actual present income. A trial court cannot use earning capacity instead of actual income without finding defendant was suppressing his income in bad faith. Finally, the court of appeals noted that if initial consent orders do not contain sufficient findings to show circumstances of the parties at time original order was entered, trial court will need to make findings about those circumstances in order to support a conclusion that the circumstances have changed significantly.

Modification

- Change in income of one party is not enough alone to support finding of substantial change in circumstances; order also must contain findings as to current reasonable expenses of both parties.
- When income of dependent spouse increases, trial court must consider how the increase affects her/his need for support and make findings accordingly.
- Alimony payments should not reduce a supporting spouse to poverty nor require him to deplete his estate while dependent spouse has surplus.
- If the standard of living of a dependent spouse increases following separation, the supporting spouse is not required to support that higher standard.
- In determining income, trial court must include support received from third parties if the support is "reliable" and "contributes to household expenses."

Dodson v. Dodson, -- N.C. App. -- , -- S.E.2d -- (May 6, 2008), order on rehearing; this opinion supersedes opinion reported in 647 S.E.2d 638 (N.C. App., August 7, 2007)

Trial court modified alimony order to decrease amount paid by defendant. On appeal, defendant argued the trial court erred in failing to appropriately consider plaintiff's increased income. The court of appeals agreed, finding that although the trial court order contained a finding that plaintiff's income had increased, the order did not make findings about how the increase affected plaintiff's need for support. The court of appeals held that the trial court should have made additional findings about plaintiff's reasonable current needs and expenses and "the ratio of those needs and expenses to her income."

Court of appeals also held that trial court erred in calculating defendant's present income by inappropriately annualizing a bonus he received from his employment. This error caused the trial court to conclude defendant's annual income had been reduced by 17% when in fact, according to the court of appeals, it had been reduced by 27%. Further, the new alimony award left defendant with a "negative cash flow", meaning his reasonable expenses and the alimony together totaled more than his income. According to the court of appeals, an alimony order should not "reduce a spouse to poverty" and should not force a supporting spouse to deplete his/her estate if the dependent spouse is enjoying a "surplus" due to the alimony award.

The court of appeals also held the trial court needed more findings regarding the standard of living of the parties near the end of the marriage and showing a consideration of wife's present expenses in light of that standard. Findings indicated the parties had lived in a mobile home during marriage but dependent spouse lived in three bedroom house at time of modification hearing. According to the court, the reasonableness of expenses must be determined in light of accustomed standard of living during the marriage.

The court of appeals also held that the trial court needed to make more findings about the financial contributions of the adult children of the parties to the dependent spouse. Additional support received by dependent spouse that is “reliable” and used for “household support” must be included in the income of the dependent spouse.

Findings Required for Postseparation Support and Alimony Orders

- Findings in postseparation support order must be sufficiently specific to show trial court considered all factors required by GS 50-16.2A(b).
- Conclusion that one spouse is dependent in an alimony order must be supported by specific findings concerning standard of living during the marriage, earnings and earning capacity of the parties, financial estates of both spouses, length of marriage, and need of dependent spouse for financial support to maintain standard of living.
- A general incorporation of all findings from other court documents in court file is not sufficient to support an award of alimony.
- Alimony order must contain findings explaining the amount and duration of the alimony award.

Crocker v. Crocker, -- N.C. App. -- , -- S.E.2d -- (May 8, 2008)

Trial court ordered plaintiff to pay defendant \$2000 in postseparation support and later entered an alimony order in the same amount. On appeal, plaintiff argued that both orders contained insufficient findings of fact to support the awards of support. The court of appeals agreed. The orders contained a few findings about the income of both parties from their employment, about the two residences owned by the parties and the mortgages thereon, and a statement that defendant “testified he needs \$3,500 per month in support.” The orders also contained statements that the court was “taking judicial notice and incorporating by reference” findings made in other court documents relating to postseparation support, equitable distribution and child support. The court of appeals set out in detail the findings required by Chapter 50 to support a determination of dependency, an award of postseparation support, and an award of alimony. Case was remanded to the trial court for the more detailed findings about financial resources and assets of the parties, reasonable and necessary expenses of the parties, standard of living of the parties during the marriage, and the reasons for the amount and duration of the trial court’s support award.

Child Support

Cases Decided Between October 2, 2007 and May 20, 2008

UIFSA – Registration of Foreign Support Orders

- Trial court erred by not confirming the registration of Florida child support orders in their entirety. Confirmation is required when defendant fails to raise any defense to registration valid under UIFSA, GS Chapter 52C.

State of N.C. *ex rel* Lively v. Berry, 653 S.E.2d 192 (N.C. App., December 4, 2007).

Plaintiff mother registered two Florida child support orders. One ordered father to pay on-going support in the amount of \$50 per week and established arrears in the amount of \$33,000. The second ordered father to reimburse public assistance in the total amount of \$850 by paying \$50 per week. Defendant contested registration, arguing that he had not paid support because he had not been allowed visitation with the child. The trial court confirmed registration of the order which required father to pay \$50 per week prospective child support but denied confirmation of the orders for arrears and past paid public assistance.

Court of appeals reversed and remanded for confirmation of both orders. The court of appeals held that foreign support orders must be confirmed by trial courts unless the obligor proves one of the 7 defenses listed in GS 52C-6-607. Denial of visitation privileges is not one of the listed defenses. The court of appeals noted that the trial court erred when it found that enforcement of an order under UIFSA is an “equitable remedy” allowing trial courts discretion in registration proceedings. The court of appeals held that equitable claims must be asserted in the issuing state, Florida in this case.

Determining Present Actual Income

- Child support generally must be based on actual present income of parties.
- Trial court can impute income only upon finding party is deliberately depressing income or otherwise acting in bad faith disregard of his/her duty to support his/her children.
- Finding that party has the present “capacity to continue to earn” same amount earned in recent past is not imputing income but rather is a determination of actual present income.

Hartsell v. Hartsell, 657 S.E.2d 724 (N.C. App., March 4, 2008)

Plaintiff obligor worked as a school teacher but also was a self-employed grading contractor. To determine his present income, the trial court made findings about his income from teaching and the income he earned from his grading business the year before the hearing, and then made a finding that because there was employment available for the grading business at the time of the hearing, plaintiff had the “present ability and capacity” to earn the same amount as previous years. On appeal, plaintiff argued that the trial court had used earning capacity to impute income to him without finding he was deliberately depressing his income in bad faith. The court of appeals rejected his argument, holding that the trial court did not impute income to plaintiff. Rather, the trial court determined actual present income by finding plaintiff had the present ability “to continue to earn” the same amount as previous years. The appellate court held that the finding was supported by evidence that work was available in the community for the grading business.

Modification

- Birth of child with new spouse is not grounds to modify child support order absent additional circumstances.
- Child support order must be based on actual present income unless findings establish basis to impute income.

Frey v. Best, 659 S.E.2d 60 (N.C. App., April 15, 2008)

Parties entered a consent order that required defendant to pay plaintiff \$1,150 in child support. Defendant requested modification and the trial court reduced his obligation to \$750 per month. On appeal, plaintiff argued trial court erred in allowing defendant's motion to modify on the sole basis that defendant had a child with his new wife. The court of appeals agreed that birth of children cannot be the sole circumstance in support of a finding of changed circumstances but the court held that it was not clear from the trial court order whether in fact this fact had been the "sole circumstance." The case was remanded to the trial court for further findings to support the modification. The court of appeals pointed out that the new child will be considered in determining the amount of child support ordered pursuant to the guidelines, if there are sufficient other factors to support a conclusion of changed circumstances.

In addition, the court of appeals held the trial court erred in determining defendant had the ability to earn income in the amount he had in the past without making an ultimate finding as to defendant's actual present income. A trial court cannot use earning capacity instead of actual income without finding defendant is suppressing his income in bad faith.

Paternity
Cases Decided Between October 2, 2007 and May 20, 2008

Rule 60(b) requests to set aside order of paternity

- Trial court cannot order a blood test when there is an order establishing paternity. Paternity is not at issue until the existing order has been set aside.
- Rule 60(b)(1), (2) and (3) motions must be filed one year from the entry of the paternity order.
- One year time period begins at the time the order of paternity is entered and not at the time a putative father signs an Affidavit of Parentage.

Guilford County ex rel. Hill v. Holbrook, -- N.C. App. --, -- S.E.2d -- (May 6, 2008)

Defendant executed an Affidavit of Parentage in July 2003. In October 2005, the court entered an order adjudicating defendant to be the father of the child and requiring him to pay child support. In May 2006, defendant filed a Rule 60(b) motion requesting that the paternity and support order be set aside because he had reason to believe mother had made misrepresentations about the paternity of the child. He also requested a blood test. Originally, the trial court granted the blood test and plaintiff filed an immediate appeal. The court of appeals reversed the order of blood tests, holding that paternity is not at issue as long as a paternity order is in existence due to principles of res judicata or collateral estoppel. On remand, trial court conducted a hearing and determined there was reason to suspect defendant was not the father of the child even without the blood tests and set the paternity order aside pursuant to Rule 60(b)(1) (“mistake”) and (b)(2) (fraud or misrepresentation of other party). On appeal, plaintiff argued that trial court erred in considering the Rule 60(b) motion because it was filed more than one year after defendant signed the Affidavit of Parentage. The court of appeals rejected plaintiff’s argument and affirmed the trial court. According to the court of appeals, the one year period for filing a Rule 60(b)(1), (2) or (3) motion begins to run only when a “judgment, order, or proceeding is entered or taken.” Therefore, in this case, the period began when the court entered the order adjudicating paternity in October 2005, less than one year before defendant filed the Rule 60(b) motion in May 2006.

Miscellaneous Cases
Cases Decided Between October 2, 2007 and May 20, 2008

Civil Contempt

- Trial court erred in holding defendants in civil contempt for violating the court’s judgment before judgment actually had been entered.
- Trial court erred in conducting contempt hearing without giving defendants five days notice of hearing.
- Trial court erred by failing to make findings that defendants had present ability to comply with judgment to support the contempt order.

Carter v. Hill, 650 S.E.2d 843 (N.C. App., October 16, 2007).

On appeal of summary ejectment judgment entered by magistrate, trial court conducted trial and found defendants owed plaintiff’s \$2,480 in unpaid rent. At the close of the trial, the trial judge “*sua sponte* notified defendants they would be held in civil contempt of court until they paid \$2,480 to plaintiffs.” The trial court stated defendants were in civil contempt because they were “not able to pay the Court ordered \$2,480.”

On appeal, the court of appeals held first that the trial court erred by considering civil contempt before the judgment that was the basis for the contempt was actually entered. The court of appeals explained that civil contempt is defined by GS 5A-21 as the “failure to comply with an order of the court.” According to the court of appeals, an order is not enforceable by contempt until it is actually entered, meaning it has been reduced to writing, signed by the judge and filed by the clerk of court.

In addition, the court of appeals held that GS 5A-23(a) requires that an order to show cause or a notice of contempt must be given at least five days in advance of the contempt hearing unless good cause is shown. The trial court in this case erred by conducting the contempt hearing immediately following the announcement of the judgment in the ejectment case.

Finally, the court of appeals held that the trial court erred by entering the contempt order without making adequate findings of fact. GS 5A-23(e) requires that “if civil contempt is found, the judicial official must enter an order finding facts constituting contempt and specifying the action the contemnor must take to purge himself or herself of the contempt.” There must be a finding that the failure to comply with the court order is willful and that “the person to whom the order is directed has the ability to comply with the order or to take reasonable steps to comply.” In this case, the trial court specifically stated that the contempt order was being entered because defendants did not have the ability to pay.

Civil Contempt

- Notice of contempt proceeding was appropriate even though it did not specify whether proceedings were civil or criminal in nature. Constitutional notice requirements applicable to criminal contempt proceedings are not implicated when a defendant is held in civil contempt.
- Trial court did not err by finding defendant in contempt for failing to pay marital debt assigned to her in an equitable distribution judgment even though judgment only ordered that she “assume responsibility for the debts”, that she transfer the debts to her name, and that she hold plaintiff harmless for any liability he incurs regarding the debts.
- Trial court had sufficient evidence to support finding of ability to pay where evidence showed defendant owned real property with equity of \$500,000.
- Trial court did not err by holding defendant in civil contempt for failing to execute documents relating to income tax returns, even though documents were not required by the IRS.
- Trial court did not err by ordering defendant to pay plaintiff’s attorney fees for the contempt proceeding.
- Trial court did err in ordering defendant to pay cost of plaintiff’s CPA expert witness.

Watson v. Watson, 652 S.E.2d 310 (N.C. App., Nov. 6, 2007), review denied (NC April 10, 2008).

Trial court held defendant in civil contempt for failure to pay debts assigned to her in an equitable distribution consent judgment. The judgment provided that defendant was to “assume responsibility” for certain marital credit card debt and to execute all documents necessary to file the parties’ joint income tax returns. After finding defendant in civil contempt, trial court ordered that she be incarcerated until she signed certain tax documents and paid plaintiff’s accountant fees in the amount of \$11,724, plaintiff’s attorney fees in the amount of \$11,235, and two credit card debts in full.

On appeal, defendant first argued that she received insufficient notice of the contempt hearing because the motion and show cause order did not designate whether the proceeding was for criminal or civil contempt. The court of appeals held that all parties agreed the proceeding was civil in nature and that the notice gave adequate notice of the basis for the charges against her. The court rejected the contention that because there was no designation of civil or criminal, defendant was entitled to all protections and notice requirements of a criminal contempt proceeding.

Defendant next argued that she could not be held in contempt for failure to pay the debts in full where the underlying judgment only required that she assume responsibility for the debts and that she transfer the balance owed on the debts to her name individually. The court of appeals held that the trial court properly found defendant in contempt for not doing what was required by the judgment; she had not assumed all liability for the debt and had not transferred the debt to her name alone. The order to pay the debts in full was, according to the appellate court, an appropriate purge condition given the defendant’s past conduct in this case.

In addition, the fact that defendant owned real property with equity in the amount of \$500,000 was sufficient to support the finding that she had the present ability to take reasonable steps that would allow her to pay the debts in full. The Purge condition was appropriate given the fact that the trial court order gave defendant 90 days to sell the real property.

Defendant also argued that she could not be held in contempt for failing to execute certain tax documents because she had been informed by the IRS that the documents were not

actually required by the IRS. She argued this fact established that the purpose of the underlying consent order could no longer be served by her compliance with the provision that she execute the documents. The court of appeals rejected this argument based upon testimony by plaintiff's expert that although no longer actually required by the IRS, execution of the documents "would be helpful" in negotiations with the IRS over penalties assessed for several late filings by the parties. The court of appeals held this evidence sufficient to show that execution of the forms would still accomplish the purpose of the underlying judgment.

Finally, while the court of appeals affirmed that attorney fees can be awarded in a contempt proceeding to enforce a judgment of equitable distribution, the court held that an award of costs is not allowed in a contempt order. Therefore, the appellate court reversed the trial court's order that defendant pay the cost of plaintiff's expert CPA.

Criminal Contempt

- Trial court did not err in holding defendants in both civil and criminal contempt where each contempt finding was based on different acts.
- Defendants' testimony under oath that they would not comply with orders of the court in the future constituted direct criminal contempt rather than indirect.

Adams Creek Associates v. Davis and Reels, 652 S.E.2d 677 (N.C. App., November 6, 2007).

Long-standing dispute between land owners and defendants over title to real property. Last court proceeding resulted in court order requiring defendants to stay off of real property and to remove certain physical structures from the land. Plaintiffs instituted contempt proceedings when defendants failed to comply with that order. During contempt hearing, defendants testified that they would not comply with any court order requiring them to stay off of the land. Trial court held defendants in civil contempt for failure to comply with court order and in indirect criminal for testifying that they refuse to comply with future court orders.

On appeal, defendants argued that the trial court erred in holding them in both civil and criminal contempt. Court of appeals held that while it is improper to hold a party in criminal and civil contempt for the same conduct, the trial court was responding to two separate actions in the present case. The first was violation of the court order and the second was the testimony that they would continue to refuse to comply with court orders in the future. According to the court of appeals, the testimony amounted to direct criminal contempt pursuant to GS 5A-13(a)(1) in that it was an act committed within the sight and hearing of a presiding judicial official and it was "disrespectful and disparaged the respect due to the court and its orders" Court of appeals held that trial court's error in designating the criminal contempt as indirect rather than direct was not grounds for reversal because the defendants had counsel and were offered opportunity to testify as to why they should not be held in contempt.

Criminal Contempt

- Criminal contempt order had to be reversed and remanded where only findings of fact in order related to acts by defendant occurring after the order to show cause for contempt was issued, even though record contained evidence of acts committed before order to show cause.
- For indirect criminal contempt, a show cause order is analogous to a criminal indictment and is the means by which the defendant is afforded the constitutional safeguard of notice.

State v. Coleman, 655 S.E.2d 450 (N.C. App., January 15, 2008).

Trial court entered order finding defendant in criminal contempt for violation of a TRO requiring defendant to stay away from and not harass employees of an automobile dealership. A show cause order was issued, finding cause to believe defendant had violated the terms of the TRO. At the contempt hearing, the court heard evidence of violations occurring before the show cause order as well as of violations occurring after the show cause was issued. The trial court held defendant in criminal contempt but made findings only about the violations occurring after the show cause was issued. The court of appeals held that the show cause order failed to give appropriate notice to defendant because it (obviously) did not allege violations which formed the basis of the contempt order. The court of appeals held “it is an elementary proposition of law that a person may not be convicted of the crime charged upon a certain date by showing that upon other dates he committed other crimes and offenses.” The court of appeals noted that there was plenty of evidence in the record to show defendant violated the TRO before the issuance of the show cause order, but remanded the case to the trial court because only the trial court can make findings beyond a reasonable doubt.

Property Rights of Unmarried Cohabitants

- Plaintiff was entitled to imposition of constructive and resulting trust on property titled in name of defendant pursuant to theory of unjust enrichment and due to defendant’s statement that property was to be used for mutual benefit of the parties.

Rhue v. Rhue, 658 S.E.2d 52 (N.C. App., March 18, 2008)

Plaintiff and defendant were married for several years, divorced and then reconciled. They continued to live together without remarriage for the next 25 years. During that 25 years, defendant acquired title to several tracts of property. When the parties separated, plaintiff filed action seeking the imposition of a constructive and/or resulting trust on title to several of the tracts. A jury found she was entitled to equitable ownership and the court of appeals affirmed the verdict. The court of appeals held that due to the nature of the relationship between the parties and the fact that defendant expressly stated to plaintiff on a number of occasions that the property “was to be used for the mutual benefit of the parties”, it would be unjust to allow defendant to retain exclusive title. The court noted that “agreements regarding the finances and property of an unmarried but cohabitating couple, whether express or implied, are enforceable as long as sexual services or promises thereof do not provide the consideration for such agreements.” Further, those agreements are enforceable through the equitable remedies of constructive and resulting trusts.

Compare *Leatherman v. Leatherman*, 297 NC 618 (1979)(supreme court case often cited as the reason North Carolina adopted equitable distribution; wife denied any interest in marital

corporation due to fact that no constructive trust can be imposed absent finding of wrongdoing on part of husband; wife's assistance and services throughout marriage deemed "gratuitous").

Civil Procedure; Striking Answer and Judgment on the Pleadings

- Filing of a late Answer is not grounds to strike the Answer pursuant to Rule 12(f).
- Judgment on the Pleadings pursuant to Rule 12(c) cannot be granted until pleadings are closed.
- Trial court has the discretion to hear motions when attorney is not present as long as appropriate notice of hearing has been given.

Carpenter v. Carpenter, 659 S.E.2d 762 (N.C. App., April 15, 2008)

Plaintiff filed complaint against defendant for breach of separation agreement. When defendant failed to file a timely Answer, plaintiff filed motion for judgment on the pleadings pursuant to Rule 12(f). After that motion was filed and noticed for hearing, defendant filed an Answer denying allegations in complaint and raising several counterclaims. At time plaintiff's motion was set to be heard, counsel for defendant was not present. The court notified counsel and was told he would be present later that morning. When counsel did not come as promised, the trial court conducted the hearing in his absence and entered an order striking the Answer and entering Judgment on the Pleadings for plaintiff.

On appeal, the court first rejected defendant's argument that the trial court erred in proceeding with the hearing without the presence of defendant's attorney. The court of appeals held that once appropriate notice of hearing is given, the trial court has discretion to proceed on the merits if defendant or defendant's counsel fails to appear as scheduled. However, the court of appeals did agree with defendant's argument that the trial court erred in striking his Answer and entering Judgment on the Pleadings. According to the court of appeals, the failure to file a timely Answer is not grounds for Judgment on the Pleadings, if the Answer is eventually filed and it raises "matters which could have a bearing on the litigation." In this case, defendant filed the Answer before the hearing on the Motion to Strike, and the Answer denied the material allegations in the Complaint and raised seven counterclaims. Because the Answer was filed and "could have a bearing on the litigation," the trial court should not have entered the order striking the Answer. Also, the trial court erred in entering Judgment on the Pleadings. According to the court of appeals, Judgment on the Pleadings cannot be considered until pleadings are closed. As the Answer raised numerous counterclaims, pleading were not closed at the time the trial court entered judgment.