

June 2008

# FAMILY LAW CASE UPDATE

# Custody Order: Okay?


- “Joint legal”: mom makes all decisions except those with financial impact on dad
  - Back to court for decisions with financial impact
- “Joint legal”: mom makes all decisions except both decide sports and extracurricular activities
  - Use parenting coordinator for disagreements

# “Legal” Custody

- Decision-making authority
- “Right and responsibility to make decisions with important and long-term implications for a child’s best interest and welfare.”
  - *Diehl v. Diehl*, 177 NC App 642 (2006)
  - *Hall v. Hall*, NC App (2/5/08)



# Legal Custody


- Includes access to information ??
  - “Absent an order to the contrary, each parent shall have equal access to the records of the minor child involving the health, education and welfare of the child.”
    - GS 50-13.2(b)
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# Joint Custody

- No presumption in favor of joint [legal] custody
- Court must consider joint [legal] custody if requested by a party
  - GS 50-13.2(a)
  - *Hall v. Hall*



# Legal Custody

- Court can:
    - Grant legal to only one
    - Grant joint legal to both
    - Split decision-making
  - What if order doesn't mention "legal" custody?
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# Split Legal

- Only upon appropriate findings of fact
  - *Deihl*
- Only when necessary and in the best interest of the child
  - *Hall*


# Split Legal

- Insufficient findings
  - Parents unable to communicate regarding needs of child
  - One parent not available to consent when necessary
  - Long-term tumultuous relationship
- Sufficient findings
  - Past disagreements regarding school or church
  - See *MacLagan v. Klein*, 123 NC App 557 (1996)





# Consider

- Order gives mom custody, dad visitation
  - Mom requests “permission” to relocate to state of Washington
  - *Frey v. Best*, NC App (4/5/08)
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# Relocation

- Step 1: Substantial change affecting welfare of child
- Step 2: New custody order based on best interest of child standard
- Weigh good vs. not-so-good about move
  - *Frey v. Best*
  - *Evans v. Evans*, 138 NC App 135 (2000)
- Don't forget other factors

# Alimony and PSS Modification

- Both require changed circumstances
  - GS 50-16.9
- Set new award based on all statutory factors



# Alimony Modification


- Change must relate to financial needs of dependent spouse or supporting spouse's ability to pay
- Fluctuation in income – even if substantial – not enough alone
- Must consider all factors in GS 50-16.3A

# Factors

- *Harris v. Harris*, NC App (2/5/08)
  - Termination of child support
  - Husband's new spouse and decreased income
- *Pierce v. Pierce*, NC App (2/5/08)
  - Decreased needs but increased debt
  - ED money spent on bills
  - Husband's new roommate and increased income




# Factors

- *Frey v. Best*, NC App (4/15/08)
    - Significant increase in wife's income
    - Findings: Need original circumstances if not in original order
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# Factors

- *Dobson v. Dobson*, NC App (5/6/08)
    - “consider ratio of earnings of dependent spouse to funds necessary to maintain accustomed standard of living.”
    - Contributions from third parties that are “reliable” and reduce household expenses
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# Alimony Findings

- ✓ Financial assets
- ✓ Reasonable expenses
- ✓ Length of marriage
- ✓ Standard of living
- ✓ Reason for amount and duration
  - *Crocker v. Crocker*, NC App (5/8/08)



# Cohabitation

- Support orders are terminated by cohabitation. GS 50-16.9(b)
- Also a defense to initial award of alimony
  - *Williamson*, 142 NC App 702 (2001)
- Supporting spouse needs order terminating support




# Cohabitation

- Two adults dwelling together continuously and habitually in a private heterosexual or homosexual relationship
- Evidenced by the mutual assumption of marital rights, duties, and obligations usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations
- GS 50-16.9(b)




# Cohabitation

- Statute reflects goal of terminating alimony in relationships that probably have an economic impact
    - *Craddock*, NC App ( 2/19/08), citing *Lee's Family Law*
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# Cohabitation?

- Sexual relationship
  - Occasional trips and dates
  - *Oakley v. Oakley*, 165 NC App 859 (2004)
  - No cohabitation
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# Cohabitation?

- Dating and sexual relationship
- Shared child-care responsibilities
- Shopping, church and traveling together
- Separate houses
- Separate financial accounts
- *Shaw v. Shaw*, 182 NC App 347 (2007)  
(*unpublished*)
- No cohabitation



# Cohabitation?


- Sexual relationship, 11 months
- Overnights at least 5 times per week
- Clothes at residence
- Trips together
- Kiss every morning
- *Rehm v. Rehm*, 104 NC App 490 (1991)
- Cohabitation

# Cohabitation?

- 5 year relationship
- Dinner, movies, traveling, holidays together
- Sexual relationship
- Separate residences; no sharing of expenses
- Worked together at home of dependent spouse; some mail delivered there
- *Craddock*, NC App (2/19/08)
- Inconclusive



# *Craddock*

- Conflicting testimony
    - # of overnights, location of clothes, business “base of operations”
  - When evidence conflicts, must consider “subjective intent”
    - ?? - of mutual assumption of marital rights, duties and responsibilities??
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# ■ Paternity - Consider

- Affidavit of parentage signed July 2003
- Paternity and support order entered October 2005
- “Father” files rule 60(b) and requests blood tests May 2006
- Can you order blood tests?




# Paternity

- Once paternity order is entered, court cannot order genetic testing under GS 8-50.1(b1) until paternity order is set aside pursuant to Rule 60(b)
    - *Bright v. Flaskrud*, 148 NC App 710 (2002)
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# Paternity

- No blood tests = No Rule 60(b)???
  - Not necessarily
    - *Hill v. Holbrook*, NC App (5/5/08)
    - “Reason to suspect” defendant was not father even without blood tests
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# Rule 60(b) Relief

- Within one year – Rule 60(b)(1), (2) and (3)
  - Mistake
    - *See Leach v. Alford*, 63 NC App 118 (motion based on “mutual mistake as to paternity”)
  - Excusable neglect
  - Newly discovered evidence
    - *See Leach* (blood test result may be newly discovered evidence)
  - Fraud, misrepresentation or misconduct

# Rule 60(b) relief

- Within “reasonable” time - Rule 60(b)(6)
  - For “any other reason” (compelling)
  - Meritorious defense
  - Broad discretion to grant or deny
  - But not intended to cover situations that would be covered under 60(b)(1), (2) or (3)
    - *Davis v. Adams*, 153 NC App 512 (2002)

# Paternity - Consider

- Affidavit of parentage signed July 2003
- Paternity and support order entered October 2005
- “Father” files rule 60(b) May 2006
- Timely?
- Yes - time begins when order entered, not when affidavit signed
  - *Hill v. Holbrook*

# Child Support - Income

- *Hartsell v. Hartsell*, NC App (3/4/08)
  - Always find “present actual income”
    - Can use past years if reflective of present
  - Never say “earning capacity” unless imputing income (bad faith)