Family Law Update
Cases Decided and Legislation/Rules Enacted
June 1, 2010 through September 21, 2010

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Child Support

Cases Decided/Rule Changes Enacted Between June 1, 2010 and September 21, 2010

Determining income; employer payments in addition to salary

- Trial court determination of income vacated and remanded where trial court included payments made by employer to third parties on behalf of employee that were paid in addition to employee's salary.
- Trial court should not include payments for insurance premiums and retirement plan contributions made by an employer on behalf of an employee unless the trial court determines that the "employer's contributions immediately support the employee in a way that is akin to income" and "enhances the employee's present ability to pay child support".
- Income does not include social security taxes and Medicare taxes paid by an employer on behalf of an employee.
- ***But see*** Child Support Guidelines, adopted by Conference of Chief District Court Judges to be effective January 1, 2011. Guidelines clarify and modify the rule adopted in this case.

Caskey v. Caskey, _S.E.2d_ (N.C. App., September 7, 2010).

In determining income of parties for the purpose of setting child support, trial court used total amount from employer wage affidavits. The wage affidavits included the salary of the party but it also included amounts paid by the employer for the employee's life and health insurance premiums and retirement fund. It also included amounts paid by employer in social security and Medicare taxes, which the employer was required to pay on behalf of the employee. On appeal, court of appeals acknowledged that this is an issue of first impression in North Carolina and reviewed appellate decisions from other states. Regarding insurance premiums and retirement contributions, the court approved and adopted the reasoning of the Indiana Court of Appeals in the case of *Saalfrank v. Saalfrank*, 899 N.E.2d 671 (2008). Applying that reasoning, the North Carolina Court of Appeals held:

> "contributions made by an employer to an employee's retirement accounts, including any 401(k) accounts, and insurance premiums, may not be included as income for the purposes of the employee's child support obligation unless the trial court, after making relevant findings, determines that the employer's contributions immediately support the employee in a way that is akin to income. We place particular relevance on a determination concerning whether the employee *may* receive an immediate benefit from the employer's contributions, such that the employee's *present* ability to pay child support is thereby enhanced. [italics in original; citation omitted] For example, if the employee could elect to receive cash instead of retirement or life insurance contributions from the employer, those employer contributions might be properly considered for child support purposes."

Regarding the taxes paid by the employer for social security and Medicare, the court held such amounts should not be included as income because "these payments by an employer provide a parent no immediate access to any additional funds from which they could contribute to child support."

Child Support Guidelines
****The following summary of changes to the child support guidelines was written and provided by Chief Judge Beth Keever

Pursuant to NCGS 50 – 13.4 (c1), the Conference of Chief District Court Judges must review the Child Support Guidelines at least once every four years "to determine whether their application results in appropriate child support award amounts. The Conference may modify the guidelines accordingly". The Guidelines were last reviewed in 2006.

Conference Chair Chief District Court Judge Stan Carmical appointed a committee in early 2010 to review the guidelines. The committee is composed of Chief District Court Judges A. Elizabeth Keever, Chair, William C. Farris, L. Dale Graham, and Larry J. Wilson. In addition, Judge Carmical served as an ex officio member of the committee. Jo McCants of the Administrative Office of the Courts served as staff to the committee and Professor Cheryl Howell of the School of Government served as consultant on issues of child support law. The Administrative Office of the Courts contracted with Dr. Jane Venohr and the Center for Policy Research to reevaluate the monthly obligation amounts to consider current expenditures for children, price levels, federal and state income tax rates and the federal poverty guidelines. Dr. Venohr also provided assistance in updating the child care tax credit provisions of the guidelines.

The committee held a public hearing on April 22, 2010, received written comments, reviewed North Carolina appellate court decisions, and reviewed legislation and guidelines from other states. Based on all information available, the Committee proposes the following substantive changes to the guidelines.

Applicability and Deviation

1. The new guidelines would be effective for all child support cases heard on or after January 1, 2011.

2. The guidelines now include a specific provision indicating that they apply to orders entered in Chapter 50B actions.

3. The paragraph dealing with retroactive support has been removed from this section and included in a new separate section.

Retroactive Child Support

1. These provisions have been moved to this new separate section.

2. Retroactive support may be determined based on the guidelines or actual expenditures. The Guidelines now provide that when using the guidelines the amount of retroactive support should be determined as if the order was being entered at the beginning of the period for which retroactive support is sought (e.g., if support is sought beginning June 2008, the court would consider the income for each party in June 2008 and determine an amount based on that income as if the order had been entered in June 2008).

3. When the parties have a valid unincorporated separation agreement and retroactive support is sought for the period that agreement was in effect, the amount of support in the separation agreement is the amount to be used as the retroactive support.

Self Support Reserve: Support Parents With Low Income

1. The 2009 federal poverty level of $902.50 net or $999.00 gross is now the standard.

2. In addition to payment of child care or health insurance for the children, other extraordinary expenses may be a basis for deviating from the guidelines if the obligor's income falls into the shaded area of the schedule when using Worksheet A.

Determination of Support in Cases involving High Combined Income

1. The full language of NCGS 50 – 13.4c is set out instead of paraphrasing that language.

Income

1. Specifically excluded from income are the following additional items:
   a. Child Support payments received on behalf of a child not included in the current action
   b. Health, life and disability insurance payments made by an employer directly to a third party and not withheld or deducted from the parent's wages
   c. Retirement benefits paid by an employer directly to a third party and not withheld or deducted from the parent's wages
(For example, the amount paid by a state agency on behalf of a state employee for that employee' health insurance or the amount paid by a state agency to the state retirement system)

2. When a child receives social security benefits because of a parent's disability, the child's payment is added to that parent's income when determining the amount of child support. The child's portion is then deducted from that parent's share of child support. This new provision makes it clear that if the child's portion exceeds the amount of child support that the disabled parent would be required to pay under the guidelines, no additional child support should be ordered unless the court elects to deviate from the guidelines. Pursuant to federal law, the child continues to receive the full amount allocated as the child's portion even if that amount exceeds the child support amount.

Pre-Existing Support Obligations and Responsibility for Other Children

1. In determining the amount of child support being paid for other children which is to be deducted from a parent's gross income, only the amount of the ongoing (current) child support is deducted. If a parent is also making a payment on arrears for the other children, that amount is not deducted.

2. The committee recognizes that parents who have multiple families create unique problems in determining an appropriate amount of child support. The committee has bolded the previous language in the guidelines that indicate that such cases may be appropriate for a deviation from the child support guidelines. The committee also added language indicating that where feasible the better practice is to hear all cases involving one parent at the same court setting.

3. In determining the proper amount to deduct from gross income for a parent's other children living in his/her household, the guidelines now provide one method for all cases. The court should deduct the total child support obligation based on that parent's income only and should not consider the income of the other parent of that child.

Child Care Costs

1. Child care costs for employment or job search are included in the determination of the child support obligation. Other child care costs, such as for education, may be a basis for deviating from the guidelines.

2. The 75%/100% provision related to the tax credit for child care had not been updated since 1994 even though the tax provisions had changed. The guidelines now set out the income at which the tax credits provide a benefit to the custodial parent.

Health Insurance and Health Care Costs

1. Language has been added to make it clear that parents whose income falls within the shaded area may be ordered to pay a share of the cost of unreimbursed medical expenses.

Custody

Cases Decided Between June 1, 2010 and September 21, 2010

Modification; evidence did not show that changes affected the child

- Trial court did not err in concluding mother did not meet her burden of proving there had been a substantial change in circumstances affecting the welfare of the minor child. While there had been a number of changes including parental relocation, a change in parent's work schedule, and a change in child's extracurricular activities, trial court correctly concluded that evidence did not show these changes impacted the welfare of the child.

Cherry v. Thomas, unpublished opinion, _S.E.2d_ (N.C. App., July 6, 2010).
Mother filed motion to modify custody order. Original order entered when parents lived 8 miles apart and each worked alternating 4-day shifts. The original order gave custody to mom for the 4 days father worked and to dad for the four days when mom worked. Mother claimed the following changes constituted a substantial change justifying modification of the order: she moved her residence and now resides almost 23 miles from father; the work schedule of both parties changed and now both work Monday through Friday; and the increased time traveling between homes interferes with child's ability to do school homework and participate in extracurricular activities. The trial court found that these changes were significant but that the evidence showed only increased inconvenience to the parents rather than impact on the child's welfare. The court of appeals rejected mother's argument on appeal that the impact on the child's welfare should be viewed as 'self-evident" and agreed that the evidence did not show impact. While mother claimed the child's ability to do homework was affected, the child's report cards from school indicated she always did her homework. And while mother claimed the child missed extracurricular activities due to the rotating custody schedule, evidence actually showed child missed only one cheerleading practice and one game. The court also rejected mom's argument that her testimony that child was 'confused' by the rotating custody arrangement was sufficient to show impact. The court stated that mom's "broad assertion" of impact on child without any specific examples to support her claim was not adequate to support a finding that the changes impacted the welfare of the child.

Third party custody; standing

- Unrelated third parties with no significant relationship to child have no standing to raise issues relating to the fitness of parents for the purpose of gaining custody.
- Plaintiffs had no standing to bring custody claim against parents where plaintiffs had known and cared for child for only two months prior to filing the custody complaint.

Myers v. Baldwin and Baker, _S.E.2d_ (N.C. App., July 20, 2010).
For reasons not explained in the appellate opinion, plaintiffs took physical custody of minor child and cared for that child for two months before filing this custody action against the parents of the child. During the two month period, the child resided with plaintiffs and plaintiffs paid for the child's medical care. The trial court awarded primary care to plaintiffs and secondary custody to child's father. The court of appeals reversed, concluding plaintiffs had no standing to bring the custody action against the natural parents. The court of appeals raised the issue of standing even though defendant did not raise the issue, noting that standing is required for subject matter

jurisdiction. According to the court of appeals, a third party must have a significant relationship with the child before the third party has the right to file a pleading seeking custody and raising issues regarding the fitness of the parents. The court of appeals held that relationships 'in the nature of a parent/child' relationship are sufficient for standing, as are other "significant relationships over extensive periods of time." The court held that in this case, "it is simply impossible … to characterize two months as the significant amount of time necessary for plaintiffs to have established a parent-child relationship" with the child and that the facts also fell short of establishing any other type of significant relationship necessary to establish standing.

Custody of child born into same-sex relationship; birth parent's waiver of constitutional rights allowed trial court to consider best interest of child

- Where parties jointly decided to create a child and intentionally took steps to identify plaintiff as a parent of the child, and defendant encouraged, fostered and facilitated the emotional and psychological bond between the child and plaintiff with no intention that the relationship be anything other than permanent, trial court did not err in concluding that defendant had waived her constitutional right as a parent to exclusive care, custody and control of child.
- Trial court properly applied the best interest test to determine custody between the parties.

Davis v. Swan, _S.E.2d_ (N.C. App., August 17, 2010).

Custody case with facts substantially similar to those in *Mason v. Dwinell*, 190 NC App 209 (2008), except the parties in this case did not execute a parenting agreement. Despite the lack of a written agreement, the trial court found that birth mother of child had waived her constitutionally protected status by voluntarily ceding parental control and authority to her partner from the time of the child's birth. The court of appeals affirmed and held that the trial court appropriately applied the best interest test to award joint custody to both parties with primary physical custody to defendant and secondary physical custody to plaintiff.

Modification; changes where effect on child is self-evident

- As a general rule, there must be evidence establishing a nexus between the change in circumstances and the welfare of the minor child.
- However, where the effects of substantial changes on the child are self-evident, there is no need for evidence directly linking the change to the effect on the child.
- Changes in this case were such that trial court was correct in concluding the changes affected the child without direct evidence of that effect.

Patten v. Werner, _S.E.2d_ (N.C. App., September 21, 2010).

Father filed motion to modify existing custody order which granted primary physical custody of minor child to mother. Trial court concluded there had been a substantial change in circumstances and that it was in the child's best interest to modify custody to grant father primary physical custody. Court of appeals affirmed, holding that the changes identified by the trial court were substantial and had a 'self-evident' effect on the minor child. Those changes were:

1) Child witnessed an incident of domestic violence between mother and her husband. The incident resulted in physical injury to the mother and law enforcement was called to the home.
2) Child had significant history of tardiness and absences from school.

3) Mother allowed alcohol in her home after her husband admitted he had a problem with alcohol, had his driver's license suspended following a DWI conviction, admitted that the domestic violence incident occurred after he had consumed alcohol, and law enforcement had been called to mother's home on two occasions due to her husband's over-consumption of alcohol.
4) Mother's husband continued to transport child in family car even though he did not have a valid driver's license.

Divorce and Annulment

Cases Decided Between June 1, 2010 and September 21, 2010

Consent order amending divorce judgment is void

- Trial court has no subject matter jurisdiction to amend a divorce judgment to incorporate an agreement regarding support, even by consent. Rule 60(b) allows court to consider setting the divorce judgment aside but it does not allow amendment.

Magaro v. Magaro, unpublished opinion, _S.E.2d_ (N.C. App., September 7, 2010). Wife filed for divorce and alleged in her complaint that there were no outstanding issues relating to alimony. The trial court entered a summary judgment absolute divorce. Thereafter, plaintiff filed a motion to modify the judgment to allow the parties to incorporate their separation agreement setting out support provisions into the divorce judgment. The trial court entered a consent order allowing the incorporation. Sometime later, defendant filed a Rule 60(b) motion to set aside the incorporation, arguing that the trial court had no subject matter jurisdiction to modify the divorce judgment. The trial court denied his motion but the court of appeals reversed. The court of appeals held that GS 50-11 prohibits a trial court from entering an order for alimony if a claim for alimony was not pending at the time the divorce judgment was entered. The trial court's attempt to amend the divorce judgment to include the alimony agreement was void because trial courts have no authority to amend a final judgment. Rather, Rule 60(b) allows the court to set aside or relieve a party from the effects of a judgment but a trial court cannot "leave intact a judgment of absolute divorce, yet order that one or more of the legal effects of that judgment may somehow be avoided."

Spousal Agreements

Cases Decided Between June 1, 2010 and September 21, 2010

College Tuition Provisions; Interpreting the Contract; Specific Performance

- Provision in unincorporated separation agreement providing both parents would pay ½ of all college expenses was not too vague to enforce.
- Where provisions in contact are not ambiguous, court cannot consider evidence beyond the language of the agreement. Therefore, trial court did not err in refusing to consider evidence of father's intent at the time the agreement was signed.
- Provisions in separation agreements are presumed separable, meaning the various provisions are not dependent and a violation of one provision by one party will not excuse the performance of another provision by the other party. Therefore, father's claim that mother failed to abide by terms relating to visitation would not be a valid defense to his failure to pay college expenses, even if father had proved she had in fact interfered with visitation.
- The remedy of specific performance is available only if trial court finds that the remedy at law (i.e. a money judgment) is inadequate. Trial court did not err in finding legal remedy inadequate where defendant's obligation under the contract would require that he make payments over time toward the college expenses of three children and defendant had indicated his unwillingness to make those on-going payments.
- While trial court can order specific performance only if performance "is feasible," the trial court is not required to find actual present ability to pay before ordering that remedy.
- Order was remanded to trial court for further findings relating to costs where trial court ordered defendant to pay cost without indicating "the authority under which such costs were awarded, indicate any specific amount to be paid, or reference any schedule of fees or costs that may have calculated the amount owed."

Martin v. Martin, unpublished opinion, _S.E.2d_ (N.C. App., June 15, 2010).
Plaintiff mother brought breach of contract action against father based on his failure to pay college expenses for oldest child pursuant to terms of unincorporated separation agreement. Although the court of appeals does not articulate any new rules relating to the interpretation and enforcement of unincorporated separation agreements, this unpublished opinion contains a very thorough discussion of the law relating to a number of issues which arise frequently in these cases.

The agreement at issue in this case stated that both parties would pay ½ college expenses for all three children. Father refused to pay when oldest child enrolled at UNC Chapel Hill. Father argued that at the time he signed the agreement, he intended to pay only 'modest' college expenses and only if he had a good relationship with the children based on the visitation provisions set out in the agreement. The trial court ordered specific performance and the court of appeals upheld all of the trial court provisions except those relating to costs. The important points of the opinion are set out in the bullets above. Regarding father's ability to comply with the order of specific performance, the court of appeals stated that trial courts are not required to find present ability to pay as would be required for an order of contempt. However, the court of appeals noted that trial court did find defendant had the ability to pay based on his financial

affidavit and testimony after concluding that he had a number of discretionary and voluntary expenditures that could be reduced.

College tuition provisions; implied good faith

- Trial court did not err in ordering father to pay all college expenses of son where agreement provided that he would pay all costs associated with son's attendance at a "mutually acceptable college or university" even though father did not participate in process of choosing the college nor did he give his approval before son enrolled.
- Provision in contract implied that father would exercise his 'discretionary disapproval' of any college in good faith.
- By failing to participate in college selection process, father waived his right to object to any particular college but he remained responsible for all costs.

Gonzales v. Gonzales, unpublished opinion, _S.E.2d_ (N.C. App., July 6, 2010).
Plaintiff mother brought breach of contract action against father based on his failure to pay college expenses for oldest child pursuant to terms of unincorporated separation agreement. Father argued that because the agreement specified he would pay for a "mutually acceptable college or university", he could not be ordered to pay when he did not participate in the decision concerning where his son would enroll. The court of appeals held that the trial court did not err in concluding that the agreement implied that father would participate in the college selection process and only use his right to object in good faith and not simply to avoid paying the expenses. According to the court of appeals, father waived his right to object to any particular school by refusing to participate in the selection process.

Incorporation; contract defenses not available after contract becomes court order

- Trial court did not err in denying plaintiff wife's Rule 60 motion seeking to set aside consent order incorporating agreement reached by parties during mediation based on her claim the agreement was unconscionable.
- In order for mistake to be grounds to set aside a consent judgment, the mistake must be mutual or the result of misconduct.
- When contract is incorporated into court order, the parties lose all contract defenses, including a claim that the agreement is unconscionable.

Griffith v. Griffith, 696 S.E.2d 701 (N.C. App., 2010).
Parties entered into a Memorandum of Judgment settling all claims following family financial mediation. The agreement was incorporated into a consent judgment. Plaintiff wife subsequently filed a Rule 60(b) motion requesting that the consent judgment be set aside because the equitable distribution provisions were so unfair that the agreement was unconscionable. The trial court denied her request and the court of appeals affirmed. According to the court of appeals, parties lose all contract defenses such as claims the contract is unconscionable when the agreement is incorporated into a consent order. A party seeking to set aside a consent judgment is limited to proving "lack of consent, fraud, mutual mistake, or unilateral mistake under some misconduct." While plaintiff argued she misunderstood the terms of the consent judgment at the time she agreed to its entry, the court held that her confusion was at most a unilateral mistake rather than the mutual mistake necessary to set aside the judgment.

Postseparation Support and Alimony

Cases Decided and Legislation Enacted Between June 1, 2010 and September 21, 2010

Jurisdiction after appeal; jurisdiction after recusal

- Trial court erred in ordering payment of attorney fees after alimony order had been appealed.
- Trial judge erred in ordering payment of attorney fees after judge signed order recusing herself from the case.

Phillips v. Phillips, unpublished opinion, _ S.E.2d_ (N.C. App., August 3, 2010).

After defendant appealed alimony order to court of appeals, trial court granted plaintiff's request for attorney fees. Court of appeals held that trial judge lacked jurisdiction to order attorney fees both because the appeal divested the district court of jurisdiction to act in the case and because the judge had entered an earlier order recusing herself from the case. According to the court of appeals, recusal divests a judge of authority to enter further orders in a matter.

Reasonable expenses; attorney fees; expert witness fees

- Trial court did not err in concluding expenses paid by defendant for new wife and adult son were not reasonable expenses required to be considered by the court when determining plaintiff's request for modification of alimony.
- Trial court has authority to award attorney fees for appeal of alimony modification order if requirements of GS 50-16.4 are met.
- However, trial court has no authority to order supporting spouse to pay fees of dependent spouse's expert witness if that witness was not subpoenaed to appear at trial.

Martin v. Martin, _S.E.2d_ (N.C. App., September 7, 2010).

Defendant supporting spouse filed motion to decrease alimony and plaintiff dependent spouse filed motion to increase. Trial court increased alimony and defendant appealed. In addition to numerous other objections to particular findings of fact made by the trial judge, defendant argued that the trial court erred in concluding that expenses paid by defendant on behalf of his current spouse and on behalf of his adult son were not reasonable expenses. The court of appeals affirmed the trial court, stating "we … decline to hold that the trial court erred in its conclusion that defendant's excess expenditures were voluntary on the part of the defendant, and unreasonable in view of his obligation to pay alimony to plaintiff." The court of appeals also rejected defendant's argument that the trial court lacked statutory authority to award attorney fees to plaintiff. The court of appeals held that fees can be awarded pursuant to GS 50-16.4 "when it is shown that the spouse is, in fact, dependent, is entitled to the relief demanded, and is without sufficient means whereon to subsist during the prosecution of the action and defray the necessary expense thereof." The court held that this authority "extends to appeals in which the supporting spouse is the appellant." However, the court of appeals agreed that the trial court exceeded its authority when it ordered defendant to pay fees of plaintiff's expert witness when that witness did not appear at trial pursuant to a subpoena.

Entry of Judgment is Responsibility of Trial Judge; attorney fees
Jackson v. Penton, unpublished opinion, _S.E.2d_ (N.C. App., September 7, 2010).
Motion filed to enforce alimony provisions in incorporated separation agreement. Trial court did not err in requiring defendant to pay attorney fees to plaintiff in accordance with terms of separation agreement. However, amount of fees was inappropriate to the extent it included compensation for work attorney performed in an effort to enforce a provision of the agreement which the trial court ruled to be unenforceable as a matter of public policy. [Trial court ruled that provision in agreement requiring automatic increases in alimony as defendant's income increased violated public policy and was not enforceable. Court of appeals did not review this issue.] Opinion states the following:

"II. Delay in Entry of Order
". . . to no one will we refuse or delay, right or justice."
The Magna Carta, clause 40 (1215).

"Justice delayed is justice denied."
Attributed to William Gladstone, British Statesman;
see also Gohman v. City of St. Bernard, 146 N.E. 291, 294 (Ohio 1924), overruled on other grounds by *New York Life Ins. Co. v. Hosbrook*, 196 N.E. 888 (Ohio 1935).

"The record in this case reveals that plaintiff's motion was filed on 26 April 2004. The hearing was held on 30 November 2005. The order was signed by the presiding judge on 7 May 2009, three and one-half years later. The record is devoid of any explanation as to why this inordinate delay occurred. Regardless of whether any delay was caused by the attorneys in submitting the order to the court, the ultimate responsibility for the timely entry of orders rests upon the presiding judge. The order entered in this case was an order of the court, not an order of the parties. The trial court is admonished to enter its orders in a timely fashion so that disrepute and public censure will not fall upon the courts of this State. The trial court should give attorneys deadlines for the submission of orders. If the deadlines are not complied with, the trial courts have adequate tools at their disposal to compel compliance."

Legislation

S.L. 2010-14 (S 59): Attorney fees in alimony cases.
Amends G.S. 50-16.4 to address the effects of the North Carolina Supreme Court decision in *Patronelli v. Patronelli*, 360 N.C. 628, 636 S.E.2d 559 (2006). The prior statute provided that attorney fees may be awarded to a dependent spouse in an alimony case "for the benefit of such spouse." The Supreme Court interpreted this provision to prohibit an award of fees where the dependent spouse received attorney services *pro bono* and therefore would not personally benefit from the award. The amendment removes the reference to the benefit of the spouse. Applies to fees for services rendered on or after October 1, 2010.

Adoption

Cases Decided Between June 1, 2010 and September 21, 2010

Required consent; reasonable and consistent support prior to petition

- Trial court did not err in concluding that the consent of the father of child born out of wedlock was required for adoption of the child by petitioners.
- Trial court finding that father had provided consistent support in accordance with his ability to pay before the petition was filed was supported by the evidence.

In re adoption of K.A.R., 696 S.E.2d 757 (N.C. App., 2010).

Mother of child born out of wedlock placed child with petitioners for adoption. Petitioners claimed father's consent was not necessary for the adoption because he had failed to provide reasonable and consistent support for the child such that his consent would be required pursuant to GS 48-3-601(2)(b)(4). The trial court disagreed, finding that while the father was unemployed during the pregnancy and unable to pay cash support, he offered support in the form of equipment and supplies for the baby as soon as he found a job. Specifically the court found that he provided a car seat, a mattress, clothing and 'miscellaneous baby paraphernalia' during the first two weeks following the birth of the child. The total value of the products was approximately $200. The court of appeals affirmed the trial court and held that the findings were sufficient to support the conclusion that the consent of the father was required for adoption. The court of appeals noted that father child's support obligation pursuant to the guidelines would have been approximately $200, the same amount he spent on the child immediately following the birth.

Miscellaneous Matters

Cases Decided Between June 1, 2010 and September 21, 2010

Alienation of affection against girlfriend who encouraged wife to drink alcohol and have an affair

- Trial court did not err in denying defendant's motion for directed verdict where evidence at trial was "more than a scintilla of proof for every element of plaintiff's claim."
- Alienation claim can succeed even if plaintiff's spouse retains affection for plaintiff.
- There is no requirement that plaintiff prove defendant intended to cause alienation, only that defendant intentionally acted in a manner likely to affect plaintiff's marital relationship.

Heller v. Somdahl, Jones and Jones, 696 S.E.2d 857 (N.C. App., August 3, 2010).
Plaintiff brought action against Somdahl, the person who had an affair with plaintiff's wife while plaintiff was deployed in Iraq, and against Mary and Denver Jones, a couple plaintiff claimed encouraged, coerced and persuaded plaintiff's wife to have the affair with Somdahl. Defendant Mary Jones moved for a directed verdict on the claim against her before the case went to the jury but the trial court denied her motion. Following a jury verdict against Mary Jones, she appealed arguing that the trial court should have granted her motion to dismiss. The court of appeals affirmed the trial court, holding that the evidence offered by plaintiff was sufficient to go the jury. Evidence showed that Mary Jones was a friend of plaintiff's wife and that she encouraged the relationship between plaintiff's wife and Somdah while plaintiff was in Iraq. Evidence also showed that Mary Jones attempted to interfere when plaintiff called from Iraq to talk to his wife on the telephone, and that she "allowed [the wife], who she know did not drink responsibly, to attend defendant's party at which alcohol was served." In addition, while the wife's affections for husband were not completely destroyed (it appears from the opinion that plaintiff and his wife are still married, although it is not clear), the court held that evidence that the wife "retreated physically and emotionally from the relationship" with her husband was sufficient to support a finding that there had been an alienation and destruction of the marriage's love and affection.

Alienation of Affection; minimum contacts; notice of trial

- Exercise of jurisdiction over defendant who had never visited North Carolina was proper where there was frequent telephone and email contact between defendant and plaintiff's wife regarding their sexual relationship.
- Rule 2 of the Rules of Practice for the District and Superior Courts contemplates that a party should receive at least two notices from the court prior to a trial date: a tentative trial calendar at least four weeks before trial and a final calendar at least two weeks before trial.
- Where notices were sent by court to the wrong address, defendant did not have appropriate notice of trial.

Brown v. Ellis, 696 S.E.2d 813 (N.C. App., August 3, 2010).
Husband filed claim for alienation of affection and criminal conversation against defendant, a resident of California. The defendant had never been physically within the state of NC before this case was filed. Court of appeals originally reversed trial court judgment after concluding that

the long-arm statute found in GS 1-75.4 did not support exercise of jurisdiction over defendant. The supreme court reversed the court of appeals and held that the contact between wife and defendant was sufficient to meet long-arm requirement. In this opinion, the court of appeals holds that there also were sufficient minimum contacts between defendant and NC to make it constitutionally appropriate for North Carolina to exercise jurisdiction. In reaching this conclusion, the court considered the frequency of defendant's actions (he contacted wife almost daily by phone or email), the quality and nature of the contacts (in pursuit of a sexual relationship with plaintiff's wife), and North Carolina's interest in this lawsuit (significant because most other states no longer recognize the cause of action). However, court of appeals reversed the verdict on the ground that defendant did not receive adequate notice of trial. Evidence showed notices from the clerk of court were mailed to house number "28422" when defendant's house number was "28442".