FAMILY LAW

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# RECENT CASES AND LEGISLATION RELATING TO FAMILY LAW: FILED OR ENACTED BETWEEN FEBRUARY 1 AND JULY 1, 2003

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The following cases and legislation were decided or enacted between February 1 and July 1, 2003. The full text of all court opinions can be found on the website of the N.C. Administrative Office of the Courts: www.nccourts.org. The full text of all legislation can be viewed on the website of the N.C. General Assembly: www.ncga.state.nc.us.

## Custody

### Fathers of illegitimate children

**Rosero v. Blake, 581 S.E.2d 41 (N.C., June 13, 2003), *reversing* 150 N.C. App. 251, 563 S.E.2d 248 (2002).**
**Holding.** Trial court did not err in using best interest to determine custody between mother and father of child born out of wedlock.
**Discussion.** Trial court awarded custody to father of child born out of wedlock after concluding that custody to father would be in the best interest of the child. Court of appeals reversed, holding that it was bound by the opinion of the supreme court in *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965). In that case, the supreme court held there is a common law presumption that custody of an illegitimate child should be awarded to the mother unless the mother is unfit or otherwise unable to care for the child. According to the court of appeals, the presumption applies until the father has legitimated the child or obtained a judicial determination of paternity pursuant to G.S. 49-14. In this case, the father had signed an acknowledgment of paternity pursuant to G.S. 110-132(a) and an order of paternity had been entered pursuant to the acknowledgment, but the court of appeals held that the acknowledgment and order pursuant to G.S. 110-132(a) were insufficient to defeat the presumption in favor of the mother. The supreme court reversed the court of appeals,

holding that case law and statutory amendments since 1965 have abrogated the common law presumption in favor of mothers of illegitimate children. The court outlined changes in the "laws governing familial relationships" since the *Jolly* decision in 1965 and concluded that those changes established that the General Assembly intended to abrogate the historical presumption in favor of mothers when it enacted G.S. 50-13.2(a), which now provides that "[b]etween the mother and father, whether natural or adoptive, no presumption shall apply as to who will promote the interest and welfare of the child."

**David v. Ferguson, 153 N.C. App. 482, 571 S.E.2d 230 (2002).**
**Holding**. Trial court erred in applying best interest analysis to decide custody between mother and father of child born out of wedlock where father had not judicially legitimated the child or judicially established paternity. Award of custody to plaintiff father is reversed.
**Discussion.** Although plaintiff and defendant lived together at the time each child was born, the parties were not married. The plaintiff had filed a voluntary acknowledgment of paternity, but had not legitimated the child nor established paternity pursuant to provisions in G.S. 49. The court of appeals therefore held that the ruling in *Rosero v. Blake*, 150 N.C. App. 251 (2002) prohibited the trial court from using the best interest of the child test to determine custody between the parties. According to the court of appeals in *Rosero*, the mother of illegitimate children has absolute right to custody in case against a father who has not legitimated the children or established paternity pursuant to G.S. 49 unless the mother is proven unfit to exercise custody. **Note:** See discussion above regarding decision by supreme court reversing court of appeals in *Rosero.*

**Smith v. Barbour, 154 N.C. App. 402, 571 S.E.2d 872 (2002).**
**Holding**. Where plaintiff initiated a legitimation action in superior court immediately after filing a custody and paternity action in district court, district court was divested of jurisdiction to proceed on the paternity claim. Therefore, the trial court erred in ordering a paternity test as part of a temporary custody order.
**Discussion**. Plaintiff filed custody and paternity claim in district court. The trial court ordered a paternity test and entered a temporary order granting plaintiff visitation rights. On the same day he filed the custody/paternity case, plaintiff also filed an action in superior court pursuant to G.S. 49-10 seeking to legitimate the child. The court of appeals held that the legitimation proceeding divested the district court of jurisdiction to hear the paternity claim and therefore it was error for the trial court to order paternity testing. The court reasoned that because legitimation "vests greater rights in the parent and the child than an order adjudicating the child's paternity, … the legitimation proceeding should be given preference when separate actions for both legitimation and paternity are filed."
**Holding**. Plaintiff had standing to bring a custody action even though he had not legitimated the child and paternity had not been judicially established where he and the child shared the same last name and plaintiff had visited with the child on a regular basis.
**Discussion**. Defendant mother was married to another man at the time of the birth of the child. Plaintiff had visited with the child since birth but alleged that mother had recently prohibited all visitation. The child and plaintiff shared the same last name. The trial court entered a temporary custody order granting visitation rights to plaintiff. Mother argued on appeal that plaintiff had no standing to bring a custody action because he had not legitimated the child or obtained a judicial determination of paternity at the time the custody action was initiated. The court of appeals held that under *Rosero v. Blake*, 150 NC App 250 (2002) a putative father who has not legitimated a child or established paternity is treated as a third party in a custody proceeding against a parent. However, in this case, plaintiff had alleged a relationship with the child sufficient to give him standing to file the custody action. (The court did not address the standard he would have to meet to be entitled to custodial rights in the final custody order). Because he alleged that the child shared his last name and he had visited with the child since birth, the court of appeals held plaintiff had standing to initiate the custody action. **Note**: See discussion above regarding decision by supreme court reversing court of appeals in *Rosero.*
**Holding.** Trial court erred in entering a temporary custody order in case brought against mother by putative father where husband of mother was not given notice of the custody action.
**Discussion.** The court of appeals held that the man married to the mother at the time of the birth of the child was a necessary party to the custody action. As he was not given notice of the proceeding, the court of appeals held that the trial court had no authority to enter the temporary custody order.

## Grandparent visitation and custody

**McDuffie v. Mitchell, 573 S.E.2d 606 (N.C. App., Dec. 31, 2002), *review denied*, 357 N.C. 165, 580 S.E.2d 368 (2003).**
**Holding.** Trial court did not err in dismissing plaintiff grandmother's complaint seeking custody or visitation in case where custodial parent died.
**Discussion.** Mother had custody of children and defendant had visitation rights. Mother died and grandmother sought custody. Father counterclaimed for custody and moved to dismiss the grandmother's claims. The trial court granted defendant father's 12(b)(6) motion and the court of appeals affirmed. The court of appeals held that grandparent claims for custody or visitation are limited to 1) those brought pursuant to the grandparent visitation statutes, and 2) those wherein grandparents claim parents have lost their constitutional right to custody. In an effort to make a claim pursuant to the grandparent visitation statutes, plaintiff grandmother had initially filed a motion to intervene in the custody case between the parents pursuant to G.S. 50-13.5(j)(the grandparent statute allowing visitation to be granted in a case where custody has been previously determined if the grandparent can show a substantial change of circumstance). However, the trial court dismissed that motion after concluding that the case between the parents no longer existed after the death of the mother. Although plaintiff did not appeal that dismissal, the court of appeals agreed in this opinion that the trial court's jurisdiction in the case between the parents terminated upon the death of one party, leaving no case within which a grandparent could intervene. In this separate action plaintiff argued that grandparents should have expanded rights to custody or visitation when a custodial parent has died. The court of appeals rejected this argument, holding that a noncustodial parent has the same constitutional right to the care, custody and control of their children as against third parties as does a custodial parent.
**Holding.** Trial court properly granted defendant father's Rule 12(b)(6) motion to dismiss where grandparent's complaint failed to allege facts sufficient to support a conclusion that defendant father had waived his constitutional right to custody.
**Discussion.** Court of appeals agreed with trial court's conclusion that grandmother's complaint failed to allege facts sufficient to prove father had waived his right to custody and control of his children. Grandmother alleged that father "had been estranged from the children for some time and currently enjoys limited visitation with the minor children." According to the court of appeals, "such allegations fall short of establishing that defendant acted in a manner inconsistent with his protected status."

**Owenby v. Young, 357 N.C. 142, 579 S.E.2d 264 (2003), *reversing* 150 N.C. app. 412, 563 S.E.2d 611 (2002).**
**Holding.** Trial court did not err in dismissing plaintiff grandmother's complaint for custody after concluding that grandmother had not met her burden of proving that defendant father had waived his constitutionally protected status as a parent.
**Discussion.** Defendant father and the mother of the children had a custody order granting primary physical custody of the children to the mother and granting father visitation. The mother was killed, and maternal grandmother filed for custody. Plaintiff grandmother's complaint alleged that father had waived his constitutional protection as a parent by engaging in conduct inconsistent with his protected status. The trial court concluded that the grandmother did not meet her burden of proving that father had waived his rights and dismissed her complaint. Court of appeals reversed, holding that grandmother's proof that father had been convicted twice of drunk driving, had continued to drive after having his license revoked, and had an unstable employment and financial history was sufficient to support a conclusion that father had acted in a manner inconsistent with his protected status. The supreme court reversed the court of appeals and reinstated the trial court's dismissal of the grandmother's complaint after concluding that the trial court had considered and rejected each allegation concerning father's misconduct. While the father was convicted of DWI twice in a 5-year period, the trial court specifically found that there was no evidence he engaged in heavy drinking on a regular basis. The supreme court noted that the children were not present when father was arrested for DWI on either occasion. In addition, the trial court found that the only time father drove on public roads after having his license revoked was when he drove to the children on the night their mother was killed. Finally, the trial court's conclusion that father had a stable work history was supported by evidence that he had been employed by the same company for more than eight years. The supreme court held that the trial court's findings supported the conclusion that grandmother had failed to prove by clear and convincing evidence that father had waived his constitutional right to custody.

**Eakett v. Eakett, 579 S.E.2d 486 (N.C. App., May 6, 2003).**
**Holding.** Trial court did not err in refusing to allow grandfather to intervene in custody action between mother and father of child or in dismissing his request for visitation where grandfather failed to allege that the child does not live in an intact family.
**Discussion.** Grandfather filed motion to intervene in custody action between mother and father of child pursuant to GS 50-13.5(j). That statute states that "In any action in which the custody of a minor child has been determined, upon a motion in the cause and a showing of changed circumstances pursuant to G.S. 50-13.7, the grandparents of the child are entitled to such custody or visitation rights as the court, in its discretion, deems appropriate." The mother had been granted custody in the case approximately one year before grandfather filed his motion to intervene. The court of appeals held that, in order to have standing to proceed under this statute, a grandparent must allege and prove that the child's family is not in tact. The court seems to indicate that the family in this case was in tact because no action had been taken in the custody case between the parents for over one year before grandfather filed his complaint. The court held that to interpret 50-13.5(j) otherwise would impermissibly infringe upon a parent's constitutional right to care, custody and control of their child.

## Procedure

## Rule 68 offers of judgment

**Mohr v. Mohr, 573 S.E.2d 729 (N.C. App., Dec. 31, 2002).**
**Holding.** Offers of Judgment made pursuant to Rule 68 of the N.C. Rules of Civil Procedure are not applicable to custody proceedings.
**Discussion**. Plaintiff filed a motion to change the terms of a custody order. Defendant responded by filing an offer of judgment offering to keep the terms of the existing order in place with no modifications. Plaintiff rejected the offer. The trial court thereafter denied plaintiff's motion to modify, and defendant claimed costs pursuant to Rule 68. The trial court denied defendant's motion for costs and the court of appeals affirmed. The court of appeals held that "Rule 68 offers of judgment are inconsistent with our framework for determining custody under Chapter 50" as application of the Rule would "allow a party to circumvent the court's statutory authority and responsibility to determine custody in the best interests of the child."

## Jurisdiction

**David v. Ferguson, 153 N.C. App. 482, 571 S.E.2d 230 (2002).**
**Holding**. Trial court had jurisdiction to hear custody claim where children had resided in N.C. for 6 months prior to the institution of the action.
**Discussion**. Parties resided together in N.C. when both children were born. In Feb. 2000, defendant moved to Maryland with the children. In June 2000, the children were returned to plaintiff in N.C. Defendant alleged that at the time the children returned to N.C., the parties agreed that the children would be returned to Maryland sometime in the future. Plaintiff filed for custody in N.C. in January 2001. The court of appeals rejected defendant's argument that, because the children were domiciled in Maryland, N.C. did not have jurisdiction to decide custody under the UCCJEA, G.S. 50A. The court of appeals held that because the children had resided in N.C. with plaintiff for at least 6 months before the custody proceeding was filed, N.C. was the home state and the only state with jurisdiction to make a custody determination. The court also rejected defendant's argument that Maryland had jurisdiction because the parties had entered into a custody agreement in Maryland. The court of appeals held that even if the parties had entered into an agreement regarding custody in Maryland, agreements between parties that do not result in a court order are not "custody determinations" within the meaning of the UCCJEA and therefore have no impact on jurisdiction.

**Foley v. Foley, 576 S.E.2d 383 (March 4, 2003).**
**Holding.** Trial court erred in concluding that it had jurisdiction to enter a custody order based exclusively on the fact that the parties previously signed a consent custody order in North Carolina.
**Discussion.** When defendant filed motion to set aside a consent order regarding custody based upon his assertion that NC did not have jurisdiction under the UCCJEA and the PKPA to enter the order, the trial court denied the motion based upon the conclusion that the parties had waived all objections to jurisdiction by agreeing to the entry of the consent judgment. The court of appeals held that parties cannot confer subject matter jurisdiction on the court by consent and therefore they do not waive jurisdiction objections when they consent to the entry of an improper order.
**Holding.** Where order contained no findings upon which it could be determined if NC had jurisdiction pursuant to the UCCJEA to enter a custody order,

order must be vacated and the matter remanded to the trial court for additional findings.
**Discussion.** Neither the order nor the record on appeal contained information about the child's date or place of birth, or about the length of time the child had resided in NC at the time of the filing of the custody complaint. Without that information, the court could make no determination as to whether NC has subject matter jurisdiction to determine custody in this case. The court of appeals held that trial courts assuming jurisdiction in custody cases should make specific findings of fact to support its actions.

## Continuances

**Ruth v. Ruth, 579 S.E.2d 909 (N.C. App., June 3, 2003).**
**Holding.** Trial court erred in denying plaintiff's motion for a new trial where trial court's denial of her motion for a continuance of the custody trial violated plaintiff's constitutional due process rights.
**Discussion.** Defendant filed a motion seeking a change of custody based upon a substantial change of circumstances. The changed circumstances involved primarily problems with the existing visitation schedule. Plaintiff's attorney withdrew 30 minutes before the start of the custody trial. Plaintiff did not request a continuance of the trial until she realized during the trial that the court was considering changing custody rather than just the visitation schedule. The trial court denied her request for a continuance and awarded custody to defendant. The court of appeals held that the circumstances of this case required that the trial court allow plaintiff more time to prepare for trial in order to avoid "a miscarriage of justice." According to the court, "due process involves the fundamental element of a reasonable time for preparation for trial." Because plaintiff reasonably believed the only issue before the trial court was visitation, the court held that due process required that she be granted a continuance after the late withdrawal of her attorney.

## Appeals

**Evans v. Evans, 581 S.E.2d 464 (N.C. App., June 17, 2003).**
**Holding.** Appeal of final custody determination was interlocutory where claims for equitable distribution and alimony remained pending in the trial court.
**Discussion.** Court of appeals rejected contention that case of *McConnell v. McConnell*, 151 N.C. App. 622, 566 S.E.2d 801 (2002) stands for the proposition that all custody determinations affect a substantial right and therefore can be appealed despite other claims pending in the trial court. The court of appeals held that without reason to believe that a child's health or safety is in jeopardy, or that irreparable harm will result from a delay of the appeal, custody orders do not affect a substantial right.

## Modification

**Shipman v. Shipman, 573 S.E.2d 755 (N.C. App., Dec. 31, 2002).**
**Holding.** Trial court's findings were sufficient to support the conclusion that there had been a material change of circumstances affecting the welfare of the child.
**Discussion.** Original order granted plaintiff mother primary physical custody and defendant father visitation. The trial court granted defendant father's motion to modify and the court of appeals affirmed. The court of appeals rejected mother's contention that the trial court made insufficient findings to support the conclusion that there had been a substantial change of circumstances affecting the welfare of the child. The court of appeals held that findings of fact including 1) mother's transience (she had moved several times and did not have a home at the time of the hearing), 2) defendant's remarriage, 3) plaintiff's cohabitation in violation of the original custody order, and 4) plaintiff's denial of defendant's visitation rights, supported the conclusion that there had been a change and that the change affected the children. Dissent by Walker, arguing that trial court made no findings about how these changes affected the child.

**Hicks v. Alford, 576 S.E.2d 410 (N.C. App., March 4, 2003).**
**Holding:** Trial court was not required to take additional evidence on modification motion when case was remanded by court of appeals.
**Discussion**: Custody modification order was remanded because original order did not contain sufficient findings to show how the change of circumstances identified by the trial court affected the child. Remand instructions did not require the trial court to take additional evidence. Therefore, according to the court of appeals, the decision to receive new evidence or rely on the evidence presented during the original hearing was within the discretion of the trial judge.
**Holding**: Trial court's findings were sufficient to support the conclusion that the change of circumstances affected the child.

**Discussion:** New order contained numerous findings as to conduct by plaintiff and her family that interfered with the visitation rights of defendant, including findings about violent actions by plaintiff and her family toward defendant in the presence of the child. The new order entered by the trial court included a finding that "it is in the best interest of the child to develop a relationship with both parents." In addition, the court found and concluded that the actions of plaintiff and her family "interfered with the father developing a relationship with the child which is not in the best interest of the child and will continue to adversely affect the welfare of the child if allowed to continue."

**Scott v. Scott, 579 S.E.2d 431 (N.C. App., May 6, 2003).**
**Holding.** Trial court did not abuse its discretion when it ruled there had been no substantial change of circumstances affecting the welfare of the child.
**Discussion**. Father offered evidence that son experienced emotional difficulty and problems in school while in mom's care and evidence that child did better when in his care. Trial court nevertheless found no change of circumstances, and indicated in findings that it believed the child was trying to manipulate the parties. Court of appeals held that while the evidence may have supported a finding of changed circumstances, the trial court was not required to find a substantial change and did not abuse its discretion in deciding there had been no substantial change.

## Visitation

**Pass v. Beck, 577 S.E.2d 180 (N.C. App., March 18, 2003).**
Trial court did not err in awarding visitation rights to plaintiff father after concluding that defendant mother's allegation that the child was conceived as the result of plaintiff' rape of defendant was not credible. Further, trial court did not err in delaying entry of a visitation schedule until after a psychologist recommended a schedule that would serve the best interest of the child. The trial court's reliance on the psychologist was appropriate where the child had no relationship with plaintiff father before the visitation order.

# Child Support

## Setting Aside Voluntary Support Agreements

**State ex. rel. Davis v. Adams, 153 N.C. App. 512, 571 S.E.2d 238 (2002).**
**Holding.** Trial judge did not abuse discretion in denying defendant's motion to set aside Voluntary Support Agreement and Order that established defendant's paternity where defendant's motion was filed more than three years after the order was entered.
**Discussion.** In 1996, the court entered a Voluntary Support Agreement and Order that established defendant's paternity of two children and set his support obligation. In 1999, a DNA test excluded defendant as the father of one of the children. In 2000, defendant filed a motion asking the court to void the order establishing his paternity of that child. The trial court treated the motion as one made pursuant to Rule 60(b) and denied the motion. The court of appeals affirmed the trial court and rejected defendant's argument that the trial court erred in treating the motion as a Rule 60(b) motion when defendant did not designate it as such. The court of appeals held that motions seeking to void or set aside a paternity judgment are Rule 60(b) motions whether designated as such by the party or not. The court of appeals held that because defendant's claim was based upon his assertion that the earlier order was obtained by mistake or fraud – a claim pursuant to Rule 60(b)(1) or (b)(3) – the claim was subject to a one-year time limitation. As there were three years between the entry of the order and defendant's motion to set it aside, the court of appeals held that the motion was properly denied. The court of appeals further held that because the motion was one properly made pursuant to Rule 60(b)(1) or (b)(3), the defendant could not ask the court to set aside the paternity judgment pursuant to the broader authority of Rule 60(b)(6), which has no time limitation.

## Enforcement of arrears

**Egbert v. Egbert, 153 N.C. App. 283, 569 S.E.2d 727 (2002).**
**Holding**. Florida orders entered in 1992 and 1997 did not result in a modification of child support order entered in North Carolina in 1989 where the mother and the child continued to reside in North Carolina. Therefore, obligor was required to pay arrearages

accrued under N.C. order even though Florida court had attempted to lower defendant's support obligation.
**Discussion.** A support order was entered in N.C. in 1989. N.C. was the home state of the child at the time the order was entered and has been the home state at all times since the entry of the N.C. order. When defendant moved to Florida, the North Carolina order was registered in Florida pursuant to URESA. The Florida court modified the North Carolina order in 1992 and 1997, both times reducing the amount of defendant's support obligation. In 1997, the Florida court dismissed the URESA proceeding after concluding that defendant had satisfied all support obligations. Plaintiff filed action in N.C. seeking to recover arrears under the 1989 support order and the trial court ordered defendant to pay. The court of appeals affirmed, holding that North Carolina had "exclusive continuing jurisdiction" pursuant to the federal Full Faith and Credit for Child Support Orders Act ("FFCCSOA"), 28 U.S.C. 1738B (1994). That act provides that a state retains exclusive jurisdiction to modify an order as long as the state remains the child's home state or as long as one party remains a resident of the state. As N.C. retained exclusive jurisdiction, the Florida court did not have jurisdiction to modify the N.C. order. The court rejected obligor's argument that plaintiff should be estopped from recovering the arrears because she had consented to the jurisdiction of the Florida court. The court of appeals acknowledged that FFCCSOA provides that a court can obtain exclusive, continuing jurisdiction by the written consent of all parties, but held that no written consent was filed in this case. Further, the court held that even if Florida obtained jurisdiction by consent, N.C. would retain jurisdiction as well. According to the court of appeals, FFCCSOA provides that if more than one state has continuing jurisdiction, then orders issued in the home state of the child must be recognized.

**New Hanover County, on behalf of Sherri Mannthey v. Kilbourne, 578 S.E.2d 610 (N.C. App., April 15, 2003).**
**Holding.** Trial court erred in failing to give full faith and credit to Oregon support order entered in 1989 and in holding that a 1992 North Carolina order was the controlling order pursuant to UIFSA.
**Discussion.** Court of appeals held that it is not necessary to determine which of two or more conflicting child support orders are controlling when the only issue is collection of arrears. Where, as in this case, a child has "aged out" and there is no need for collection of prospective support, the question to be resolved is whether the arrears accrued under the orders are entitled to full faith and credit. The court held that the arrears accrued under the Oregon order were entitled to full faith and credit because 1) the order was valid under URESA when entered and the NC order did not specifically express an intent to nullify the Oregon order, and 2) Oregon has a statute similar to NC G.S. 50-13.10 providing that arrears vest when they accrue.

## Modification

**Lombardi v. Lombardi, 579 S.E.2d 419 (N.C. App., May 6, 2003).**
**Holding.** Trial court did not err in modifying New Jersey order to terminate defendant's obligation to pay support for his adult mentally retarded child.
**Discussion:** New Jersey entered an order wherein the court declared the adult child of the parties to be unemancipated and ordered defendant to pay support. Plaintiff and adult child moved to NC and defendant moved to Maryland. Defendant filed a request in NC pursuant to UIFSA that the New Jersey order be modified to terminate his support obligation. The trial court terminated his support obligation and the court of appeals affirmed. According to the court of appeals, New Jersey lost continuing exclusive jurisdiction when all parties left that state. North Carolina has modification jurisdiction under UIFSA because New Jersey no longer has exclusive jurisdiction, defendant is not a resident of NC, and plaintiff is subject to the personal jurisdiction of the NC court. According to the court of appeals, a modifying court must apply the law of the forum state unless the provision to be modified is not subject to modification under the laws of the issuing state. In this case, the court held that New Jersey law allows the modification of a determination that a child is unemancipated and therefore in need of continued support. The court of appeals held that, because it is a modifiable provision, the North Carolina court had no choice but to terminate defendant's obligation in accordance with NC law. In addition, no change of circumstances was required to support the modification because NC law provides that support obligations end when the child becomes 18.

**Mason v. Erwin, 579 S.E.2d 120 (N.C. App., April 15, 2003).**
**Holding.** Trial court did not err in imputing income to defendant where findings of fact supported the conclusion that he voluntarily depressed his income in deliberate disregard of his obligation to support his minor child.
**Discussion.** Defendant took early retirement after his new wife won the Canadian lottery. The court of

appeals upheld the trial court's decision to calculate his child support obligation using the salary he earned before he retired. Citing the child support guidelines, the court of appeals held that income may be imputed to a parent who is voluntarily underemployed only when the underemployment is the result of the parent's bad faith or deliberate suppression of income to avoid his or her child support obligation. The trial court's conclusion that defendant retired and reduced his income in deliberate disregard of his obligation to pay reasonable support was properly supported by findings that 1) he was an able-bodied, 52 year old worker with no physical disabilities, 2) while he paid support pursuant to consent orders, he never paid an amount of support equal to support required by the guidelines, and 3) his past actions indicated an unwillingness to provide adequate support for the child despite the fact that all of his financial needs were being met from his wife's lottery earnings.
**Holding.** Fact that defendant paid support according to a consent judgment before the trial court modified the support obligation did not prevent the court from finding that defendant had failed to provide sufficient support as a basis for an award of attorney fees to plaintiff.
**Discussion.** Trial court awarded fees after finding, as required by GS 50-13.6, that plaintiff had insufficient means to pay for the litigation and that defendant had failed to provide adequate support before the motion to modify was filed. The court of appeals rejected defendant's argument that the trial court erred in finding that he failed to provide adequate support when he was paying as required by a consent judgment. The court of appeals cited the finding by the trial court that the consent judgment did not require defendant to pay the amount that would have been required by application of the guidelines.

**Shipman v. Shipman, 573 S.E.2d 755 (N.C. App., Dec. 31, 2002).**
**Holding.** Trial court did not err in modifying child support based upon the modification of a custody order without giving notice to the Child Support Enforcement Agency.
**Discussion.** Court of appeals held that the lack of notice to the Child Support Enforcement Agency that helped plaintiff with the initial child support order "was not fatal" because an agent of the agency appeared and testified at the modification hearing.
**Holding.** After modifying child support, trial court did not err in giving plaintiff a credit toward her future support for the amount defendant was in arrears under the original order.
**Discussion.** The court of appeals rejected plaintiff's argument that the trial court erred in giving her a credit on her future support for defendant's arrears under the original order rather than ordering defendant to pay all arrears. The court of appeals held that "plaintiff will receive the support but in different form."

**Orange County ex rel. Harris v. Keyes, 581 S.E.2d 142 (N.C. App., June 17, 2003).**
**Holding.** Trial court erred in modifying an order requiring obligor to repay past paid public assistance where trial court did not find a compelling reason sufficient to justify modification of vested arrears pursuant to G.S. 50-13.10(a)(2).
**Discussion.** Obligor signed a voluntary support agreement, agreeing in part to repay $1,272 in past paid public assistance. On obligor's motion to modify, trial court concluded that it was appropriate to forgive the arrears arising from the past paid public assistance because it accrued before obligor became aware of the existence of the child. The court of appeals held that G.S. 50-13.10 prohibits the reduction of vested arrears unless a motion to reduce is made before the payment is due or, if the obligor is precluded from making the motion before the payment is due because of physical disability, mental incapacity, indigency, misrepresentation, or other compelling reason, the motion is filed promptly after the obligor is no longer precluded. The court of appeals held that the facts of this case did not establish one of the grounds that would allow the obligor to request reduction after the payment became vested.

## Deviation

**Scotland County DSS, on behalf of Shannon Powell v. John Powell, 573 S.E.2d 694 (N.C. App., Dec. 31, 2002).**
**Holding.** Although neither party gave the required advance notice of a request to deviate from the guidelines, objection to the lack of notice was waived by the presentation of evidence without objection concerning the needs of the children and the relative ability of each party to pay support.
**Discussion.** The parties shared joint physical custody of the children. In this support action, neither party requested deviation in the pleadings. However, at trial, defendant requested deviation and presented evidence about the needs and expenses of the children as well as the income and expenses of both parents. The court of appeals held that a party requesting variance from the guidelines is required to give advance notice of the request. If the request is not contained in the pleadings,

it must be given at least 10 days prior to the child support hearing. In this case, no advance notice was given. However, objection to the failure to provide notice was waived by the fact that both parties introduced evidence about the needs of the children and the ability of both parties to pay support.

**Holding.** Trial court did not err in ruling that evidence of third party contribution to the support of the children was irrelevant where the support existed some months prior to the hearing but not at the time of the hearing.

**Discussion.** Defendant sought to introduce evidence that plaintiff's parents contributed to the support of both her and the children. The trial court excluded the evidence as irrelevant and the court of appeals affirmed. The court of appeals held that contributions of third parties are relevant in a deviation case. However, in this case, evidence showed that while plaintiff lived with her parents at times prior to the hearing, she was not living with them and there was no evidence of their support at the time of the child support hearing.

**Holding.** Trial court's findings of fact were sufficient to support its decision not to deviate from the guidelines.

**Discussion.** The court of appeals held orders allowing or denying deviation must contain "factual findings specific enough to indicate to the appellate court that the judge below took due regard of the estates, earnings, conditions, and accustomed standard of living of both the children and the parents." The factual findings in this case were sufficient because they indicated that the trial court based its decision not to deviate on the "interplay between the reasonable needs of the children and the relative ability of each party to provide support."

## Extraordinary expenses; attorney fees

**Doan v. Doan, 577 S.E.2d 146 (N.C. App., March 18, 2003).**

**Holding.** Trial court did not err in concluding that costs associated with child's ice skating were extraordinary expenses but there was insufficient evidence to support trial court's finding as to the amount of the monthly expense.

**Discussion.** Court of appeals held that trial court has discretion to determine what constitutes an extraordinary expense. In this case, trial court's conclusion that ice skating expenses were extraordinary expenses to be apportioned between the parties was supported by findings that the child is devoted to ice skating, has the drive and the potential to be "an Olympic-caliber skater," and that the monetary costs associated with the child's skating were high for a person of defendant's financial status. However, the court of appeals held that it was error for the trial court to find that the expenses totaled $752 per month when there was no evidence introduced during the hearing to support that finding.

**Holding.** Trial court did not err in awarding attorney fees pursuant to GS 50-13.6 after concluding that plaintiff's action was frivolous.

**Discussion.** Court of appeals interpreted GS 50-13.6 to allow attorney fees "as appropriate under the circumstances" when the trial court determines that an action for custody and support is frivolous. The court rejected plaintiff's argument that a father's complaint for custody can never be declared frivolous, and held that the trial court's determination was supported by the findings in this case. The order contained findings that, before initiating the custody and support action, plaintiff refused to have contact with the minor child and refused to pay support.

## Amendment of Consent Judgment

**Spencer v. Spencer, 575 S.E.2d 780 (N.C. App., Feb. 4, 2003)**

**Holding.** Trial court erred in using Rule 60(a) to amend a consent judgment where the amendment affected the substantive rights of the parties.

**Discussion.** Consent judgment contained a finding of fact stating that the parties "should" share college expenses incurred on behalf of the child. However the decree section of the judgment did not mention college expenses and stated only that defendant should pay support until the child reached 18. Defendant paid college expenses for several years but then told the child he would stop paying when she reached the age of 21. Plaintiff filed a motion pursuant to Rule 60(a) requesting that the court amend the judgment to reflect the intention of the parties. The trial court granted the motion, but the court of appeals held that Rule 60(a) does not allow amendments to judgments that affect the substantive rights of the parties. The court of appeals rejected plaintiff's argument that adding college expenses to the decree section of the order was not a substantive change.

**Holding.** Defendant was estopped from denying his obligation to share college expenses after having received benefits from the agreement.

**Discussion.** While refusing to amend the judgment, the court of appeals held that estoppel barred defendant from denying his obligation to pay a portion of the college expenses. The court of appeals held that

defendant had been allowed to claim a tax deduction for the child in part based upon his agreement to help pay college expenses. Because he benefited from the agreement and abided by the agreement for the child's first couple of years of college, the court of appeals held that defendant could not deny his obligation even though it was not technically required by the consent judgment.

## Legislation

**S.L. 2003-288.** Effective July 1, 2003, amends G.S. 50-13.4 to provide that if an arrearage is owed at the time an award of child support terminates, payments shall continue in the amount of the support order until such time as the arrearage is paid in full. Also amends G.S. 110-135 to provide that, upon the death of an obligor who owes arrears, the Department of Health and Human Services must attempt to collect the arrears from the estate of the obligor if the department determines that estate has assets from which to satisfy the arrearage. Amends G.S. 110-139(b) to require that the department release the payment history information gathered by the department about the obligor that is otherwise confidential to the court, the obligor, or the person on whose behalf an enforcement action is being taken. Also mandates the release of income and expense information to either parent for the purpose of establishing or modifying a support order.

Also amends, effective October 2, 2003 [90 days after enactment of the legislation], G.S. 110-139.2 to allow Child Support Enforcement to assert a lien against accounts held by financial institutions for obligors in arrears in an amount not less than 6 months of support or $1,000, whichever is less. After serving notice on the obligor, provides that the Agency can levy on funds in the accounts in satisfaction of the arrears.

# Equitable Distribution

## Valuation

**Franks v. Franks, 153 N.C. App. 793, 571 S.E.2d 276 (2002)**
**Holding**. Trial court did not err in considering testimony of expert offered by wife as to value of husband's business even though wife's inventory affidavits gave no estimated value of the business.
**Discussion.** Court of appeals rejected argument that trial court could not consider evidence of value of a small business from an expert during the trial that was different from the wife's estimation of value in her inventory affidavit filed at the beginning to the ED case. The court of appeals held that G.S 50-21 provides that affidavits required by the statute are subject to amendment and not binding on the trial court as to value of specific assets. In response to defendant's argument that wife was required to amend the affidavit before trial, the court held that because husband received a copy of the expert's valuation report prior to trial, the trial court was free to accept the value offered at trial.
**Holding.** Trial court did not err in accepting valuation opinion of expert and rejecting the value offered by the owner of the business.
**Discussion.** Expert used "the asset approach, the market approach and the income approach…" to arrive at a value for husband's painting business, and used "the excess earnings method [to determine] the value of the business's goodwill." According to the court of appeals, these are all acceptable valuation methods. The court of appeals rejected husband's argument that his opinion of value, because he is the owner of the business, was "the best evidence that the trial court had as to value."

**Surles v. Surles, 154 N.C. App. 170, 571 S.E.2d 676 (2002).**
**Holding.** Trial court did not abuse its discretion when it denied defendant's request to set aside ED judgment pursuant to Rule 60(b). In denying the request, the trial court correctly determined that the ED judgment intended to award plaintiff ownership of a life insurance policy with a fair market value of $192,617.92 even though the judgment valued the policy at $32,617.92 to reflect the cash value of the policy.
**Discussion.** ED judgment classified a life insurance policy owned by defendant as marital property. The judgment found that the value of the policy on the date of separation was $32,617.92 based upon evidence of the cash value of the policy. The ED judgment awarded "absolute ownership and exclusive possession" of the policy to plaintiff. Defendant did not appeal the ED judgment. Defendant attempted to satisfy the ED judgment by paying plaintiff the cash value of the policy rather than turning over possession of the policy. When plaintiff refused the money, defendant filed a Rule 60(b) motion, arguing that the trial court did not intend to award plaintiff an asset with a fair market value of $192,617.92. The Rule 60(b) motion was heard by the same judge who entered the ED judgment, and in denying the Rule 60(b) motion, the trial court made findings to indicate that the ED judgment clearly intended to grant ownership

of the policy to plaintiff and there was no surprise, excusable neglect, or unfairness, nor any clerical mistake that would support setting aside the judgment. The court of appeals agreed, holding that defendant failed to show an abuse of discretion on the part of the court in denying the motion to set aside the judgment. In a concurring opinion, Judge Greene noted that the ED statute requires that a trial court use fair market value rather than the cash value when valuing an insurance policy. However, neither party introduced evidence of the market value to the court during the ED trial.

## Death of Party

**Bowen v. Mabry, 154 N.C. App. 734, 572 S.E.2d 809 (2002).**
**Holding.** ED action pending at time statutory amendment took effect did not abate even though death of party occurred prior to effective date of amendment.
**Discussion.** Claim for ED was filed Sept. 14, 2000. Plaintiff husband died Feb. 15, 2001, while the ED claim was pending. On October 2, 2001, defendant filed a motion to dismiss the ED claim, arguing that pursuant to the supreme court opinion in *Brown v. Brown*, 353 N.C. 220 (2000), the ED claim abated upon the death of plaintiff because no judgment of absolute divorce had been entered before plaintiff died. The trial court dismissed the ED claim but the court of appeals reversed. The court of appeals held that the amendment to G.S. 50-20(l) providing that ED claims do not abate upon the death of a party applied to this case. The statute provides that it applies to "actions pending or filed on or after" August 10, 2001. As this was a claim pending on the effective date of the statute, the amendment rather than the *Brown* decision controlled the outcome of the case. The court of appeals rejected defendant's argument that the claim abated on the date of plaintiff's death, prior to the effective date of the statute. **Note:** See discussion below regarding amendment of G.S. 50-20(1) by S.L. 2003-168 relating to the survival of ED claims upon the death of a spouse.

## Asset in UTMA accounts

**Guerrier v. Guerrier, 155 N.C. App. 154, 574 S.E.2d 69 (2002).**
**Holding.** Trial court erred in removing defendant as custodian of children's account created pursuant to the Uniform Transfers to Minors Act found in G.S. 33A because the clerk of superior court has original jurisdiction over such accounts.
**Discussion**. Equitable distribution judgment classified UTMA account as marital property, awarded it to defendant who was the designated custodian for the children under the account, and ordered that defendant provide information to plaintiff about the account. The trial court held defendant in contempt for failure to provide the required information and for withdrawing monies from the account. The trial court ordered defendant to repay the money and removed him as custodian of the account. The court of appeals reversed, holding that G.S. 33A-18(f) grants exclusive jurisdiction to the clerk of superior court to enter orders relating to the removal of custodians on UTMA accounts. The court noted in a footnote that the account should not have been classified as marital property under the original ED judgment because such accounts are property of the children rather than the parties.

## Legislation

**Divisible property**
**S.L. 2002-159, sec. 33.5**. Effective October 11, 2002, amends G.S. 50-20(b)(4)(d) to provide that divisible property includes decreases in marital debt. Although the act does not specify, the change probably applies only to cases filed on or after the effective date. The amendment seems to be in response to the decision in *Hay v. Hay*, 148 N.C. App. 268 (2002) where the court held that the definition of divisible property as written at the time of the opinion did not cover postseparation payment of marital debt. Specifically in *Hay*, the court of appeals held that the payment of the mortgage by one party after separation and before the date of trial did not result in a divisible property interest.

**Death of a party**
**S.L. 2003-168.** Effective June 12, 2003, amends G.S. 50-20(1) to provide that a claim for equitable distribution survives the death of a spouse as long as the parties were living separate and apart at the time of death, regardless of whether an action has been filed at the time of death. Specifies that the provisions of G.S. 28A, Article 19 (provisions governing claims against a decedent's estate) generally apply to claims against an estate of a deceased spouse, and specifies that claims by an estate against a surviving spouse must be brought within one year of the death.

# Divorce

**Freeman v. Freemen, 573 S.E.2d 708 (N.C. App., Dec. 31, 2002)**
**Holding.** Trial court did not err in granting defendant's Rule 60(b)(4) motion to set aside divorce judgment as void where defendant met burden of proving that she was not served with process in the divorce action.
**Discussion.** Judgment of divorce was entered in 1985. After entry of that judgment, however, the parties continued to live together, purchased property together as tenants by the entirety, and applied for social security benefits as husband and wife. After death of husband, wife moved to set aside the divorce judgment, claiming that she had no knowledge of the judgment and that she had not been served with process before its entry. The trial court granted her motion and the court of appeals affirmed. The record showed that service had been accomplished by acceptance. The notation of service on the summons contained a signature purporting to be that of defendant. The court of appeals held that while a presumption of valid service arises when a signature is shown on the summons, defendant presented evidence sufficient to rebut the presumption in this case. Her evidence included: 1) her own testimony that she did not sign the summons and that she had never been to the courthouse where the signing allegedly took place, 2) testimony from defendant and others that plaintiff and defendant continued to act as husband and wife after the entry of the divorce judgment, and 3) a handwriting expert who testified that he could not say with any certainty that the signature belonged to her.

# Separation Agreements

## Specific Performance; Interpretation of Agreement

**Gilmore v. Garner, 580 S.E.2d 15 (N.C. App., May 20, 2003).**
**Holding.** Trial court did not err in granting summary judgment for plaintiff on her claim for specific performance of separation agreement.
**Discussion.** Parties executed a separation and property settlement agreement in 1989. One provision stated "It is stipulated that husband has a substantial retirement account built up under the Railroad Retirement Act. Wife agrees not to make any demand on husband at the present time, for any portion of the Railroad Retirement. However, it is stipulated and agreed by both parties that each of them may draw Railroad Retirement benefits in accordance with law when they are eligible to so draw, and that the other party will not contest any of said benefits."

In 2000, plaintiff filed an action for specific performance because defendant retired but was not cooperating in helping plaintiff collect a portion of his retirement funds. The trial court held, and the court of appeals agreed, that the language of the agreement clearly indicated an intention on the part of the parties that the benefits would be divided when defendant began receiving them. The court of appeals rejected defendant's contention that the agreement only referred to plaintiff's right to a divorced spouse annuity under the Railroad Retirement Plan. The court of appeals held that such an interpretation would render the section of the agreement meaningless because no agreement is needed for plaintiff to be entitled to that annuity. The court held that the language "reflects the parties' intention that upon defendant's retirement, the divisible portion of his retirement benefits would be divided in accordance with governing law."
**Holding.** Trial court correctly entered an order awarding plaintiff a 29.5% portion of defendant's divisible retirement benefits.
**Discussion**: The court rejected defendant's contention that awarding plaintiff a portion of defendant's retirement amounted to an equitable distribution of his account. The court held that the agreement provided that the account would be divided in accordance with applicable law, and nothing else appearing from the agreement, the applicable law is GS 50-20.1. In ordering specific performance, the trial court correctly determined the amount of plaintiff's share by applying the "fixed percentage method" set forth in GS 50-20.1(d).

# Domestic Violence

## Renewal of protective orders

**Basden v. Basden, 154 N.C. App. 520, 572 S.E.2d 442 (2002). UNPUBLISHED OPINION.**
**Holding.** Trial court did not err in granting plaintiff's motion to renew a domestic violence protective order. In addition, the renewal order contained sufficient findings of fact and conclusions of law where it incorporated by reference the original protective order.
**Discussion.** Court of appeals held that there was sufficient evidence to support the renewal of a domestic violence protective order where the record on

appeal showed that defendant violated the terms of the initial order and made additional threats that made plaintiff "scared that somebody's going to get hurt, particularly my kids." In addition, the court of appeals found that the trial court made sufficient findings and conclusions of law to support the renewal order but only because the form order incorporated by reference the original protective order. Holding that "[a] n order renewing a domestic violence protective order must be based on sufficient findings of fact and conclusions of law …", the court held that judges should use caution when filling out Form AOC-CV-306 because the form contains no findings or conclusions in support of renewal.

## Legislation

**S.L. 2003-107. "An act to clarify the definition of a protective order under the laws relating to domestic violence."**
1) Makes several changes to clarify that the term "protective order" as used within Chapter 50B includes orders entered by consent.
2) Amends GS 50B-3(b) to provide that a court can renew any protective order, including an order that has previously been renewed, for an additional period of time up to one year, upon a motion filed by the aggrieved party before the expiration of the original order. Provides that an order can be renewed upon a showing of "good cause" and specifies that no new act of domestic violence is required to support a renewal.
Effective May 31, 2003.

**S 919. "An act to enhance the safety of victims in serious domestic violence cases."** Ratified July 10, 2003. Effective December 1, 2003.
1) Amends G.S. 50B-3.1 to require the court to order defendant to surrender all firearms and permits to purchase or carry firearms in cases where the defendant
- uses or threatens to use a deadly weapon or has a pattern of prior conduct involving the use or threatened use of violence with a firearm against persons,
- made threats to seriously injure or kill the aggrieved party or minor child,
- made threats to commit suicide, or
- inflicted serious injuries upon the aggrieved party or a minor child.

Provides that firearms not be returned to a defendant until the expiration of the protective order or any subsequent order and prohibits the return of weapons if the court determines that the defendant is prohibited from possessing firearms pursuant to state or federal law.
2) Makes it a Class H felony to possess or purchase a firearm or possess a permit to purchase or carry a firearm in violation of a domestic violence protective order.

# Alienation of Affection

## Damages

**Oddo v. Presser, 581 S.E.2d 123 (N.C. App., June 17, 2003).**
**Holding.** Evidence of plaintiff's loss of income as an investment advisor when he lost his job as a result of his emotional distress over the break-up of his marriage was not too speculative to support compensatory damages; however loss of college tuition benefits for children who were age ten, seven and three at the time of trial was too speculative.
**Discussion.** Evidence showed that defendant established a relationship with plaintiff's wife while she was married to plaintiff, and plaintiff and his wife eventually divorced as a result. Plaintiff presented evidence to the jury that he lost his job as an investment advisor and as a coach for Davidson College as a result of his mental distress over the break-up of his marriage. The jury awarded $910,000 in compensatory damages and $500,000 punitive damages. The court of appeals rejected defendant's argument that evidence relating to plaintiff's lost wages from his job as an investment advisor was too speculative because of the uncertainty of the future performance of the financial markets. The court of appeals held that the expert testimony presented by plaintiff gave the jury what it needed to come to a reasonable conclusion as to his lost future wages. However, the court of appeals agreed that evidence of the value of the lost tuition benefits that Davidson College gave children of employees at the time of plaintiff's employment was too speculative due to the young age of the children at the time of trial.
**Holding.** Evidence of sexual relations between defendant and plaintiff's wife was sufficient to support an award of punitive damages.
**Discussion.** With a dissent on this point, the court of appeals held that evidence of preseparation sexual conduct is sufficient to support an award of punitive damages in alienation cases.
**Holding.** Award of $500,000 in punitive damages was not excessive.
**Discussion.** Court of appeals rejected defendant's argument that the punitive damages award was

excessive, holding that the award was well within the limitations of G.S. 1D-25.

## Sterilization

**S.L. 2003-13.** Effective April 17, 2003, this act repeals Article 7 of Chapter 35A which set forth the procedure for the involuntary sterilization of mentally ill or mentally retarded individuals. The old law is replaced with a procedure permitting sterilization of the mentally ill or retarded only when there is a medical necessity. New procedure is before the clerk of court with all appeals going to the superior court.

## Family Law Arbitration Act

**S.L. 2003-61.** Effective May 20, 2003, the act amends G.S. 50-53 to clarify that parties to an arbitration agreement can agree not to present an arbitration award to a court for confirmation.

## Contempt

### Criminal contempt and suspended sentences

**Reynolds v. Reynolds, 356 N.C. 287, 569 S.E.2d 645 (2002),** ***reversing majority and adopting dissent in*** **147 N.C. App. 566, 557 S.E.2d 126 (2001).**
**Holding**. Trial court entered an order of criminal rather than civil contempt. Therefore, appeal of contempt is dismissed because appeals of criminal contempt orders are taken to the superior court rather than to the court of appeals.
**Discussion**. Trial court held defendant in contempt for failure to pay child support. Evidence showed that defendant had the ability to pay the ordered amount of support but for years he repeatedly failed to pay, resulting in numerous contested contempt proceedings. On the occasion leading to the hearing that resulted in the order on appeal, defendant paid all amounts due immediately prior to the contempt hearing. The order entered by the trial court stated that the court found defendant in criminal contempt. The trial court imposed a sentence of thirty days imprisonment but then "suspended" the sentence on the condition that defendant comply with certain conditions. The conditions required that defendant post of a bond in the amount of $75,000 to assure future payment, pay plaintiff's attorney fees, and pay all future child support in a timely manner. The court of appeals held that, even though the trial court designated this to be an order of criminal contempt, it was in fact an order of civil contempt because defendant could in effect "purge" his contempt by complying with the conditions of the suspended sentence. The court of appeals held that the order would have been criminal had the trial court placed defendant on probation after suspending the active sentence, because probation places a defendant under "disabilities" that do not abate when the defendant complies with the conditions of probation. The court of appeals then reversed the order of contempt, holding that defendant could not be held in civil contempt because he had paid all required support prior to the contempt hearing.

Judge John wrote a dissent to the majority opinion in the court of appeals and the supreme court adopted his dissent. The dissent argued that the order was an order of criminal contempt and that the court of appeals therefore had no jurisdiction to hear the appeal. G.S. 5A-17 requires that appeals of criminal contempt be to the superior court for a trial de novo. The dissent concluded that a "determinate suspended sentence, notwithstanding that it is accompanied by conditions, compromises criminal punishment…".

### Contempt to enforce consent orders

**Hemric v. Groce, 154 N.C. App. 393, 572 S.E.2d 254 (2002).**
**Holding.** Trial court has no authority to enforce a consent judgment by contempt (unless it is a domestic relations case).
**Discussion**. Defendants leased their farm property and corresponding tobacco allotments to plaintiff. A dispute arose concerning the lease agreement and plaintiff filed suit. That suit was settled by the parties, resulting in a memorandum of judgment and a subsequent consent judgment signed by the parties and by the trial court. The trial court later held defendant in contempt for failure to abide by the terms of the consent judgment. Defendant thereafter filed a Rule 60(b) motion seeking to have the order of contempt set aside. The trial court denied the motion and the court of appeals reversed. The court of appeals held that "[a] consent judgment is a contract between the parties entered upon the record with the sanction of the trial court and is enforceable by means of an action for breach of contract and not contempt." The court noted in a footnote that consent orders entered in domestic relations cases are enforceable by contempt.

**Holding.** Trial court erred in refusing to set aside the order of contempt pursuant to Rule 60(b) because orders of contempt seeking to enforce a consent judgment are void.
**Discussion.** The court of appeals rejected plaintiff's argument that the contempt order was not void but merely voidable, thereby leaving it within the trial court's discretion to decide whether to set it aside pursuant to Rule 60(b). According to the court of appeals, orders are void when entered without subject matter or personal jurisdiction, or when the trial court lacks authority to grant the relief contained in the judgment. As the trial court had no authority to use contempt to enforce the consent judgment, the court of appeals held that the order was void and should have been set aside.

**General Motors Acceptance Corporation v. William Wright and Joyce Wright, 154 N.C. App. 672, 573 S.E.2d 226 (2002).**
**Holding.** Trial court did not err in holding Joyce Wright in contempt for failure to comply with provisions in a consent judgment that required her to specifically perform terms of a separation agreement.
**Discussion.** William and Joyce Wright executed a separation agreement wherein Joyce received possession of a car with a lien held by GMAC. The agreement provided that Joyce would make all payments owed to GMAC. Joyce failed to pay; GMAC repossessed the car and then sued both Joyce and William for the deficiency. The parties settled the case with a consent judgment containing no findings of fact but requiring that Joyce make the payments required of her by the separation agreement. When Joyce failed to pay, the trial court held her in civil contempt. On appeal, Joyce argued that the trial court erred in holding her in contempt for failing to abide by a separation agreement that had not been incorporated into a court order. The court of appeals held that while unincorporated agreements cannot be enforced by contempt, an order requiring that a party specifically perform as required by a separation agreement can be enforced by contempt. The court of appeals held that the consent order in this case was an order requiring specific performance of the separation agreement and therefore was enforceable by contempt.
**Holding.** Trial court had authority to enforce consent judgment by contempt where Joyce Wright failed to rebut presumption that the court had adopted the consent judgment at the time of its entry.
**Discussion.** Joyce argued that the court erred in using contempt to enforce the contempt order because there was no indication that the trial court had adopted the settlement agreement set forth in the consent order as "the court's determination of the rights and obligations of the parties." The consent order contained no findings of fact or conclusions of law. The court of appeals held that there is a "presumption favoring adoption" of consent judgments and Joyce failed to rebut the presumption by proving that the trial court did not intend to adopt the settlement. The court of appeals found it significant that the order specified that the parties had waived all findings of fact and necessary conclusions of law.
**Holding**. Trial court's findings of fact were sufficient to support the conclusion that Joyce Wright had the ability to comply with the consent order.
**Discussion.** Trial court found that Joyce had the ability to pay the $50 per month payment required by the consent order based upon her testimony that she had been continuously employed and remained employed, earning approximately $9 per hour. The court of appeals held that finding sufficient to support the conclusion that she had the present ability to comply with the order.

## Contempt in custody and support proceedings

**Scott v. Scott, 579 S.E.2d 431 (N.C. App., May 6, 2003).**
**Holding.** Trial court erred in holding defendant in civil contempt for conduct that was not specifically prohibited by the existing custody order.
**Discussion.** Mother's evidence showed that father verbally abused the mother at a baseball game in the presence of the children and refused to allow her to get into the car with her children until a third party intervened to help her. The trial court held that this conduct amounted to an interference with the custody rights awarded her under the custody order and held father in contempt. The court of appeals held because the conduct was not prohibited the language of the custody order, father's actions could not constitute contempt. In addition, the court held that the trial court's purge condition that defendant father "not interfere with plaintiff's custody of the minor children and not threaten, abuse, harass or interfere with plaintiff or the minor children" was "impermissibly vague" because it did not tell defendant what "he can or cannot due to purge himself of contempt." Dissent by Timmons-Goodson.

**Ruth v. Ruth, 579 S.E.2d 909 (N.C. App., May 20, 2003)**
**Holding.** Trial court erred in holding plaintiff in civil contempt for failing to return children after visitation

because she had returned the children before the contempt hearing.
**Discussion.** Trial court modified custody order to grant defendant primary custody and visitation to plaintiff. While on appeal, plaintiff violated the order by refusing to return the children at the end of a scheduled visitation. The trial court held her in civil contempt and ordered that she pay defendant's attorney fees for both the contempt proceeding and a proceeding initiated by plaintiff in West Virginia to recover the children, and further ordered that she reimburse defendant for the wages he lost while attending various hearings on the matter. The court of appeals held that GS 50-13.3 authorizes the enforcement of a custody order pending appeal, but only through civil contempt. As the purpose of civil contempt is to compel performance, a trial court may not find a party in civil contempt once the required action has been performed. In this case, defendant returned the children before the contempt hearing so it was error for the trial court to find her in civil contempt.
**Holding.** Trial court erred in ordering plaintiff to pay defendant for time he missed from work in prosecuting the contempt claim and for attorney fees he incurred relating to a separate proceeding he initiated in West Virginia. However, the trial court's award of attorney fees for the civil contempt action was appropriate.
**Discussion:** Court of appeals held there is no authority for trial court to order reimbursement for time away from work and that only a West Virginia court could order plaintiff to pay attorney fees arising out of the West Virginia proceeding. However, the court held that while generally fees are awarded only when a party prevails in a contempt hearing, fees are allowed when a contempt order is denied because the offending party complies with the court order after the show cause order is issued but before the contempt hearing.

**Guerrier v. Guerrier, 155 N.C. App. 154, 574 S.E.2d 69 (2002).**
**Holding**. Trial court had jurisdiction to enforce contempt judgment even though defendant had appealed the order of contempt.
**Discussion.** Trial court held defendant in contempt for failing to comply with child support order but postponed placing defendant in jail for 30 days. Defendant appealed the order. At the end of 30 days, the trial court entered another order sanctioning defendant $100 for failure to comply with the purge conditions of the contempt order. The court of appeals rejected defendant's contention that the trial court lost jurisdiction to enter further orders to enforce the child support while the appeal of the contempt order was pending. The court of appeals held that although the general rule is that the trial court loses jurisdiction when an appeal is filed, G.S. 50-13.4(f)(9) provides that child support can be enforced during appeal. The only recourse to defendant is to apply to the appellate court for a writ of supersedeas staying enforcement of the contempt order.

# Attorney Fees

**Burr v. Burr, 153 N.C. App. 504, 570 S.E.2d 222 (2002).**
**Holding.** Trial court did not err in awarding attorney fees to defendant even though she did not prevail at trial.
**Discussion.** Plaintiff brought action for custody, support and termination of parental rights against defendant. The trial court granted custody to plaintiff, visitation to defendant, ordered defendant to pay past due and on-going support, and denied plaintiff's request for termination of defendant's rights. The trial court concluded that defendant was an interested party, acting in good faith, who was without means to defray the cost of the action and ordered plaintiff to pay defendant's reasonable attorney fees. The court of appeals upheld the part of the award relating to the custody and support proceeding, rejecting plaintiff's argument that fees only can be awarded a prevailing party.
**Holding.** The trial court erred in awarding fees to defendant for defense of the termination action.
**Discussion.** The court of appeals held that attorney fees may not be awarded unless a statute specifically authorizes the award in a particular case. As there is no statute allowing the award of fees in termination of parental rights cases, that portion of the trial court's award was improper.

**General Motors Acceptance Corporation v. William Wright and Joyce Wright, 154 N.C. App. 672, 573 S.E.2d 226 (2002).**
**Holding.** Trial court did not err in awarding attorney fees in the contempt action brought to enforce the consent judgment in a deficiency case because the provisions of the consent judgment with which plaintiff failed to comply "was analogous to an equitable distribution award."
**Discussion.** William and Joyce Wright executed a separation agreement wherein Joyce received possession of a car with a lien held by GMAC. The agreement provided that Joyce would make all

payments owed to GMAC. Joyce failed to pay; GMAC repossessed the car and then sued both Joyce and William for the deficiency. The parties settled the case with a consent judgment requiring that Joyce make the payments required of her by the separation agreement. When Joyce failed to pay, the trial court held her in civil contempt, and the trial court ordered Joyce to pay William's attorney fees arising out of the contempt proceeding. The court of appeals acknowledged that there is no statutory authority for the award of attorney fees in an action to enforce a consent judgment entered in a deficiency action. However, the court held that fees are available in an action to enforce an equitable distribution order, and further held that "there is no recognizable distinction between a court awarding attorney fees through contempt proceedings when a spouse fails to honor a marital debt arising out of an equitable distribution award and when a spouse fails to specifically perform payment of a marital debt arising out of a consent judgment."

**Phillips v. Brackett, 575 S.E.2d 805 (N.C. App., Feb. 4, 2003).**
**Holding**: Trial court made sufficient findings with regard to the time and labor expended by plaintiff's counsel to support award of attorney fees pursuant to GS 6-21.1.

**Discussion**: Trial court made findings as to the various tasks performed by counsel and his staff during the litigation and made findings as to the total number of hours counsel and staff spent on the case. Court of appeals rejected defendant's argument the trial court was required to make specific findings as to the amount of time spent on each separate activity. According to the court of appeals, "such detail … is not required to support an award of attorney fees."

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