Family Forum

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Chair's Comments: We Want You!

Lloyd Smith

I believe in volunteering. This belief may arise from my youth when, as a 10-year-old, I sat enthralled as the "forever young president" said, "And so, my fellow Americans: ask not what your country can do for you; ask what you can do for your country." Perhaps growing up in the 1950s, near Fort Bragg, when the heroism of American soldiers of World War II felt very recent, the poster of Uncle Sam declaring, "I want you" instilled this belief.

Regardless of how I came to this belief, volunteerism is a tenant I extol. Indeed, the purpose of this comment is to have you, dear reader, volunteer your time, talent, and legal abilities immediately to some worthy cause. I suggest you can begin with something like the North Carolina Bar Association's 4All Statewide Service Day, which is scheduled for March 7, 2014.

I know all of us are busy. I understand we are under pressure. So why should we volunteer? There are many reasons and I would suggest six of them.

1. You can help someone less fortunate or less experienced than yourself. I have read about, and in one case personally witnessed, great lawyers volunteering huge amounts of time to defend a wrongfully convicted defendant which ultimately lead to an acquittal. While we cannot all achieve such a remarkable result, by donating our time and talents we can help another person with more mundane matters. Perhaps we could provide free advice regarding domestic matters or tutor a younger lawyer. I assure you such help is and will be greatly appreciated. Over the years when I have donated time and effort to help someone, I have been rewarded with such things as duck sausage. Who wouldn't want duck sausage?

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Double Counting Income Streams – Does it Always Create Inequities?

By Paul Saltzman and Chris Mitchell

Here is a common scenario faced by family law attorneys:

One spouse owns and operates a small family business and the marriage has benefited from years of financial success attributable to this business. Specifically, the family business has generated $300,000 in taxable income that has historically been divided as $140,000 in annual W-2 wages to the owner in addition to $160,000 of annual distributions. During settlement negotiations the business was appraised and the valuation expert opined that the market rate for the business owner's work efforts is $70,000 and the normalized cash flow available for distribution is $230,000. The appraiser also determines that a 5.0x multiple to be applied to cash flow available for distributions is appropriate and the resulting fair market value of the business is $1,150,000. Everyone agrees to the $1,150,000 value and the attorney for the non-property spouse indicates a $4,000 per month alimony amount is appropriate. The $4,000 monthly alimony amount is based on many factors, one of which is the earnings capacity of the business owner making $140,000 in W-2 wages. If the parties can agree on alimony, the case is settled.

Double-dipping in the scenario described above encompasses the notion that a marital asset is double counted for purpose of the division of property and for the purpose of determining alimony/maintenance. Let's break down the $1,150,000 in business value and what economic factors give rise to it.

The $1,150,000 business value is a function of the $230,000 cash flow determined by the appraiser and the multiple, equivalent to a risk rate

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Chair's Comments, *continued from the front page*

2. By volunteering, you help our profession. Let's face it, we are not held in high esteem by many people. We are viewed as "takers," "money grubbers," or "worshippers of the hourly rate." By giving and becoming a giver, we can dispel this perception which I would suggest is ill-conceived and incorrect. There is no way to immediately reverse the perception many people have about lawyers, but by donating our time to worthy causes we can help slowly restore the prestige of our profession.

3. You can discharge your professional duty by volunteering. Rule 6.1 of the Rules of Professional Responsibility, governing all of us, provides that each lawyer has a professional responsibility to provide legal services to those unable to pay and the lawyer should aspire to render at least fifty (50) hours of pro bono public legal services per year. Under this rule, the North Carolina State Bar recognizes in Subsection (b) that you can provide such services through the delivery of services described in Subsection (a) or by participating in activities improving the law, the legal system, or the legal profession. In other words you can discharge your ethical responsibilities by helping persons of limited means; charitable, religious, civic, community, governmental, or educational organizations; groups, persons or organizations seeking to secure certain rights or purposes. You can also choose to serve on the State Bar Council, serve as a volunteer for the North Carolina Bar Association, or join one of the many sections and agree to serve on a committee, or lecture.

4. By volunteering you can perhaps inspire someone else to become a lawyer by giving back to your community. I have always wanted to be a lawyer and I believe it to be a noble profession. I remember the lawyers of my childhood and how much they inspired me. I also remember those lawyers that helped me get on the right track in high school.

Many judicial districts have teen court where juvenile offenders are tried, defended, and judged by their peers and they need lawyers to help them. I can personally report that because of involvement in teen court, certain people I know have gone on to become lawyers. The North Carolina Advocates for Justice supports high school moot court competitions statewide through the Carolina Center for Civic Education, and you can volunteer your time teaching or judging. Again from first-hand knowledge, I can tell you it is fun to watch high school students grasp the intricacies of how to present and defend arguments.

In the article titled *"Why Do I Volunteer?"* Terrance Shawn McGill stated, "Volunteering is the ultimate payback to those who helped me on the road to success."

There is something to be said for paying it forward.

5. The fifth reason for volunteering is that it helps you to make new friends and learn different and better ways of approaching your area of practice. Surely, all of us want to be better lawyers. I live and practice in a small town (or as one of my big city friends calls it a "Middlesex") of 2,132 people. I wouldn't be writing this comment nor would I know many of the domestic lawyers across the state if I hadn't volunteered to participate in the North Carolina Bar Association. I have taken much more from volunteering than volunteering has taken from me. Every time I lecture I learn something. Every time I attend a meeting and listen to lawyers much smarter than me share their thoughts, I learn ways to increase my ability to help my clients. Volunteering is extraordinarily good for creating relationships with people you would have never met or come in contact with, and it is even better at helping you become a better practitioner.

6. The final reason I would suggest that you should volunteer is volunteering produces many benefits to the volunteer's mental and physical health. A recent article published by Helpguide.org found volunteering increases self-confidence and combats depression. While most lawyers have a healthy ego, from time to time our egos are bruised, if not battered, by what we do. I recently read and forwarded an article published by CNN concerning the abnormally high depression rate, and resulting suicide rate, among lawyers. We can all use a boost and volunteering provides one.

Chair's Comments, continued from page 2 | The Harvard Medical School published a Harvard Medical School Special Health Report titled "Simple Changes, Big Rewards: A practical, easy guide for healthy, happy living" in which it found the more people volunteered the happier they were. It noted that, when compared to people who never volunteered, the chance of being "very happy" increased seven percent among those who volunteered monthly, 12 percent for those who volunteered bi-weekly, and 16 percent for those who volunteered weekly. It further found "among weekly volunteers, 16 percent felt very happy," a hike in happiness that is comparable to having an income of $75,000 versus $20,000.

Do you know a lawyer who doesn't want to be 16 percent happier? I don't. I assure you that when you go out and volunteer you feel better about yourself and better about your profession.

After all, Uncle Sam in telling the "Greatest Generation" that "I want you," assembled a group of volunteers who helped make this nation the greatest in the world and defeated three of the worst, most aggressive enemies of liberty ever assembled. Of course, all of us don't get a chance to be heroes on a grand scale but we can be grand on a small scale by helping folks. So pick up the phone or type an email and volunteer. We really want YOU!

Have You Woozled a Judge?

By Judge Laurie Hutchins

How often do you wonder "what was that judge thinking?" after she rules on your custody case? In this article I will tell you a secret: what every district court judge learned at our Fall 2013 Conference on shared custody and what the judge might be thinking at your next hearing.

We heard from Dr. Linda Neilsen, Ed.D., a professor of Adolescent and Educational Psychology at Wake Forest University, on the topic of shared residential custody, defined as 35% to 50% of the time with both parents. She is an expert on the topics of divorced father-daughter relationships and shared parenting after divorce. She has written four books on the father-daughter relationship and been featured on PBS and NPR. She has written numerous journal articles and a college textbook on adolescent psychology.

Her goal at our conference was to debunk myths about shared parenting. She did this by giving us a true/false quiz to show us we had been "woozled." You may remember the Woozle in *Winnie the Pooh* by A.A. Milne. Pooh and Piglet follow tracks in the snow believing they are tracks left by the Woozle. Christopher Robin solves the mystery and discovers poor Pooh and Piglet are following their own tracks. The woozle effect, also known as evidence by citation, occurs when frequent citation of previous publications that lack evidence misleads readers into thinking there is evidence.

Dr. Nielsen's two primary woozle examples were the American Baby Study in the *Journal of Marriage and Family* [June, 2013] done at UVA and the Australian Baby Study [May, 2010]. The UVA study showed infants and toddlers who spend even one night away from their mothers become insecurely attached to them. The Australian study showed infants spending one night away from their mothers were more irritable, inattentive, and stressed out. That study concluded further that the babies had more physical maladies like asthma and wheezing.

Dr. Nielsen blew these studies to smithereens during her presentation! There are now 33 studies on shared parenting. It took her five years to review all of them.

She enthusiastically concluded shared parenting is the better custodial plan. She found in her review of all the studies that children benefit from maximizing non-residential father time to include more overnights even if there is high conflict between the parents. She found children want more time with their father and the effect is better adjusted kids.

She gave us the following "rules":

1. Parents do not have to be good buddies to share custody. It can be successful by court order [not agreed to by the parties].
2. Conflict usually declines over a 1 to 2 year time period. And most importantly, it will decrease more quickly in a shared parenting plan than standard weekend plan.
3. Shared parenting does not have to be co-parenting. It can be parallel parenting [if conflict then okay with little communication].
4. Highest level of conflict is the swap. Therefore, limit transition as much as possible. Exchange at school is okay.
5. High conflict is offset by the high relationship with both parents.
6. Shared parenting had better results for kids for drinking and drug problems.
7. Shared parent kids had better relationships with their fathers later in life than those with a standard weekend visitation. They could talk to their father about things that bother them during the shared custody.
8. There is no negative outcome for babies to have overnights with father.
9. Studies showed kids like the shared parenting plans; "two homes is no home" is a myth.

In conclusion, out of 33 studies, 31 showed equal or better results for kids with shared parenting. Only two studies showed mixed results. At your next hearing your judge will have a copy of Dr. Neilsen's article.

For a fascinating read I refer you to her article "Shared Residential Custody: Review of the Research [Part I of II]" in the Journal of Divorce and Remarriage [2012] and to her website, ***neilsen@wfu.edu***.

Laurie Hutchins graduated from the University of North Carolina in 1978 with a degree in English and from Wake Forest University Law School in 1983. She practiced law for 13 years in state and federal criminal and civil courts. She was elected to the District Court in the 21st Judicial District/Forsyth County in 1996. She lives in Winston Salem and is married to Dan Johnson, of counsel with Grace, Tisdale and Clifton, P.A.

Double Counting Income, continued from page 1

or a rate of return. It is important to remember that in the context of a business valuation, value is a function of future, anticipated earnings rather than historical earnings. Therefore, the assumed $230,000 in cash flow is a forward looking amount. Figure 1 and

FIGURE 1

	Actual Results	Fair Market Value	Proposed Settlement
Annual Wages from Family Business	$ 140,000	$ 70,000	$ 140,000
Annual Distributions from the Operations of the Family Business	$ 160,000	$ 230,000	$ 230,000
Total Economic Benefit Derived from Operating the Family Business	$ 300,000	$ 300,000	$ 370,000

FIGURE 2

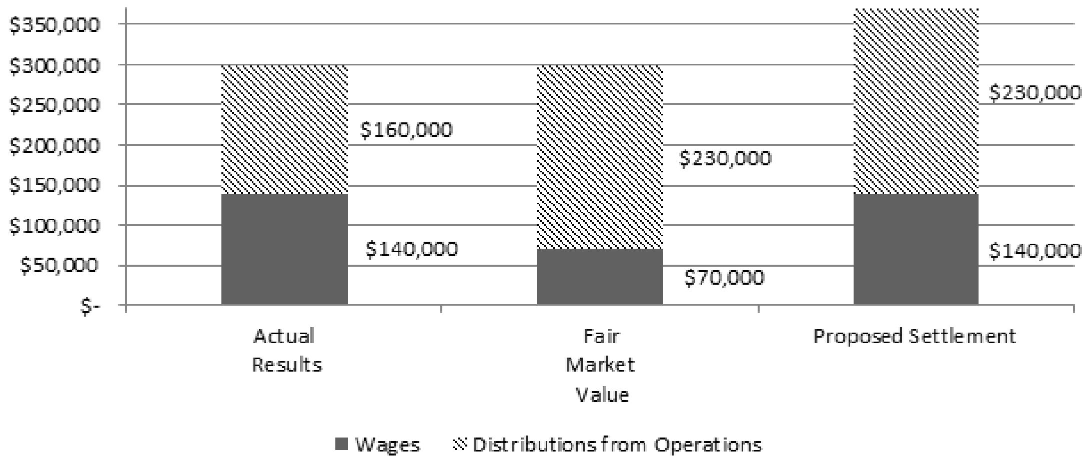

Figure 2 provide representations of the economics of this situation.

In the proposed settlement, some portion of income from the family business is being counted twice. But does this double-dip provide for inequities? Assume for simplicity that the family business is the only marital asset to be divided. Because there are no other assets, the parties agree that the business owner will pay out the non-property spouse for her/his portion of the value of the family business over a five-year period. The cash flow used to make these payments will come from operating the family business. Can the parties agree on a $4,000 monthly alimony amount? This extreme example may point out a fact pattern where the attorney for the business owner borrows a line from ESPN college football analyst Lee Corso, “Not so fast my friend!”

In this fact pattern, the non-property spouse may receive a windfall of economic benefit if a $4,000 monthly alimony amount is accepted. Recall also that the non-property spouse is being bought out as part of the property settlement over five years. This annual buyout equates to $115,000 ($1,150,000 divided equally between the parties divided again by five years). At this level of monthly alimony, and assuming the annual payment of $115,000 for the division of property is made, the non-property spouse’s after tax cash flows could make up an overwhelming majority of the after tax cash flows attributable to the sole marital asset—the family business. Remember that the business owner will be taxed on the entire $300,000 (less any deductible alimony paid) and the non-property spouse receives the annual property division payout of $115,000 tax free. This imbalance of cash flows will take place during the five years that the business owner is paying out his former spouse. The lack of other assets of the couple to be transferred to the non-property spouse causes this scenario.

An alternative solution may be to lower the alimony amount based, in part, on the market rate of the normalized compensation of $70,000 determined by the business appraiser. Another alternative would be to have the business appraiser capitalize the actual annual distributions, which results in a lower value and consider conceding to the $4,000 monthly alimony amount.

Other fact patterns, however, may not lead one to consider the double counting of income for the division of property and for alimony to be inequitable. Consider the situation where there are two assets to divide, the income producing family business that could be liquidated and the non-income producing marital residence. For simplicity, assume both of these assets have an equity value of $1,150,000. In this fact pattern the business owner will enjoy the benefit of $300,000 in annual income even though a portion of this income was used to estimate the value of the marital asset distributed to the business owner. Obviously alimony is a function of many factors, including marital misconduct, duration of the marriage and the relative needs of the spouses. It could be deemed that a $4,000 monthly alimony amount is indeed equitable. Just because a particular income stream was used to estimate the value of a marital asset does not mean the supporting spouse will not enjoy the economic benefits of this asset for the purposes of determining alimony.

Consider a similar scenario whereby the two assets that exist that are to be divided are the income producing family business and, instead of the marital residence, income producing real property, both of equal value. Again, the business owner is distributed the family business and the dependent spouse is distributed the income producing real property. Certainly the rental income that could be produced by the rental property and earned by the dependent spouse could be a factor in determining alimony, even if the value of this asset was determined using its anticipated future income stream.

Many factors are considered in determining an appropriate alimony amount. These factors include “the relative earnings capacities of the spouses” and “the amount and sources of earned and unearned income of both spouses ...” N.C.G.S. §50-16.3A(b)(2) and (4). However, N.C.G.S. §50-16.3A(b)(16) explicitly states,

"In determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors, including … the fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property."

Clearly, the impact of the double counting of an income stream on the division of property and on the determination of alimony is at the discretion of the court. In **Loutts v. Loutts**, ___ NW 2d ___ (2012), Published Opinion of the Court of Appeals. Docket No. 297427, Decided September 20, 2012, 2012 Mich. App., the Court of Appeals address the issue of double-dipping by finding,

"We decline to adopt a bright-line rule with respect to 'excess' income and hold that courts must employ a case-by-case approach when determining whether 'double dipping' will achieve an outcome that is just and reasonable .. ."

The potential to double count income for the purpose of property division and for the purpose of determining alimony is routinely faced by family law attorneys. The astute family law attorney must understand the economics of a particular case and how these pieces fit into the overall divorce puzzle. A clear understanding of the economics of this issue can help in negotiating a fair settlement for a client. In the various scenarios presented herein, the business owner's cash flow is $300,000 and the court may, in certain circumstances, deem it equitable to use that available income to support a dependent spouse even if a portion of the same income stream was used to determine property settlement.

Paul Saltzman has been in practice since 1975, focusing on income tax, accounting and advisory services. In the most recent seven years, Paul has focused in the areas of business valuation, fraud and forensic accounting, calculation of damages and litigation support. He is licensed as a Certified Public Accountant and credentialed in business valuation and financial forensics. ***Chris Mitchell*** has been practicing since 2004, focusing on audit, accounting and advisory services. In the most recent seven years, Chris has focused in the areas of business valuation, fraud and forensic accounting, and litigation support activities with a focus on business valuation. He is licensed as a Certified Public Accountant and credentialed in business valuation and financial forensics.

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Divorce and the Closely-Held Business Owner

By Erin Durand Hollis, ASA

According to the U.S. Census Bureau, for individuals under age 45, approximately 50% of first marriages for men and between 44 and 52% of women's first marriages end in divorce. The likelihood of a divorce is lowest for men and women age 60, for whom 36% of men and 32% of women may divorce from their first marriage by the end of their lives. Business owners, of course, are not excluded from these daunting statistics.

For many married business owners, the business is both the most valuable and most illiquid asset in the marital estate. Therefore, it is reasonable to assume that if owners divorce, the business will be an asset that will spark substantial controversy and conflict between the divorcing parties. Further, without preparation and precaution, the consequences of divorce can have a devastating financial impact on your client's business. If either your client or your client's business partners are contemplating divorce or if divorce is imminent, you should consider three very important questions: 1) Who should perform the business valuation? 2) What is to be valued? and 3) How will the divorce impact the business?

Who Should Perform the Business Valuation? | If the business is to be included in the dissolution of the marital estate, it is highly recommended you have a business valuation performed by an appraiser who meets the following criteria:

- **Independent** | An attorney is an advocate of the client whereas an appraiser is only an advocate of the business' value. Therefore, having your client's CPA, or other individual they already have an existing personal or professional relationship with, perform the business valuation is a big no-no. Opposing legal counsel (for the non-owner spouse) can easily dispute the credibility and objectivity of the business valuation report. Not only that, any appraiser they have an existing relationship with and who knowingly accepts such an assignment is bordering on a violation of professional ethics.
- **Certified** | An individual may have an alphabet soup of letters after their name, but at least one set of those letters should be from a recognized professional business valuation organization. Many courts have disallowed valuations performed by uncertified individuals. Hiring an uncertified appraiser not only wastes your time but your money as well.
- **Experienced** | Unfortunately, it's not enough to hire an independent, certified appraiser.

  You must also hire one who has substantial valuation experience in your client's company's industry. Experience is critical and typically can make or break the validation of the appraiser's value opinion, especially if your company operates in a niche market. Further, your appraiser may be required to provide a verbal attestation of the value opinion in court.

What is to be Valued?

1. **Level of Ownership** | The amount (or percentage) of ownership to be valued will guide your appraiser in the valuation analysis and application of the appropriate valuation methodology. Typically, a 51% or more business ownership represents a controlling interest and is worth more than one that is of a non-controlling nature, or 50% or less. Depending on the particular state case law, a valuation discount for minority ownership may apply. However, if the ownership of the company is 50%-50% between co-owner spouses, a non-controlling premise may not apply. In this case, the individual 50% ownership may be recognized as a controlling interest due to the familial relationship of the parties involved.
2. **State Case Law** | Your appraiser should be very familiar with the relevant state case law. Many states mandate a particular standard of value be utilized valuing closely-held stock or ownership for divorce purposes. For most tax matters concerning the IRS, the standard of value is fair market value, i.e. hypothetical willing buyer and seller. However, for divorce purposes, the standard may not be fair market value. The value might be referred to as "divorce value" or "marital estate value." The standard of value may also impact the court's allowance of valuation discounts, such as marketability and minority ownership discounts. Further, the particular state case law may specify the separation of corporate goodwill and personal goodwill. This is particularly pertinent to professional service companies, such as engineering firms, accounting firms, or healthcare practices.
3. **Corporate goodwill is the goodwill of the business.** | It is a transferable asset, and is included in the valuation of the enterprise. Personal goodwill is goodwill that adheres to an individual. It is not transferable, and consists of the personal attributes of an owner including personal relationships, skill, personal reputation, and various other factors. The existence of personal goodwill may indicate dependence on a key person. If your client's company has key person issues – meaning, the business could not sustain its current level of operations and financial performance without the significant participation of any one particular individual, such as the owner – the value that individual brings to the company must be excluded from the value of the business "If" that state specifies the exclusion of personal goodwill from the value of the business.
4. **Entity Structure and Taxation** | The entity structure of your client's company is also relevant. A hotly contested topic in business valuation is the tax affecting advantages and disadvantages of C corporations versus those of pass-through entities, such as S corporations and limited liability companies (LLCs). Although there are different schools of thought on the issue, the taxation of business earnings is controversial because it may make a material difference in the value of your client's ownership interest. If your client's company is taxed as an S

corporation your appraiser may use the SEAM (S Corporation Economic Adjustment Model), for example, to ascertain the effect the income tax treatment the pass-through entity has on the value of your pro rata ownership.

How Will the Divorce Impact the Business? | Aside from the obvious emotional impact a divorce may have on your client, the financial implications on your client's business can be overwhelming and more than anticipated. As mentioned, the business may be the largest asset in the marital estate as well as the most illiquid. However, funding the marital settlement can place a financial burden on your business if you do not have sufficient personal liquidity. Supporting the settlement without interrupting business operations typically requires sufficient cash on hand, readily available liquid assets, or other type of funding vehicle such as a business loan.

Some common mistakes an owner, who is facing a divorce, may make in relationship to the business are:

- Run personal or non-business related expenses through the business;
- Blatantly neglect operations;
- Sell off or destroy business-owned assets;
- Dramatically deplete profits or cash on hand; and
- Cease operations.

Oddly enough, these tactics may have zero to little effect on the business' value and it is recommended owners avoid extraordinary actions or business decisions outside the company's day-to-day operations. Firstly, the court and opposing counsel will probably be savvy enough to recognize the actions of possible self-inflicted sabotage. Secondly, the court will typically specify a valuation date, which could be the date of separation or another specified date, and the value of the business may be based on historical operations up to that date. Lastly and most importantly, anomalies and extraordinary events may be "normalized," meaning the appraiser will recast the financials to reflect the normal course of business. Nevertheless, an appraiser can bring sanity to divorce business valuation situations. Therefore, as legal counsel to a business owner, don't make the mistake of choosing an inexperienced, unaccredited appraiser. A wrong choice could not only cost your client unnecessary aggravation but the payout of unnecessary money.

Be Prepared | Although it may seem a bit pessimistic to suggest planning for divorce, the consequences of not planning for any untimely life event—whether it is divorce, disability, or death—can have a devastating financial impact on your client's business. Regular business valuations allow you to proactively care for the viability of your client's business investment and therefore "anticipate" an untimely event requiring immediate liquidity. However, if planning isn't an option and the unexpected event is already upon your client or their business partner, be smart in your selection of an appraiser. A business owner who is contemplating marital dissolution should always seek, with their legal counsel, advice to determine the scope of the valuation engagement and the necessary course of action. Due to the variances in the appraisal process by state, company, and personal circumstances, the business appraiser should work closely with their designated counsel in defining the focus for the valuation process. Not doing so may waste precious time and money.

Erin Durand Hollis, ASA, is on the American Society of Appraisers Business Valuation Committee. The American Society of Appraisers is an international organization devoted to the appraisal profession. ASA is the oldest and only major appraisal organization designating members in all appraisal specialties. Hollis is with AIW, LLC in the Chicago area and can be reached at ***erin.hollis@sta-na.com***.

2014 Family Law Section Annual Meeting

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NORTH CAROLINA FOUNDATION BAR ASSOCIATION CONTINUING LEGAL EDUCATION

A Primer on the Collaborative Law Proceedings Statute in North Carolina

By Randolph (Tré) Morgan III

As the statutory Collaborative Divorce process spreads in North Carolina, practitioners can expect to receive more requests from clients and prospective clients to represent them in a collaborative divorce process. Due to the less byzantine procedures of a collaborative law proceeding, lawyers are tempted to see it as an "anything goes" process. That can lead to a casual entry into a collaborative divorce case. And that can lead to trouble.

Many family lawyers may be surprised to learn that Collaborative Divorce is defined and regulated by statute in North Carolina. N.C.G.S. Sections 50-70 through 50-79 provide clear standards that must be met in a collaborative divorce proceeding in North Carolina. Understanding the collaborative law statutes in this state is obligatory for practitioners offering this process to clients.

This article seeks to familiarize practitioners with the collaborative law proceedings statutes, their mandates, and potential issues arising from their provisions.

N.C.G.S. § 50-70. Collaborative law.

As an alternative to judicial disposition of issues arising in a civil action under this Article, except for a claim for absolute divorce, on a written agreement of the parties and their attorneys, a civil action may be conducted under collaborative law procedures as set forth in this Article.

This section is simply an introduction to the Act. However, it reveals a few requirements of the process: first, an absolute divorce itself cannot be handled through the collaborative process; second, the process requires a written agreement to participate; and third, both the parties and their attorneys must sign the agreement. Of further note is that the statute implies that a collaborative law process is a form of a "civil action," as opposed to just another form of negotiation (*e.g.*, voluntary pre-suit mediation or pre-suit attorney negotiation).

N.C.G.S. § 50-71. Definitions.

As used in this article, the following terms mean:

1. Collaborative law – A procedure in which a husband and wife who are separated and are seeking a divorce, or are contemplating separation and divorce, and their attorneys agree to use their best efforts and make a good faith attempt to resolve their disputes arising from the marital relationship on an agreed basis. The procedure shall include an agreement by the parties to attempt to resolve their disputes without having to resort to judicial intervention, except to have the court approve the settlement agreement and sign the orders required by law to effectuate the agreement of the parties as the court deems appropriate. The procedure shall also include an agreement where the parties' attorneys agree not to serve as litigation counsel, except to ask the court to approve the settlement agreement.
2. Collaborative law agreement – A written agreement, signed by a husband and wife and their attorneys, that contains an acknowledgement by the parties to attempt to resolve the disputes arising from their marriage in accordance with collaborative law procedures.
3. Collaborative law procedures – The process for attempting to resolve disputes arising from a marriage as set forth in this Article.
4. Collaborative law settlement agreement – An agreement entered into between a husband and wife as a result of collaborative law procedures that resolves the disputes arising from the marriage of the husband and wife.
5. Third-party expert – A person, other than the parties to a collaborative law agreement, hired pursuant to a collaborative law agreement to assist the parties in the resolution of their disputes.
6. The definitions in the collaborative law statutes provide much of the meat of the statute.

Definition of collaborative law: The statute defines collaborative law as a process between a man and a wife. It appears that the act does not cover same-sex or unmarried couples. It is also unclear whether pre-nuptial agreements can be negotiated under the act because the couple is not yet husband and wife. Likewise, it is unclear whether post-nuptial agreements can be negotiated under the act because the definition requires separation or the contemplation of separation. This definition of collaborative proceedings requires both parties to have attorneys; no party can participate pro se. The definition of collaborative law requires both clients and attorneys to use "best efforts" and make a "good faith attempt" at resolution. While these terms are nebulous, they at least forbid intentional refusals to negotiate and bad faith gestures of negotiation without an actual intent to resolve the matter. Most collaborative attorneys believe that these phrases also prohibit threats, coercion, and other overtly aggressive negotiation tactics. The definition repeats the written agreement requirement for entering the collaborative process. The last sentence is the hallmark, as it requires the attorneys that represent the clients in the collaborative law proceeding to voluntarily agree not to represent their client in court, if the collaborative proceedings do not result in a resolution. This is known as the "mandatory withdrawal provision." Importantly, the mandatory withdrawal provision does not forbid all litigation work. It allows the collaborative attorneys to participate in a friendly lawsuit as a vehicle for the entry of a consent order. (In reality, few collaborative divorce clients wish to have public orders entered for privacy reasons.)

Definition of collaborative law agreement: The statute defines participants as "husband and wife." It is clear is that the collaborative attorneys must sign the collaborative law agreement in order to create a collaborative law proceeding in North Carolina. Notably,

other collaborative professionals (*e.g.*, financial neutrals) are not required to sign the agreement under the North Carolina statutes.

Definition of collaborative law settlement agreement: The husband and wife terms are repeated again in defining who may enter into a collaborative law settlement agreement. The interesting part of this definition is that it does not mention the mandates of N.C.G.S. Section 52-10.1. While the standard practice is to execute all collaborative law settlement agreements in accordance with Section 52-10.1, no court appellate court has determined whether a collaborative law settlement agreement must comply with Section 52-10.1 in order to be enforceable.

Definition of third-party expert: this definition does not match the definition of an expert for litigation purposes. The North Carolina Rules of Evidence do not control what experts may participate in collaborative law proceedings. It is also important to note that the experts must be hired pursuant to, and therefore after, a collaborative law agreement's execution. This ostensibly means that experts hired prior to the signing of that agreement by both parties and their attorneys do not meet the definition of third-party expert in a collaborative law proceeding. It is unclear whether experts hired by the parties prior to the execution of the collaborative law agreement can be fit into this definition if they are essentially "re-hired" after a collaborative law agreement is in place. This concern would arise where, for example, a couple has seen a financial professional to help them with some issues of their divorce prior to entering the collaborative process. If the couple then wanted that person to be a third-party expert, they should re-hire that person after the execution of the collaborative law agreement to bring them under the statutes. A third-party expert should insist on being hired pursuant to a collaborative law agreement to obtain the protections afforded them under other collaborative law statutes.

N.C.G.S. § 50-72. Agreement requirements.

A collaborative law agreement must be in writing, signed by all the parties to the agreement and their attorneys, and must include provisions for the withdrawal of all attorneys involved in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute.

Section 50-72 seems to simply coalesce the previous two statutes. It repeats Section 50-70's requirements that there be a written collaborative law agreement and that both clients and attorneys sign that agreement. It then repeats the mandates of Section 50-71 that there be a mandatory withdrawal agreement. However, Section 50-72 clarifies the mandate by stating that the mandatory withdrawal provision must be a part of the collaborative law agreement itself.

N.C.G.S. § 50-73. Tolling of time periods.

A validly executed collaborative law agreement shall toll all legal time periods applicable to legal rights and issues under law between the parties for the amount of time the collaborative law agreement remains in effect. This section applies to any applicable statutes of limitations, filing deadlines, or other time limitations imposed by law or court rule, including setting a hearing or trial in the case, imposing discovery deadlines, and requiring compliance with scheduling orders.

The legislature chose to protect parties who submit their cases to the collaborative law process by tolling their legal deadlines during the process. Section 50-73 provides that a properly executed collaborative law agreement tolls all legal time periods in a case for as long as the agreement remains in effect. This tolling allows the clients and counsel to devote the time required to earnestly invest in the collaborative process without fear of losing rights to the calendar. However, only a "validly executed" collaborative law agreement tolls these time periods. So, both clients and attorneys must sign, and the agreement must include a mandatory withdrawal provision as set forth in Section 50-72. A verbal agreement and/or a flawed collaborative law agreement leave parties vulnerable to passing deadlines and lost claims.

N.C.G.S. § 50-74. Notice of collaborative law agreement.

(a) No notice shall be given to the court of any collaborative law agreement entered into prior to the filing of a civil action under this Article.

(b) If a civil action is pending, a notice of a collaborative law agreement, signed by the parties and their attorneys, shall be filed with the court. After the filing of a notice of a collaborative law agreement, the court shall take no action in the case, including dismissal, unless the court is notified in writing that the parties have done one of the following:

1. Failed to reach a collaborative law settlement agreement.
2. Both voluntarily dismissed the action.
3. Asked the court to enter a judgment or order to make the collaborative law settlement agreement an act of the court in accordance with G.S. 50-75.

If the parties have not filed a civil action prior to entering the collaborative proceeding, then the courts do not need to know about the collaborative proceeding. But many family law practitioners may be surprised to learn that the collaborative law statute contemplates that clients will choose to submit active litigation cases to the collaborative law process. Section 50-74 provides a vehicle for notifying a court that a case in litigation has been submitted to the collaborative law process. The "notice of collaborative law agreement" must be filed with the court in order to have the court refrain from further action during the collaborative process. The statute is arguably unclear as to whether all parties must sign the notice, or all parties must only sign the collaborative law agreement. In the absence of total clarity, best practice dictates that both clients and their attorneys (both litigation and collaborative attorneys, if different) sign the notice. There is also some question of whether the filing of this notice is required to begin the tolling in Section 50-73. Section 50-73 does not mention the filing of a notice. It only mentions the valid execution of a collaborative law agreement. However, to be safe, lawyers should assume that a properly executed collaborative law agreement combined with a properly executed and filed notice of collaborative law agreement are required to trigger the legal deadline protections of Section 50-73. Without these two documents, clients in an active litigation case that moves into the collaborative process risk unwittingly losing important rights as deadlines pass without being tolled.

In order to re-engage the court in an action suspended by a collaborative proceeding, the attorneys will need to notify the court in writing that one of the three listed scenarios exists. Keep in mind that while the written notice to suspend the court's involvement needs to be signed by clients and attorneys and then filed, the statute does not require that the written notice to re-engage the court meet either of these requirements.

N.C.G.S. § 50-75. Judgment on collaborative law settlement agreement.

A party is entitled to an entry of judgment or order to effectuate the terms of a collaborative law settlement agreement if the agreement is signed by each party to the agreement.

Section 50-75 creates some questions. First, is a "judgment or order to effectuate the terms of a collaborative law settlement agreement" a consent order only? Or, can it also be an order for specific performance based on the agreement's terms? If the latter is true, then can a collaborative law settlement agreement be enforced without the notarization formality required by Section 52-10.1? None of the collaborative law proceeding statutes specifically require that a collaborative law settlement agreement be notarized. Our courts have not considered the question. Best practice dictates that attorneys in a collaborative proceeding draft an agreement that complies with Section 52-10.1 unless the clients desire a consent judgment.

N.C.G.S. § 50-76. Failure to reach settlement; disposition by court; duty of attorney to withdraw.

(a) If the parties fail to reach a settlement and no civil action has been filed, either party may file a civil action, unless the collaborative law agreement first provides for the use of arbitration or alternative dispute resolution.

(b) If a civil action is pending and the collaborative law procedures do not result in a collaborative law settlement agreement, upon notice to the court, the court may enter orders as appropriate, free of the restrictions of G.S. 50-74(b).

(c) If a civil action is filed or set for trial pursuant to subsection (a) or (b) of this section, the attorneys representing the parties in the collaborative law proceedings may not represent either party in any further civil proceedings and shall withdraw as attorney for either party.

Section 50-76 (a) makes it clear that the parties retain their rights to access the courts if the collaborative divorce proceeding does not resolve all of their disputes. It also makes it clear that a collaborative law agreement may provide that the parties will participate in arbitration and/or mediation prior to filing a lawsuit.

Subsection (b) reiterates that a notice to the court of the termination of the collaborative process is required if a lawsuit was filed prior to the parties signing the collaborative law agreement. It also makes it clear that the court has the authority to enter orders once the notice has been provided to the court. Subsection (b) allows the court to remove the mandatory stay that was created by the collaborative proceeding.

The most salient point of this statute is the mandatory withdrawal of the collaborative attorneys if either party files or continues litigation either during or at the conclusion of a collaborative law process. As repeated throughout the collaborative law statutes, attorneys retained for the collaborative law process cannot thereafter represent that client in court in the same matter. It is also important to note that while litigation attorneys can move into a collaborative law proceeding, collaborative attorneys cannot move into a litigation proceeding. Therefore, for clients that request collaborative law, an attorney must choose to either represent the client in a collaborative law proceeding, or if the attorney wishes to retain the ability to represent that client in court later, refer the client to a collaborative attorney.

N.C.G.S. § 50-77. Privileged and inadmissible evidence.

(a) All statements, communications, and work product made or arising from a collaborative law procedure are confidential and are inadmissible in any court proceeding. Work product includes any written or verbal communications or analysis of any third party experts used in the collaborative law procedure.

(b) All communications and work product of any attorney or third party expert hired for purposes of participating in a collaborative law procedure shall be privileged and inadmissible in any court proceeding, except by agreement of the parties.

This section of the statute contains the protections for the clients and professionals involved in the collaborative process. Subsection (a) protects both clients' and professionals' work product from disclosure and admission into evidence in a subsequent lawsuit. This prohibition is in line with Rule 408 protections of other settlement discussions such as those that the mediation process offers.

In contrast, subsection (b) specifically applies only to attorney and third party expert communication and work product. As opposed to the "confidential" and "inadmissible" language of subsection (a), this subsection uses the terms "privileged" and "inadmissible." Black's Law Dictionary defines a confidential communication as a "privileged" communication. So, the difference in language is probably moot.

Importantly, the parties can agree to make otherwise protected information admissible in a subsequent court action. For example, the parties may choose to admit expert valuations, reports, appraisals, or other information into evidence to avoid the additional expenses of testimonial or consulting experts.

It is crucial to recognize that the protections of this statute only apply if the parties and attorneys have executed a collaborative law agreement that conforms to Sections 50-71 and 72. Without this agreement, the attorney-client privilege and Rule 408 may well protect some information from disclosure or discovery. But without the agreement the risk to neutral experts is more pronounced. The statutory privileges in Chapter 8 of the General Statutes may not apply to protect mental health experts in a third party expert capacity. Further this author is not aware of any reliable legal protections for financial neutrals outside of the collaborative law agreement.

Therefore, carrying out a "collaborative" negotiation without a properly executed collaborative law agreement subjects the parties and the professionals to an unnecessary risk of having to divulge work product and/or appear in court in the event that the parties end up in litigation. Even if a negotiation is successful in keeping a couple out of court initially, future litigation over the validity or interpreta-

tion of a separation agreement may draw the professionals into the fray years down the road without a collaborative law agreement.

N.C.G.S. § 50-78. Alternate dispute resolution permitted. Nothing in this Article shall be construed to prohibit the parties from using, by mutual agreement, other forms of alternate dispute resolution, including mediation or binding arbitration, to reach a settlement on any of the issues included in the collaborative law agreement. The parties' attorneys for the collaborative law proceeding may also serve as counsel for any form of alternate dispute resolution pursued as part of the collaborative law agreement.

This statute specifically allows the parties to move from a collaborative process into mediation, arbitration or any other ADR process without having to find new attorneys. The line for the collaborative attorneys is not drawn at the exit of the collaborative proceeding, but rather at the door to the courthouse.

N.C.G.S. § 50-79. Collaborative law procedures surviving death. Consistent with G.S. 50-20(l), the personal representative of the estate of a deceased spouse may continue a collaborative law procedure with respect to equitable distribution that has been initiated by a collaborative law agreement prior to death, notwithstanding the death of one of the spouses. The provisions of G.S. 50-73 shall apply to time limits applicable under G.S. 50-20(l) for collaborative law procedures continued pursuant to this section.

This section confirms that the collaborative process may continue for equitable distribution issues after the death of a spouse. Given the consensual nature of collaborative divorce, the personal representative must make an election to continue or terminate the process. This section further confirms that the previously described tolling provisions of the Act apply if the personal representative elects to continue the process. No specific written notice of election is required to be sent or filed with the court under this provision.

Summary | For Collaborative Family Law in North Carolina, there are best practices and then there are statutory requirements. For their own protection, not to mention protecting their clients, experts and other collaborative professionals, at a minimum family lawyers taking on a collaborative divorce case should be familiar with and comply with the statutory requirements. Part of the benefit of collaborative law is that a collaborative proceeding is less regimented than a litigated case. However, there are still mandatory steps that must be taken to properly enter, conduct and terminate a collaborative proceeding. The well-prepared family law attorney should be familiar with these mandates before agreeing to represent a client in a collaborative law proceeding.

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The Nominating Committee of the Family Law Section is soliciting nominations for Council members for the coming 2014-15 year. Five positions will be filled to serve 3 year terms on the Family Law Council. Five names will be presented by the Nominating Committee for a vote by the membership at the Annual Meeting in Charleston in May. Nominations should be sent by April 1 to Charles Montgomery, Chair of the Nominating Committee at: ***charles@montgomeryfamilylaw.com*** or P.O. Box 1325, Cary, NC 27512-1325. Nominations should be marked "confidential." Nominations by FLS members and self-nominations by FLS members will be considered by the committee. A nominee's professional curriculum vitae is helpful, but not required. Council members are required to attend meetings regularly.

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Family Law Case Updates | September 17, 2013 – December 3, 2013

By Mary Aiken Barrow, Katie Foster Fowler, Jeffrey R. Russell & Rebecca Watts

Alienation of Affection & Criminal Conversation

Quackenbush v. Steelman, No. COA 13-240, Unpublished (November 5, 2013).

The trial court granted the defendant's motion to dismiss the plaintiff's alienation of affection and criminal conversation claims for lack of personal jurisdiction. The Court of Appeals affirmed. The trial court dismissed the plaintiff's complaint based on the defendant having insufficient minimum contacts with the state of North Carolina. The Court of Appeals gave a detailed explanation of both general and specific jurisdiction before it determined that there was an issue with specific jurisdiction in this case. The Court also listed in detail the factors that are relevant for determining whether sufficient minimum contacts exist, and it clearly analyzed each factor before it determined that the evidence presented at trial supported the trial court's "presumed findings." The only evidence presented at trial included the plaintiff's complaint and an affidavit written by the plaintiff's husband (the man whom the plaintiff alleged was in a relationship with the defendant). While no single factor controlled, the Court emphasized that the quantity of the contact between the defendant and North Carolina was based on the defendant and the husband's single visit to North Carolina while driving together from Florida to New Jersey. The visit lasted only 18 hours, compared to the six months they had been interacting. Additionally, the Court explained that the husband's affections towards the plaintiff had already been alienated when the defendant seduced and engaged the husband in sexual intercourse in Florida. However, the Court did acknowledge the plaintiff's claim for criminal conversation was stronger, as there was evidence that the husband and the defendant had sexual intercourse in North Carolina, but it held that one factor was not dispositive to find sufficient minimum contacts. Finally, the Court explained that, aside from the 18-hour stay in North Carolina, the three individuals involved in this case (the plaintiff, her husband, and the defendant) had no connection to the state, and that since they were all residents of New Jersey there was no evidence that North Carolina would be the more convenient forum. Thus, the Court of Appeals held that the "presumed findings" supported the trial court's conclusion that the defendant's due process rights would be violated if the trial court exercised personal jurisdiction, since there were insufficient contacts between the defendant and North Carolina.

Attorneys' Fees

Church v. Decker, No. COA 13-455, Unpublished (December 3, 2013).

Plaintiff appealed an order of the trial court awarding attorney's fees to defendant. The Court of Appeals agreed with plaintiff, reversing the trial court and remanding for further proceedings.

The parties in this case have, in the words of the Court of Appeals, "litigated extensively against one another since the dissolution of their marriage, including numerous appeals before [the] Court." In a previous appeal, the Court of Appeals held "[p]laintiff's challenge to the trial court's order dismissing his September 3, 2009 notice of appeal, his challenge to the order denying his request for the reinstatement of visitation rights, his challenge to the trial court's order holding him in contempt for violating the interim attorney's fees order, and his challenge to the trial court's order sanctioning him pursuant to N.C. Gen. Stat. § 1A–1, Rule 11 were 'not well grounded in fact and [were] not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law[.]'" Thus, the Court of Appeals awarded defendant attorney's fees and remanded the case to the trial court for a determination of the amount of fees and expenses that should be awarded "in connection with the frivolous portions of [the] appeal." On remand, counsel for defendant indicated to the trial court that he had difficulty distinguishing the amount of his time he had spent working on the frivolous portions of the appeal from the non-frivolous portions of the appeal. Counsel for defendant also requested the trial court impose its own sanctions to bring the award to one hundred percent of the fees. The trial court declined to impose its own sanctions. However, in its written order the trial court awarded fees amounting to one hundred percent of the work done on the appeal.

Plaintiff's sole argument on appeal was that the trial court erred by awarding one hundred percent of the fees because such an award contravened the mandate of the Court of Appeals to award fees only in conjunction with the frivolous portions of the appeal. The Court agreed, saying it was an abuse of discretion for the trial court to ignore the plain language of its mandate and award all fees without imposing additional sanctions or otherwise justifying some reasonable basis for the award.

Hennessey v. Decker, No. COA 13-629 (December 3, 2013).

Husband appealed from an order of the trial court awarding wife attorney's fees. The Court of Appeals affirmed the order of the trial court.

The parties separated in June of 2009 and in August of 2009 they entered into a separation agreement. The separation agreement addressed property distribution, custody of the parties' minor child, alimony, and the relief available in case of breach, including attorney's fees. The agreement was never incorporated into a court order. In November of 2009, wife filed a complaint for child custody, child support based upon the guidelines, a TRO to prohibit husband from harassing her, specific performance of the alimony provisions of the agreement, and attorney's fees. Husband filed counterclaims based in Chapter 50. After years of litigation, the parties resolved all outstanding issues in a consent order, except for attorney's fees. Following a hearing on both parties' requests for an award of attorney's fees, the trial court allowed wife's request for attorney's fees and denied husband's request. Husband first argued the trial court erred by awarding attorney's fees to wife because the separation agreement precluded

such an award. The separation agreement provided that the "losing party" was responsible for "all legal fees and costs." The Court of Appeals noted that it was difficult to determine which party was the winning or losing party in this case; however, the separation agreement simply did not apply here because, under its terms, there was no breach of the agreement, specific performance, or clear winner or loser. Additionally, the separation agreement did not preclude a statutory award of attorney's fees, which each party requested under N.C.G.S. Section 50-13.6. Husband next argued that the trial court erred by awarding attorney's fees under section 50-13.6 because the court made insufficient findings, which did not reflect the evidence before the court, and because the trial court prevented him from presenting evidence of his ability to pay. The trial court, in its order, found that wife was currently unemployed, had stopped working while she was pregnant with the parties' child, and had not been employed since. The trial court also found that wife had $717.07 in her checking account, $197 in her savings account, a 401K worth approximately $900, and a 2006 Honda Pilot. Wife had incurred a total of $28,260 in attorney's fees, which alone far exceeded the value of all of her assets combined. Conversely, husband had a monthly income of about $10,883. The Court of Appeals concluded that there was sufficient evidence to support the findings, that the findings supported the conclusions of law, and that the conclusions of law supported the award of attorney's fees. The Court of Appeals also noted that nowhere in the record did it reflect that husband attempted to offer any evidence that was refused by the trial court. Finally, husband argued that the trial court's written findings did not accurately reflect what the trial court said from the bench at the hearing. The Court of Appeals said this argument was meritless and noted that husband cited no law in support of the contention that a trial judge is restricted to findings he or she rendered at a hearing when entering a written order.

Simon v. Simon, No. COA 13-249 (December 3, 2013).
Wife appealed from the trial court's order denying her request for reasonable attorneys' fees. The Court of Appeals agreed, reversing the trial court's order and remanding for a determination of the amount of fees to be awarded to wife. Wife requested her reasonable attorneys' fees in conjunction with her claims for child custody, child support, and alimony. The trial court denied wife's claims, finding that she had sufficient means to defray the cost and expense of the suit as her separate estate was valued at $902,139.54. At the time of the hearing, wife owed about $180,000 in attorneys' fees, of which approximately $122,000 were recoverable under the statute. The Court of Appeals noted that while wife and husband had similar values in their respective separate estates, wife's estate consisted entirely of assets received in equitable distribution, most of which were not liquid. She also had no cash on-hand, was carrying a balance of approximately $15,000 in credit card debt, and had not worked outside the home for approximately 20 years. Therefore, wife would have to unreasonably deplete her relatively small resources to pay her recoverable attorneys' fees. Thus it was erroneous for the trial court to deny her attorneys' fees claim. (This case is also listed under equitable distribution.)

Child Custody

Davis v. Davis, COA 13-113 (September 17, 2013).
After an incident involving inappropriate physical discipline in Father's home, Mother would not allow Father to exercise the visitation set out in their custody order. Mother and the children continued to tell Father that if he would obtain anger management counseling they would resume the custodial schedule. Wife filed a "motion in the cause for modification/clarification of a prior custody order" in which she asked the court to clarify "ambiguities" in the existing order and filed a motion in the cause asking the court to order Father to attend anger management counseling. Father filed a motion to modify custody and a motion for contempt. A hearing was finally held two and a half years after the incident which caused Mother to withhold visitation (and a little over two years from the filing of the parties' respective motions). The trial court found that there had not been a substantial change in circumstances and denied the motions to modify. However, the trial court granted Mother's motions in the cause, ordering Father to attend anger management counseling, making modifications to the existing order, and setting a new, temporary visitation schedule for Father in an effort to gradually resume visitation. Father appealed. The Court of Appeals reversed the trial court's order because the trial court is without authority to require counseling after denying a motion to modify and because the trial court was without authority to make "clarifications" to the custody order after finding that there had not been a change in circumstances. The Court of Appeals stated that although a court may fix clerical errors pursuant to Rule 60, the trial court may not make changes to the custody order in an effort to "clarify" an order because to allow the trial court to make changes to an order without a finding of a change in circumstances would undermine the purpose of the change in circumstance requirement, which is to provide stability for children and to reduce the tendency toward continuous, acrimonious litigation.

Gary v. Bright, No. COA 13-687 (December 3, 2013).
Mom appealed from the entry of a new custody order which found that a prior custody order was temporary and modified that order by applying a best-interests analysis without first finding a substantial change in circumstances. The Court of Appeals agreed, holding that the prior order was, in fact, a permanent order and could only be modified upon a showing of a substantial change in circumstances. The Court of Appeals first noted that there is no absolute test for whether an order is temporary or permanent. The Court then recited the often used test for whether an order is temporary: "if either (1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues." After reviewing the prior custody order, the Court of Appeals concluded that the "order was not entered without prejudice to either party, failed to state a clear and specific reconvening time, and determined all the issues pertaining to custody," which made the prior order a permanent order, rather than a temporary order as found by the trial court. The Court of Appeals then emphasized the standard for modifying temporary orders versus permanent orders by citing to the recent case of **Woodring v. Woodring**, __ N.C. App. __, __, 745 S.E.2d

13, 18 (2013), "[p]ermanent child custody or visitation orders may not be modified unless the trial court finds there has been a substantial change in circumstances affecting the welfare of the child. If there has been a substantial change in circumstances, the court may modify the order if the modification is in the best interests of the child. Conversely, temporary orders may be modified by proceeding directly to the best- interests analysis." In this case, because the trial court modified the (permanent) order by proceeding directly to the best-interests analysis, the Court of Appeals vacated the new order and remanded the case to the trial court.

Child Support

Duplin Co. DSS ex rel Debbie L. Pulley v. Frazier, No.COA13-619 (November 19, 2013).

Plaintiff obtained a judgment for arrears in 2001, and filed to renew that judgment in 2010. The judgment was renewed and Defendant was ordered to make periodic payments to reduce the judgment. Defendant subsequently filed a motion to set aside the judgment pursuant to Rule 60(b), asserting the judgment was void due to the vagueness of the underlying statute, and that the trial court lacked the authority to enter periodic payments after renewing the judgment under the statute. The trial court granted Defendant's motion, and Plaintiff appealed. The Court first reviewed the grounds upon which a Rule 60(b) motion can be granted. The Court reviewed the trial court's order, and indicated that the judgment could not be "void," as the trial court had jurisdiction pursuant to N.C.G.S. Section 50-13.4(f)(8) and pursuant to case law. Thus, as the trial court had jurisdiction, the judgment could not be void. The Court also found that the trial court's conclusion that N.C.G.S. Section 50-13.4 was vague was also improper. The Court reviewed case law explaining that periodic payments after judgments had been done previously and were found to be proper. Thus, the Rule 60(b) order was vacated and the prior order was reinstated.

Cumberland County Ex Rel: Retting v. Retting, No. COA 13-287 Unpublished (December 3, 2013).

Dad appealed from an order denying his motion to reduce his child support obligation. The Court of Appeals upheld the lower court's decision. In July of 2012, a temporary support order was entered ordering dad to pay $984 per month as support for his minor children. Two weeks later, dad quit his job at Purolator. Less than six weeks later, dad moved to modify his child support obligation citing the fact the he had recently resigned his employment at Purolator to pursue an associate's degree at Fayetteville Technical Community College, which left a monthly benefit under the G.I. bill as his sole income. Dad represented himself at the hearing and after he told the court the basis of his motion, the court asked dad several questions about the nature of his previous employment, his education and career goals, and whether dad would be able to rely on his new wife's income. Dad testified that he had worked at $19.26 per hour for an average of 48 hours a week while at Purolator; that he aspired to become a mechanical engineer, requiring four years of college; and that he could rely on his new wife's income "[t]o a certain extent[.]" The court subsequently denied dad's motion, indicating that the fact that dad quit his job two weeks after entry of the support order was bad faith and imputing his previous wages at while at Purolator. Dad first challenged the trial court's denial of his motion to modify child support. The Court of Appeals noted that the fact that dad's income had been reduced substantially did not automatically entitle him to a reduction in his child support obligation and that if he was intentionally depressing his income to an artificial low or intentionally leaving his employment to go into another business, it was a proper basis for the court to deny his motion to modify. The Court of Appeals held that there was sufficient testimony to support the court's findings of bad faith, and that based upon the findings the Court of Appeals could discern no abuse of the trial court's discretion in denying dad's motion. Dad next contended that the trial court's mode of questioning prejudiced him because it was not in accordance with North Carolina Rule of Evidence 611. The Court of Appeals disagreed, saying that the trial court's questions, while "focused," were not impermissibly leading and that the mode of questioning was within the trial court's sound discretion. Dad's next arguments addressed the trial court's permanent child support order. Dad contended that the trial court erred when it used his earnings capacity rather than his actual earnings when it entered the permanent child support order. The Court of Appeals disagreed, saying that using a party's earning capacity is proper when accompanied by a finding that the party deliberately suppressed his or her income. Dad also challenged the court's failure to take evidence of mom's income at the time of the hearing or the current needs of the minor children. The Court of Appeals noted that a child support worksheet was attached to both the temporary and permanent orders and it reflected mom's income, which could not be altered once dad's motion to modify was denied, because it would be erroneous for the trial court to modify support after concluding that there had not been a substantial change in circumstances. The same reasoning applied to evidence of the children's needs. Dad next argued that the trial court erred by considering his new wife's income in determining his child support obligation. However the Court of Appeals pointed out that the worksheet used to calculate dad's obligation did not include his new wife's income and that any findings about her income were merely superfluous. Finally, dad argued that the trial court erred by ordering him to provide medical coverage for his children without making finding that he could procure the coverage at a reasonable cost. The Court of Appeals held that the issue was not properly before it, because the language of the order required that dad provide medical coverage only if it was available to him at a reasonable cost from his employer, and that dad was not currently employed, making his ability to provide medical coverage irrelevant at this time.

Contempt and Recusal

Liberatore v. Liberatore, No. COA 12-1571, Unpublished (November 5, 2013).

This opinion addressed issues surrounding the trial court's denial of Husband's motion to recuse and various contempt issues. The case began with a complaint filed by Wife for divorce from bed and board, alimony, injunctive relief, and family support. There were nine hearings in this case, many of which were on Wife's motions for contempt against Husband for various violations of court orders, including withdrawing and secreting marital assets, failing to pay family sup-

port, failing to pay attorney fees, failing to pay the balance of interim distributions, and failing to aid in the selling of the marital residence. During one of those hearings, Husband made a motion to recuse. First, the Court of Appeals held the trial court did not err by failing to grant Husband's motion to recuse the case for a hearing before another judge. Husband had the burden to show the Judge had a personal bias, prejudice, or interest that would prevent her from ruling impartially. Husband presented no evidence to show the Judge had ever shown bias, partiality, or undue favoritism. Husband attempted to do so based on the Judge's ruling that Husband's attorney could withdraw and failing to grant a motion to continue during one of the hearings, despite the fact Husband did not object at the hearing to the withdraw and that there were already substantial delays in the case. Second, the Court of Appeals held that the trial court did not err in holding Husband in continuing civil contempt at a hearing that occurred after that court denied Husband's motion to recuse. Husband argued that the trial court did not have authority to hold him in contempt because it erred in denying the motion to recuse. Third, the Court of Appeals addressed Husband's argument that he should have received a de novo hearing when the trial court committed him to a sixty-day active sentence after finding him in continuing civil contempt. In order to receive a de novo hearing pursuant to N.C.G.S. § 5A-21(b2), Husband had to show that he was recommitted to an additional term of imprisonment. The Court explained that Husband's original sentence was for an indefinite period that was temporarily suspended, but the suspension was conditioned upon Husband's compliance with a previous order. Husband failed to comply; thus, the trial court sentenced him to sixty days in jail. There was only one sentence; therefore, the Court held Husband had not been recommitted. Fourth, the Court of Appeals reviewed whether there were sufficient findings to establish that Husband was able to comply with one of his contempt orders. The trial court ordered that Husband could purge himself of contempt if he paid attorney's fees and produced some diamonds he had purchased from wiring marital money to a Cyprus bank. It also made specific findings, which were supported by competent evidence presented at the hearing, regarding Husband's income. The Court reasoned that these findings were enough to show Husband's ability to comply. Thus, the Court upheld the trial court's conclusion that there was a willful violation. Fifth, the Court of Appeals discussed why the trial court did not exceed its authority when it appointed Husband's attorney to oversee a business that was marital property. Husband argued that the appointment created a receivership. The Court explained that Husband's attorney was not given authority to sell property at the trial court's discretion; thus, a receivership was not granted. Rather, the attorney was appointed under N.C.G.S. § 50-21(a) to prevent the disappearance, waste, or destruction of marital assets, based on Husband's past behaviors.

Dismissed Appeals

Ellis v. Ellis, No. COA 13-351, Unpublished (October 15, 2013). Wife filed claims for child custody, child support, equitable distribution, post separation support, and alimony. The trial court found that she was not a dependent spouse and denied her claims for post separation support and alimony. The issues of child custody and equitable distribution were still pending at the time of the entry of the order denying her claims for spousal support. Wife appealed the trial court's order denying post separation support and alimony. The Court of Appeals dismissed her appeal as interlocutory because the issues of custody and equitable distribution were still pending, there was no substantial right implicated, and the trial court did not certify the action for immediate appeal. (Reviewer's note: The Record on Appeal in this case was filed in March 2013, prior to the enactment of N.C.G.S. Section 50-19.1, which became effective on July 26, 2013. An appeal from an alimony order while other issues are still pending would be permissible now pursuant to N.C.G.S. Section 50-19.1.)

Morales v. Morales, No. COA 13-406, Unpublished (October 15, 2013). Plaintiff/Mother was held in civil contempt for failure to comply with a custody order. The order holding her in contempt was entered on November 14, 2013, and she was served with a copy of the order within three days of the entry of the order. Mother filed a notice of appeal on December 17, 2012 – 33 days after the entry of the order. The Court of Appeals dismissed Mother's appeal because her notice of appeal was not timely filed.

Equitable Distribution

Ross v. Ross, No. COA 12-1141 (October 1, 2013)
This is the fourth in a series of appeals filed by the Plaintiff, where the underlying action was filed eleven years ago. The Court reviewed "Ross I," where the parties' beach property was improperly classified as marital instead of partially marital and separate (the property had been purchased by the plaintiff prior to marriage). Upon remand, the trial court entered two orders – the first, which determined valuation and classification of the property, and the second, which ordered the property sold. Plaintiff appealed both orders. The first order made findings as to the down payment and loan equity payments on the property, the joint contributions made during the marriage, and each party's divisible payments on the property. Based on those findings, the trial court found that the property was 53 percent marital by dividing all payments made during the marriage by all payments made during the ownership of the property. The trial court also found that the property was 29 percent separate property of the Plaintiff, and 18 percent separate property of the Defendant. The trial court also found that the Plaintiff was entitled to 55.5 percent of the equity in the property, and Defendant was entitled to 45.5 percent of the equity in the property (by adding each of their separate percentages to one-half of the marital percentage).

Plaintiff appealed, arguing that the trial court erred by failing to accurately classify and value the property, and by ordering that the property be sold.

First, Plaintiff argued that the trial court erred by treating the lot and house as a whole, rather than individually valuing the lot and house, because the lot was the cause of the majority of the appreciation in value of the lot. The Court found that the application of the "source of funds" rule in this case was not inappropriate, citing previous cases where the house and lot were treated as one unit. The Court also pointed out that Plaintiff never offered any evidence of the value of the lot individually versus the value of the home. This assignment of error was overruled. Plaintiff next argued that the trial court erred in classifying the re-

payment of a certain loan as partially separate and partially marital. The trial court found that a percentage of the loan was marital by dividing the number of months the loan was in place during the marriage divided by the number of months the loan existed. Plaintiff argued that there was no evidence as to what amounts of the loan were paid during the marriage, thus the loan could not be classified as marital. The Court found that there was insufficient evidence to conclude the loan was partially marital and partially separate, but found that the debt was solely marital, while Plaintiff argued it should be classified as solely separate. The Court found that Plaintiff failed to meet his burden of proving the debt was separate debt, as the only evidence presented was that the debt was cancelled during the marriage (the Court also noted that Plaintiff also refused to provide evidence surrounding this issue in discovery). Thus, the Court reversed the trial court findings that the debt was partially marital and partially separated, and ordered the trial court to find the debt solely marital upon remand. Plaintiff next argued that the trial court erred in finding that all post-separation payments were divisible and then awarding such payments as separate property to each party. Defendant acknowledged that she should not have been awarded $2,163.00 of divisible payments, and Court ordered that the trial court adjust its order accordingly.

Plaintiff further argued that the trial court erred in allowing Defendant's post-separation support payments to increase his share of equity in the property. The Court agreed, adjusted the percentages of equity to be divided by the parties, and reduced Defendant's share to 43.25 percent from 44.5 percent. Plaintiff finally argued that the trial court erred in ordering the property sold. However, Plaintiff cited no authority for this argument, and the Court treated it as if it were abandoned.

Johnson v. Johnson, No. COA 12-977 (November 5, 2013).

There were four issues before the Court of Appeals; however, the Court only addressed the first three in detail. The first three issues relate to the valuation and distribution of Husband's military pension, the valuation of the marital residence, and the classification and valuation of a promissory note owed to the parties. On the first issue, the Court of Appeals held that the trial court did not err in declining to value and distribute Husband's military pension where Wife failed to produce credible evidence of the value of the pension at the time of separation. The trial court made a finding that there was insufficient credible evidence for the court to value the pension; thus, it did not distribute the pension. The parties separated on August 25, 2009. On the pre-trial order, neither party listed a value for the military pension. At trial, there was very little testimony concerning the value of the pension. The testimony included the following: Husband had been in the military for 24 years, his retirement increased by a percentage for each year of service up to his thirtieth year, he could retire anywhere from July of 2012 to August 2017, the earliest he could retire was 2012, and if he retired in the next year, 2012, his retirement would be somewhere around $3,500 per month. Additionally, after the trial, Wife filed a nine page memorandum in support of the valuation of Husband's military pension, which in part asked the trial court to take judicial notice of documents and internet sites that were not offered as evidence at trial. The Court of Appeals reiterated its analysis in **Bishop v. Bishop**, 113 N.C. App. 725, 725 S.E.2d 591 (1994), which outlined how the trial court should value a defined benefit plan. The Court explained that in order to value the pension, the trial court must determine the amount of the monthly pension payment that the employee would be entitled to receive at the later of the earliest retirement age or the date of separation, assuming he retired on the date of separation. The only evidence presented at trial relating to this value was Husband's testimony about what his retirement might be if he retired sometime in 2012. Moreover, Husband's testimony that the earliest he could retire was 2012 was not specific enough for valuation purposes. The Court of Appeals also noted that the trial court ordered an unequal distribution of the marital property in favor of Wife because of the lack of sufficient credible evidence to value Husband's military pension. On the second issue, the Court of Appeals held that the trial court did not err in its valuation of the marital residence where Wife received the marital residence in an interim distribution order and did not receive credit for subsequent payments on the home that accrued to her benefit. The parties not only agreed in the consent interim distribution order that the marital residence should be distributed to Wife and the value would be determined at the equitable distribution hearing, but they also stipulated that the date of separation value for the marital residence was a negative value, based on the fair market value of the house less the balance of the first and second mortgages. Additionally, the trial court found that the house increased in value from the date of separation until the house was distributed to Wife and that the increase was divisible property. The trial court distributed the house to Wife at the negative value to which the parties stipulated and distributed the increase in value to Wife, as well. The Court of Appeals distinguished this case from **Bodie v. Bodie**, ___ N.C. App. ___, 727 S.E.2d 11 (2012). The Court explained that, in this case, as opposed to **Bodie v. Bodie**, the trial court classified the increase in value of the home as divisible, valued it, and distributed it to Wife. Moreover, since the property was distributed to Wife, any benefit gained by making the payments after date of separation accrued to Wife when she received the property. Thus, the Court of Appeals upheld the trial court's ruling. On the third issue, the Court of Appeals held that the trial court did not err in classifying and valuing a promissory note owed to the parties, where the parties stipulated that it was a marital asset on the pre-trial order and that Wife offered testimony as to the value at trial. On the amended pre-trial equitable distribution order, the parties agreed the promissory note was marital property; however, Husband valued it at $45,000, while Wife valued it at $40,000. During the trial, Wife repeatedly asserted that the amount was actually $45,000 instead. The Court held that the pre-trial stipulations and the testimony regarding the amount of the debt were sufficient to support the trial court's findings of fact.

Simon v. Simon, No. COA 13-249 (December 3, 2013).

Wife appealed from the trial court's order, arguing that during equitable distribution it erred in failing to classify certain property and in valuing certain property. The Court of Appeals agreed with some of wife's arguments and vacated portions of the order, remanding the case for further proceedings.

Wife's first two arguments involved the value of certain stock. The trial court used wife's expert's valuation of the stock on the date of separation in its findings of fact. The expert testified—and the court found—that the stock was worth $832,000 on the date of separation. Wife argued the trial court erred by not valuing the stock as of the date of distribution, an amount her expert placed at $960,000. In conjunction with that argument, wife argued the trial court erred by failing to classify the $128,000 increase in value as divisible property. The Court of Appeals disagreed, saying that the trial court was only required by N.C.G.S. § 50-21(b) to value marital property as of the date of separation, and there is no requirement that the trial court value the property as of the date of distribution. The Court of Appeals also noted that even assuming arguendo that it remanded the issue, the trial court would be under no obligation to accept wife's expert's valuation as of the date of distribution. Thus the Court of Appeals observed, "[Wife's] argument is purely speculative — her alleged $128,000 increase in stock value between the date of separation and the date of distribution does not exist." Wife next argued the trial court erred by not classifying the 2006 and 2007 profit distributions received by husband—after the September 16, 2006, date of separation—as divisible property. The Court of Appeals noted that husband bore the burden of showing the property should be classified as separate, and that funds received after the separation may appropriately be considered as marital property when the right to receive those funds was acquired during the marriage and before the separation. Husband testified that he played no role in the financial management of the company in regards to profit distributions, and the record lacked other evidence to support a finding that the 2006 profit distribution was derived solely from his financial or managerial contributions. Therefore, the Court of Appeals remanded the issue to the trial court for further findings of fact, saying "[u]nless [husband] can sufficiently quantify the active post-date of separation component, the 2006 profit distribution should be classified as divisible property and distributed to [wife] accordingly." However, the Court disagreed with wife's argument as to the 2007 profit distribution because her interest in the stock that was the basis for the distribution ended on the date of separation and the parties were separated for all of the year 2007. (This case is also listed under attorneys' fees.)

Personal Jurisdiction for Divorce

Morgan v. Morgan, No. COA 13-134, Unpublished (October 15, 2013). Husband filed an action for divorce and equitable distribution in North Carolina and served the complaint and summons on Wife in Virginia. Wife did not file a responsive pleading because Husband had assured her that they would divide property and that there was no need for her to hire an attorney. Husband dismissed his equitable distribution claim a week before entry of the divorce judgment. Wife filed a Rule 60 motion asking the trial court to set aside the divorce judgment based on excusable neglect and also filed a motion asking that the court allow her to file an equitable distribution claim pursuant to N.C.G.S. Section50-11(f) because she contended the trial court did not have personal jurisdiction over her. The trial court denied her motions and she appealed.

The Court of Appeals agreed with the trial court's determination that Wife's failure to file a responsive pleading did not rise to the level of excusable neglect. (The Court of Appeals noted that Wife herself had testified that Husband had a "history of lying" and so her reliance upon his assurances regarding equitable distribution was misplaced.) The Court of Appeals also upheld the trial court's ruling on personal jurisdiction, which found that Wife's visits to North Carolina over several years when Husband was stationed in North Carolina, Wife's intention to purchase a house in North Carolina with Husband, Wife's execution of a North Carolina power of attorney, and Wife's choice to insure her car here constituted sufficient minimum contacts with North Carolina to satisfy due process.

Separation Agreement

Herring v. Herring, No. COA 13-544 (December 3, 2013). Husband appealed from the trial court's order denying his motion to set aside the parties' separation agreement on the ground of mutual mistake. The Court of Appeals affirmed the order of the trial court. In 2007, the parties executed a separation agreement that distributed their real and personal property. The separation agreement provided that wife would "retain all bank checking, savings, mutual fund, money market, stocks, 401K, 456B retirement and governmental employees retirement accounts which are presently titled in her name only as her separate property." The agreement had a similar reciprocal provision for husband. In 2012, wife filed a complaint for divorce, to which husband filed an answer and counterclaim seeking equitable distribution and to set aside the separation agreement. Husband contended that they were mutually mistaken about "the actual marital value of [wife]'s Governmental Employees Retirement. The actual value was far greater than the $27,499 value divided by the parties." Following a hearing, the trial court denied husband's motion and claim for equitable distribution. Husband made a similar argument to the Court of Appeals, contending that the mutual mistake occurred when the parties based their calculation of the value of wife's defined benefit plan on the contributions she made to it, rather than the expected future value of the plan if wife continued working for the State. The Court of Appeals first noted that a "mutual mistake of fact is a mistake common to both parties and by reason of it each has done what neither intended." The Court also noted that "neither unilateral mistakes of fact nor mutual mistakes of law are, standing alone, sufficient to set aside or reform a contract." In this case, the Court of Appeals was not convinced that the value the parties used to calculate the distribution of the defined benefit plan was a mistake of fact for both parties. The Court of Appeals also expressed its belief that the alleged mistake would actually be more accurately viewed as a mistake of law as to how a defined benefit plan is valued and distributed under North Carolina's equitable distribution law.

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