Family Forum

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The Chair's Comments

Chuck Montgomery

A Strong Beginning to a Busy Year

The Family Law Section had a great annual meeting in May with high attendance at the seminar and a lofty party overlooking old Charleston. As your section chair for 2012-13, I am pleased to take the wheel of a juggernaut of an organization that has a proud record of service to family lawyers, the NCBA, and the citizens of our state. Family lawyers are exceptional people. They are eager to serve their clients and to improve the legal profession and the system of justice. They typically have little interest in being on the sidelines. They want to be in the midst of the action.

The breadth and strength of leadership in the FLS goes back more than 25 years making it one of the most active and influential sections of the NCBA. Lori Vitale's leadership as last year's chair continued that tradition. The FLS is widely admired for leadership in areas such as Continuing Legal Education, Legislation, the Family Forum newsletter, and 4ALL Service Day participation. When members are asked to serve on committees with substantial responsibilities, they take on the tasks with energy and skill. The recent Life Time Achievement Award winners, Howard Gum, John H. Parker, and Carlyn Poole are prime examples of members of the FLS who have given much back to their profession and the citizens of our state.

The Family Law Council met in July and August taking up an ambitious legislative agenda for the upcoming 2-year term of the Legislature. Proposals that were approved by the Council and will be submitted for approval to the NCBA Board of Governors include:

(1) Amendments to the Adoption Statutes presented on behalf of the Adoption Committee by Brinton Wright

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Listen To Your Clients (Even If They Do Not Always Listen To You)

By George W. "Trey" Aycock III

"It is the province of knowledge to speak. And it is the privilege of wisdom to listen." -Oliver Wendell Holmes

Some view us family lawyers as silver tongued hired guns. Oratorical wizards who master the art of verbal persuasion and fashion the worst of scenarios into winnable, or at least not-as-losable, situations. The greater the challenge, the greater the motivation to prevail by skillful argument.

I have learned through my many years of doing this in those great labs that we call courtrooms, and increasingly in rooms in which we mediate and arbitrate, that it is nearly impossible to speak with knowledge, as Holmes suggests, until I have wisely listened.

Listening is crucial in court. We cannot effectively cross-examine unless we listen. We cannot effectively object unless we listen. We cannot counter our ad-

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and Bobby Mills;

(2) Amendments to allow interlocutory appeals of orders for alimony, equitable distribution, permanent child custody and support, and divorce from bed & board presented by Jonathan McGirt as the Appeals/Listserv Monitor;

(3) Amendments to the Divisible Property Statute adding language for "passive increases" and "passive decreases" adopted by the Council as an alternative to the proposal presented on behalf of the ED Committee by Arlene Reardon;

(4) Amendments to §50B providing for consent orders (in response to Kenton) and to §50C regarding attorney's fees presented by Becky Watts on behalf of the Domestic Violence Committee;

Dave Holm is chair and Stephanie Gibbs is vice-chair of the Legislative Committee that will be working with Kim Crouch, NCBA's director of Governmental Affairs, and the respective FLS committees to shepherd these proposals through the Legislature if they are approved by the Board of Governors.

A special thanks goes to Shelby Benton, our liaison to the Board of Governors, and Jacquelyn Terrell, our staff liaison, for all their special efforts on our behalf. This is a strong start to a busy year for the FLS. The juggernaut moves forward! •

Chuck Montgomery is a Board Certified Family Law Specialist and a DRC certified mediator practicing with Montgomery Family Law in Cary.

Seeking Authors...

Family Forum is seeking authors or contributors for the November, February and May editions.

Do you have a practice mistake or trap you would like to share anonymously with your peers?

Do you have a practice tip or pointer that you have discovered and would be willing to share?

Do you have a story, case or article that would be of interest to your fellow family law attorneys?

If so, please contact Debra Griffiths at *dgriffiths@sandlindavidian.com* or Ruth Bradshaw at *rbradshaw@halvorsenbradshaw.com* •

Listen, *continued from page 1*

versary's argument unless we listen. Those are givens.

We must also, though, master the skill and ability, not just to be our client's "attorney at law," but also their "counsellor at law." This requires listening.

When I passed the bar exam I thought the best way to show the world how much I knew was with my mouth. I reveled in dispensing advice, in crafting arguments for court, in other words, talking.

I learned though that, as usual, my late mother was right. God gave us two ears and one mouth for a reason. I have learned through many trials and lots of error that I am a better lawyer if I listen more and talk less – especially when dealing with my clients.

Our clients do not always listen to us nor do they always follow our advice. We, however, are doing a disservice if we do not listen to them. What we may think we can do within or outside of Chapter 50 is not necessarily what our clients truly want – and after all, if we can get our clients what they truly want, regardless of whether it is what we want for them, will they not be more grateful?

Do not get me wrong. I get a high from winning cases and negotiating great deals. As hopefully my clients will attest, I am opinionated (imagine that from a family lawyer) and very much advise them of what they can, and what I think they should, do. I tell them that my job regarding any financial matter is to treat their situation like a business transaction: remove as much emotion as possible, and get them as much money (or keep them from losing as much money) as possible. They seem appreciative.

As we traverse the roller coaster that we ride from the start of our relationship until the end, things sometimes change. What my clients decide that they want does not always equate with what I see as the best financial deal for them.

We then confer – a lot!

I listen. I talk. I listen some more. I advise. I listen some more. I counsel. I listen some more. Things can get testy.

Many of you have mediated cases in which I have advocated. You have heard me tell clients, sometimes rather heatedly, that "This is a bad deal. You will regret this. I am worried about your financial future. I can get so much more for you. We have them exactly where we want them. Let me do my job." The list goes on.

In virtually every situation I learned through listening why it is that my client wants what he or she wants and decides to disregard my advice and that, as the old adage goes, "the customer is always right." Clients who decide that for some reason they are willing to settle for something that means more or less to them than what some economist or appraiser says eventually turn out to be the happiest and most satisfied clients. The ones who I fear will go tell the world that they got a bad deal because of me end up thinking I hung the moon because I advised them of everything, cautioned them against what they were doing, and then allowed them to make an informed decision.

I see defeat. They see victory.

You need not start thinking that I am becoming a softy. I have just learned that sometimes things, be it personal property baubles or real property dirt, mean more to those whose lives are truly intertwined in them than what some third party expert or I may think.

Cezanne's The Card Players is the most expensive painting ever sold, with an estimated sales price of $300 million. There are a couple of ways to "value" that. In Cezanne's day painters earned a few dollars an hour. Paint was cheap. Maybe there is $100 worth of labor and materials in the painting. A private family in Qatar, however, willingly paid several hundred million dollars for the painting.

Suppose some parent had a painting that their child made. Let's say the child died. What is that painting worth?

To the multi-billionaire Qatar family to whom $300 million is nothing, the painting is worthless. To the child's parent it is priceless. No money could replace that particular painting to that particular parent.

In the past few years a couple of cases stand out in which I thought my clients took "bad" deals when I had them in position "A." These clients remain in touch. They give me Christmas presents. They send me new clients.

I called one of them the day after a multi-day mediation to make sure that everything was okay. My client had cried all night. I thought, "Oh God, I'd better call Lawyers Mutual." She said they were tears of joy. She said that when I got her what she wanted (very much what I did not think she should get) she felt like she did on a special day when she was a little girl and her daddy came home and gave her her first pony. She said, "you just can't express how great a feeling it is to get what your heart truly desires." She then explained to me why this "asset" meant so much to her. I got it.

Another client called just before one Christmas. I thought, "Oh no. She finally realized she got a bad deal." She said she had something for me. I thought, "I knew we should have installed a metal detector. She's going to come here and kill me for what I let her do." Instead, she presented me with a beautiful piece of artwork that it took her countless hours to complete. It adorns one of the walls in our main conference room.

I'll stop "talking" for now. Thanks for giving me the privilege of wisely listening. If I can impart one final piece of advice: in an abundance of caution, it never hurts to send a cover your behind letter – just in case. •

George W. "Trey" Aycock III is board certified family law specialist and is a partner in the law firm of Coltrane Aycock & Overfield, PLLC in Greensboro, North Carolina.

Shared Residential Custody

Relevant Research for Family Lawyers

By Linda Nielsen, Ed.D.,
Wake Forest University, Winston Salem, NC

One of the most controversial and complex issues related to custody and parenting plans is how parents should divide the residential parenting time. That is, how much time should the children live with each parent and how should that time be arranged? What is the best parenting plan in terms of the long term outcomes for the children? In families where the children live 35%-50% time with each parent after their divorce, the terms shared residential custody, shared care or shared parenting are used interchangeably. While many states have already revised their custody laws so that more shared parenting occurs, the majority of family lawyers must still guide their clients through the complicated maze of questions and decisions about shared parenting.

Understandably family lawyers and other professionals involved in custody decisions and crafting parenting plans sometimes rely too heavily on the one or two studies that happen to receive the most attention at conferences or in journals. Indeed some of the so called "reviews" of the research in fact present only a handful of the available studies. For example, a recent article by Belinda Fehlberg at the University of Oxford law school which argues against shared residential custody claims to be based on "international research". Yet her article only cites four of the nearly two dozen studies now available on this topic.[1] Likewise another British law school professor, Liz Trinder, cites only five studies that compared shared care and primary care families in her "review of recent research" arguing against shared parenting.[2]

A growing and substantial body of research has found more positive outcomes for children who live 35% to 50% of the time with both parents. Compared to children who live with only one parent (which is referred to as primary care or as sole residential custody) and spend varying amounts of time with their nonresidential parent (almost always their father), children in shared parenting families generally are generally better off in regard to: academic and cognitive development, emotional and psychological health, stress related illnesses, social behavior, and drinking, drug use, delinquent and aggression. More compelling still, the shared care children have more communicative, more enduring and more meaningful relationships with their fathers than other children of divorce. These conclusions are based on data from more than two dozen studies conducted over the past twenty years and involving approximately 6,000 children from shared parenting families. All of these studies were published in peer reviewed journals and directly compared children in shared care and sole care families.[3,4] It is also worth noting that a clear linear relationship has been established between overnight fathering time and the quality of the father-child relationship two to three years later. In this recent longitudinal study, regardless of the level of conflict between the parents, the amount of overnight time non-residential fathers had spent with their children in seventh grade was highly correlated with the quality of their relationships three years later.[5]

Several other interesting and surprising findings have emerged from these two dozen studies on shared parenting families. First, most shared parenting families do not fail, meaning that most children do not tend over time to drift back to live full time with their mothers. Second, compared to parents who do not share, parents who succeed at shared parenting are not necessarily far more cooperative or conflict free – the exception being that they do not have a history of violence or physical abuse in their relationship. Third, a substantial number of these parents did not initially want to share the residential custody. Many of their arrangements were negotiated with mediators or lawyers. Fourth, even when there is ongoing verbal conflict, these families can succeed and the children still benefit from the shared parenting. In other words, the benefits of living with both parents generally counter the negative impact of parents' ongoing conflicts. It has long been acknowledged that children tend to be more stressed, anxious and depressed when their parents drag them into the middle of their ongoing and unresolved conflicts - in intact families as well as in divorced families. Shared residential custody, however, usually helps to offset this stress, rather than increase it. Overall then, the benefits associated with shared parenting outweigh the negative impact of parents' conflicts and the inconvenience of living in two homes.

These studies, however, do not tell us how many of these children started living with both parents as infants or as preschoolers. As the 2012 national conference of the Association of Family and Conciliation Courts and the July issue of Family Court Review clearly demonstrate, there is still not enough data to make recommendations about the best parenting plans for infants and preschoolers. Likewise, the editors of the most recent book of research on parenting plans explicitly state: "Overnight time sharing for infants, toddlers and preschoolers is an emerging area of research where general conclusions based on research cannot yet be offered and where there remains important debate" (p. 579).[6]

Unfortunately there are only three studies that have compared children under the age of five in shared care and primary care families – two of which have serious methodological problems that limit their usefulness in making recommendations for the vast majority of divorcing parents. The first and oldest study by Solomon and George is now nearly 15-years-old[7]. In this study, 40 infants between one- and two-years-olds who spent any overnight time with their fathers were compared to 49 infants who never overnighted. Many overnighting infants had never lived with their father before their parents separated. Others went for weeks without seeing him before spending a night in his home. Moreover, the overnighting infants' parents had more hostile, dysfunctional relationships, often involving restraining orders for physical violence. Although the overnighting infants had

higher scores on a laboratory test designed to assess how "securely attached" they were to their mothers, the differences were too small to be statistically significant. Commenting on how their study is often misused to argue against overnights for infants, the authors write: "The interpretation of our findings is obviously problematic". "Our study is used in a variety of different ways, including some that I do not agree with or that the data do not support".[8]

The second and more methodologically sound study was headed by Yale University researcher, Marsha Pruett, and involved 132 children ages two to six [9]. Data were gathered from both parents, not just from the mothers as in the previous study. In terms of sleep problems, depression, anxiety, aggression or social withdrawal, children under the age of three who overnighted were similar to those who did not overnight. On the other hand, the overnighting two year olds were more irritable and the two and three year olds were less persistent at tasks. For the four to six year olds, however, the overnighting children had fewer problems than the other children. Those overnighters who did the least well were the ones with inconsistent schedules and multiple caretakers. The girls who overnighted generally fared better than boys – a finding which the researchers attributed to girls being more socially and verbally mature than boys their age. Overall then, overnighting was not associated with serious, ongoing problems and was clearly advantageous for children ages four to six.

Unlike these first two studies, the third study was not published in a peer reviewed academic journal. This report headed by Jennifer McIntosh was commissioned by the Australian government.[10] The limitations of this study have been enumerated in detail elsewhere.[4,11,12,13] But because it has received so much attention,[14] it is worth noting several of its shortcomings. First, nearly 90% of the parents with children under age two had never been married to one another and nearly 30% had never lived together. Moreover, for children under age two, data were only gathered for 14 to 18 children in primary care and only 43 to 59 children in shared care. More problematic still, "shared care" was so broadly defined (children who spent anywhere from four to fifteen nights a month with their nonresidential parent) that nothing can be determined regarding which patterns of overnight care are best or worst. Although shared care children had slightly higher scores on some measures, the differences between the shared care and primary care infants were not statistically significant on irritability, physical health, monitoring their mothers' whereabouts, or negative responses to strangers.

When many of these same children were assessed again two years later, there were only 25 children in shared care (which the researchers were now defining as 35-50% overnight time with each parent). Again, the differences between the shared care and primary care children were not statistically significant, except for wheezing which was more common in shared care children. When the children were measured again as 4 to 5 year olds, for some reason the researchers added several hundred "new" children to their sample. Still, there were no statistically significant differences in the shared care and primary care groups except for hyperactivity/attention deficit disorder which was more common in shared care families – families who also had a higher percentage of boys. This matters because hyperactivity/attention deficit is two to three times more common for boys than for girls in the general population. In any case, given the small statistical differences in outcomes and the many flaws in this study, it is somewhat surprising that it has been the focus of so much discussion on shared parenting.

In sum then, the research on overnighting for infants and preschoolers does not provide enough data to guide us in making public policy about custody or in making decisions about individual children. The debate about overnighting involves a vast body of research (and theory) on each parents' impact on their child during infancy and the preschool years – research that encompasses far more than the just early childhood attachment. As pointed out in a recent review in Family Law Quarterly, attachment issues in child custody are "an additive factor, not a determinative one".[15] For overviews of the vast body of research on early childhood development as it relates to overnighting and shared parenting, consult the issues of Family Court Review in July 2002, July 2011, and July 2012. Again, there is no consensus among experts and no synthesis of recent research in regard to overnighting for infants and young children. More bluntly put, we cannot base parenting plans or custody agreements on the belief that infants and toddlers have a primary attachment to only one caregiver and that this primary bond will be jeopardized by overnights with their other parent.

Given the confusion among many family court workers and family lawyers over "what the research shows", we must take special care not to be "woozled" by one or two studies – or by articles that claim to be reviews of the research. Dr. Richard Gelles a sociologist and expert in domestic violence research warned us years ago about the dangers of being "woozled".[16] Describing how the research on domestic violence was being misconstrued and manipulated by advocacy groups, Gelles coined the term "woozle effect". He was referring to situations where only one or two studies were being discussed or cited often enough that they came to be held as "true" by people who had never even read the studies. Even if completely untrue, a single study (the woozle) can become "scientific evidence" that is used to promote a particular agenda or uphold our personal opinions. In my recent AFCC presentation, I described these "woozles" as "myths that are harder to kill than a vampire". Like vampires, these unfounded beliefs keep resurrecting themselves even after seeming to have died off and to have been defeated by more balanced, more complete data. In our efforts to arrange the best possible parenting plans and custody agreements for children whose parents are no longer living together, we must be ever wary of the woozles and the vampires. •

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Linda Nielsen, Ed.D., is a professor of adolescent and educational psychology at Wake Forest University in Winston Salem, N.C. She has written five books and numerous academic articles on father-daughter relationships, with a special focus on divorced fathers. Her reviews of the research on shared residential custody have been published in the Journal of Divorce & Remarriage and in the American Journal of Family Law. As an expert witness, she has presented this research in a number of recent custody cases. She has also presented her research for three years at the annual conference of the Association of Family and Conciliatory Courts. For copies of her articles, email ***nielsen@wfu.edu*** or download them from her website ***www.wfu.edu/~nielsen***

2012 Distinguished Service Award Honors Lawyers at the Family Law Annual Conference

By Lori Vitale

The Distinguished Service Award was created in 1989 to reward and recognize remarkable service to the Family Law Section. The award can be given to a Family Law Section member, judge or other person who goes above and beyond what is normally expected of them, or who contributed substantially to the practice of family law. This is the first time in 10 years that the Distinguished Service Award has been presented. A committee was formed of past award recipients to determine who should be given the award. This year, the committee decided to honor three outstanding family lawyers with the Distinguished Service Award. All three recipients share a love of being a lawyer and have dedicated themselves not only to the practice of family law, but also to the advancement of family law through teaching the law, sharing their knowledge and skills with other lawyers, leading various committees, sections and organizations, and encouraging active participation by others in the family law section and in national, state and local bar association organizations.

Carlyn Poole began practicing law after having a first career as a teacher. As a lawyer, she has served as a mentor, advocate and problem solver, and she has taught us all how to be better lawyers through her professionalism, creativity and good sense. She has served as an adjunct professor of family law at UNC Chapel Hill, and she has planned and presented numerous family law legal education seminars. In 2006, Carlyn was awarded the Wake County Bar Association Joseph Branch Professionalism Award and chaired a publication on Professionalism in which she wrote, "Most of what we need to know about professionalism we learned as children – tell the truth, mind your manners, be on time, dress properly, follow the rules, and do your homework." She has applied these principles in her practice and has led by example in her service to the family law section, which includes, among other things, being Chair of the Section, Chair of the CLE Committee, and managing editor of the 1st edition of the Marital Claims Deskbook that is a great resource for family law practitioners in this State.

After leaving large firm practice, John Hill Parker served as a District Court Judge from 1976 to 1982. He has often said that family law cases were the most interesting and complex cases to come before him, leading him to focus his career on family law when he left the bench. He has served as a Chair and officer in both national and state family law organizations, including the North Carolina Bar Association Family law Section, North Carolina Chapter of the American Academy of Matrimonial Lawyers and American College of Family Trial Lawyers. John has been a leader in growing section membership through chairing the membership committee and generating enthusiasm among family law lawyers to participate in local, state and national committees and activities. He has helped to raise the bar by showing us the importance of getting involved in our profession beyond the doors of our office, by planning family law legal education programs for more than 30 continuous years, and by bringing ideas, legislation and trial skills from other states back home to us. His contributions have shown us all how to be better lawyers.

In addition to serving two terms as Chair of the Family Law Section, and serving as a State Bar Councilor since 2006, Howard Gum has been a key player in the establishment of legal specialization by the North Carolina State Bar. He served as Chair during the development of the standards for family law certification, and then as Chair of Board of Legal Specialization. The Howard Gum Award was created in his honor and is presented at the annual N.C. State Bar specialist luncheon. Howard has presented at numerous family law CLEs on complex topics, and has served as the ethics liaison to the Family Law Council, keeping us abreast of proposed and actual ethics opinions and shared his insight into how they would be interpreted and whether the council should comment. His ongoing dedication to our profession and the practice of family law is illustrated not only by the numerous awards he has received and the quality of practice he has encouraged us to obtain through specialization, but by the over 2400 hours he has logged driving from his home in Asheville to Wake County for the meetings he has attended (and Chaired) to make it happen.

We are all better lawyers because we have role models like Carlyn, John and Howard who have served the practice of family law by demonstrating and sharing their knowledge, integrity and professionalism. •

Family Law Section Distinguished Service Award Recipients

Lynn P. Burleson | 1990
Richard D. Stephens | 1991
J. Edgar Moore | 1992
Fred A. Hicks | 1995
Representative Joe Hackney | 1996
Marcia H. Armstrong | 1997
George K. Walker | 2000
Howard L. Gum | 2012
John H. Parker | 2012
Carlyn G. Poole | 2012

Lori Vitale is a certified family law specialist and a member of the American Academy of Matrimonial Lawyers. She can be reached at ***lori@vitalefamilylaw.com.***

What is an IWO?

Commonly known as an income withholding order, the Income Withholding for Support (IWO) is the Office of Management and Budget-approved standard form that must be used by all entities to direct employers to withhold income for child support payments.

What is the SDU?

The State Disbursement Unit (SDU) is a centralized collection and disbursement unit for child support payments from employers, income withholders, and others. An SDU is responsible for:

- Receiving and distributing all payments
- Accurately identifying payments
- Promptly disbursing payments to custodial parents
- Furnishing payment records to any parent or to the court

Why were standard forms and payment directions developed?

Under provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Congress required the use of a standard withholding process to increase child support collections for all families, promote self-sufficiency for low-income families, and reduce the burden on employers. States were also required to establish and maintain SDUs to receive child support payments from employers and other sources for all IV-D cases and for all non-IV-D cases with support orders initially issued on or after January 1, 1994 payable through income withholding.

Are there exceptions to income withholding?

Yes, § 466(a)(8)(B)(i) of the Social Security Act allows two exceptions as stated below:

"The income of a noncustodial parent shall be subject to withholding, regardless of whether support payments by such parent are in arrears, on the effective date of the order; except that such income shall not be subject to withholding under this clause in any case where (I) one of the parties demonstrates, and the court (or administrative process) finds, that there is good cause not to require immediate income withholding, or (II) a written agreement is reached between both parties which provides for an alternative arrangement."

How is income withholding ordered?

When entering a child support order, judicial and administrative officials must enter an IWO. Some states use the following language in the child support order: "reference is hereby made to a separate income withholding order, the entry of which is required of this (Court) (Agency) by law and specifically incorporated herein as part of this (Court's) (Agency's) order in this case."

Is use of the OMB-approved IWO Required?

The IWO form has been required since August 22, 1996 for orders issued or modified on or after January 1, 1994. After May 31, 2012, IWOs not on the OMB-approved form will be returned to the sender by employers.

All IWOs that order an employer to withhold payments, including those issued by court and private attorneys, must direct payments to the SDU. Effective June 1, 2012, employers/income withholders will return the IWO to the sender if payment is not directed to the SDU.

All entities or individuals authorized under state law to issue income withholding orders to employers must use the OMB-approved IWO form and direct payments to the SDU.

The revised IWO form with accompanying instructions and a revised process flow was published on May 16, 2011. (*See* Action Transmittal 11-05.) A fillable version of the form is available at ***http://www.acf.hhs.gov/programs/cse/forms/OMB-0970-0154.pdf***.

National Center for State Courts (NCSC)

The NCSC has recognized the issue and considers it to be a high priority. It is proactively communicating with chief justices, court administrators, and other leadership it serves to bring focus to the issue and to the actions that need to be taken to prevent problems that may occur after May 31, 2012.

For more information, contact Kay Farley: ***kfarley@ncsc.dni.us***. •

Additional resources:

- Section 466 of the Social Security Act
http://www.ssa.gov/OP_Home/ssact/title04/0466.htm

- Action Transmittal 11-05 (AT-11-05)
http://www.acf.hhs.gov/programs/cse/pol/AT/2011/at-11-05.htm

- 45 CFR 303.100 – Procedures for income withholding
http://www.gpo.gov/fdsys/pkg/CFR-2010-title45-vol2/pdf/CFR-2010-title45-vol2-sec303-100.pdf

- Intergovernmental Referral Guide (IRG) –
State's IWO procedures ***https://extranet.acf.hhs.gov/auth/login***

- State Contact and Program Information –
State-specific information and contacts for questions
http://www.acf.hhs.gov/programs/cse/newhire/employer/contacts/contact_map.htm

- Employer Services –
Private sector and federal agency employer processes for the IWO notice, withholding calculations and examples
http://www.acf.hhs.gov/programs/cse/newhire/employer/home.htm

Family Forum Case Updates
March 20, 2012 – August 7, 2012

By Suzanne Buckley, Katie Foster Fowler, Andrew D. Hargrove, Angela McIlveen & Rebecca Watts

Alimony and Equitable Distribution

Bodie v. Bodie, No. COA11-999 (June 5, 2012) In proceedings stemming from the Plaintiff-Husband's petition for divorce and ancillary relief, the trial court entered orders for equitable distribution and denied the Defendant-Wife's motion for alimony. The Husband appealed the equitable distribution order and the Wife appealed the dismissal of her alimony claim.

Regarding the Husband's appeal, the Husband argued that the trial court erred by failing to properly classify certain property for equitable distribution. The Court of Appeals reversed in part and affirmed in part. The court reversed the lower court's equitable distribution order because the lower court had found that the Husband had paid $216,000 towards the marital home after the date of separation, yet made no determination about the nature and extent to which this marital debt was paid with divisible property. The court held that since there is no rule that a spouse is entitled to a "credit" for post-separation payments made using marital funds, "the trial court should have determined the source and extent to which Husband used separate property to pay towards marital debt." As a result, the court remanded the issue for further findings of fact on the classification, nature, and amount of: the parties' debt; the Husband's distributions from his 401(k) account, including the amount of passive appreciation between the date of separation and distribution; and the Husband's post-separation payments toward marital debt, including whether such payments were made with marital or separate funds.

Husband also challenged the trial court's failure to use the uncontradicted testimony of his real estate agent regarding the change in value of marital real estate. The court found no error in the trial court's determination on this issue since "uncontradicted expert testimony is not binding on the trier of fact."

In her appeal, the Wife argued that the trial court erred in dismissing her alimony claim by failing to find her to be a "dependent spouse" and by failing to properly take into account her "accustomed standard of living" during the marriage. The Court of Appeals affirmed the trial court's ruling. Since the Wife's monthly income exceeded her monthly expenses and Wife testified that she was able to satisfy her current living expenses, the court found that the Wife was not a "dependent spouse." Furthermore, the court rejected the Wife's argument that she needed alimony to maintain the marital standard of living. The record showed that the parties' previous standard of living was "'artificially maintained' by [a] 'massive infusion of debt'" and was unsustainable. The record also showed that the Wife was "not sure" how much alimony she wanted. Finally, the court found that the Husband failed to offer evidence to show that the Husband was capable of paying alimony, and that such payments would have been nearly impossible for the Husband to make considering that he was bankrupt at the time of the hearing.

Alimony

Blackburn v. Bugg, No. COA11-1349, Unpublished (April 17, 2012) Husband appealed the trial court's order holding him in contempt for failing to pay alimony and requiring him to pay wife's attorney's fees. Husband contends the trial court erred by allowing certain types of evidence into the hearing, finding him in contempt of court, ordering him to pay interest on amounts owed, requiring him to pay his wife's attorney's fees, and failing to rule on his counterclaim against his wife. The court affirmed the trial court's ruling on the issue of civil contempt, holding that there was adequate evidence to find that husband was willful in his failure to pay alimony owed. The court agreed with husband, and vacated that portion of the trial court's order, that required him to pay his wife's attorney's fees. The court held that, in the absence of express statutory authority, attorney's fees are not allowable as part of the court costs in civil actions. The court noted that attorney's fees are not available in contempt proceedings except in cases to enforce equitable distribution or child support. The court concluded that husband's remaining arguments were without merit.

Attorney's Fees

Murn v. Murn, No. COA11-882, Unpublished (April 17, 2012) Husband appealed an order awarding attorney's fees to his ex-wife. The couple separated around July 1, 2004, and entered into a Separation Agreement and Property Settlement on Aug. 19, 2004. The separation agreement provided in part that the parents would have joint custody shared as close to 50/50 as possible. The couple agreed to guideline child support. Wife filed suit on January 8, 2008, alleging that husband failed to comply the terms of separation agreement as it pertained to child support and seeking to have physical custody of the children. Proceedings recommenced on Sept. 2, 2010, and the trial court entered an order granting wife primary physical custody of the children and husband secondary physical custody. On Dec. 16, 2010, the trial court entered an order for attorney's fees. The trial court found that the Plaintiff was an interested party acting good faith without the necessary means to defray the cost of the action, that husband had acted in bad faith, and that husband had failed to pay child support in accordance with the terms of the Agreement. The trial court ordered husband to reimburse wife $15,000 as reasonable attorney's fees. Husband contends the trial court erred by making findings of fact and conclusions of law that were not required and that the order is not supported by necessary evidence.

The Court of Appeals held that the trial court was not required to make the findings outlined in the second sentence of N.C.G.S. Section 50-13.6. In this case, the trial court was not required to make

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findings of fact regarding husband's refusal to pay child support, whether he acted in bad faith or whether he initiated proceedings. Therefore, the court concluded they should not have been included in the order. Husband also argued there was insufficient evidence to support the trial court's finding that wife was without sufficient means to defray the cost of the action. The court concluded there was sufficient evidence in the record to support the trial court's finding of fact. Finally, husband argued that there was no evidence to support the amount of attorney fees awarded. Because the trial court did not make a finding of fact about the number of hours wife's attorney worked, the court reversed the award of attorney's fees and remanded for additional proceedings on the issue of the reasonableness of the attorney's fees.

Child Custody

Zankey v. Riselvato, No. COA12-146, Unpublished (July 17, 2012) Husband's appeal of the trial court's entry of a preliminary injunction prohibiting him from changing the children's schools was dismissed by the court as interlocutory.

Child Support

Greco v. Greco, No. COA11-1396, Unpublished (July 3, 2012) Mother appealed the trial court's order modifying the amount of child support father was required to pay. The court agreed with mother that the court failed to use evidence of father's income at the time of the modification and vacated the order and remanded. The court held that the trial court is required to use the parent's incomes at the time the order is entered and not as of the time of remand or based on a monthly average of income preceding the trial. In cases where it is difficult to determine the parents' current income, the trial court can use an earlier year's income but the court must make explicit findings of fact on this issue and the court in this case failed to do so.

Meeker vs. Meeker, No. COA11-1217, Unpublished (July 3, 2012) Husband filed an action seeking custody and child support against Wife on Jan. 8, 2001. Wife filed a counterclaim seeking custody and support. The parties entered into a consent order on Nov. 19, 2002, wherein Husband was ordered to pay child support of $775 per month. Wife filed a motion to modify child support on Oct. 6, 2009. The trial court entered an order increasing Husband's child support to $1,600 per month, assessing arrearages of $9,900, and awarding Wife's attorney's fees of $4,000. Husband filed an appeal claiming the trial court's order contained several errors mandating reversal. The Court of Appeals agreed with Husband and found that the trial court failed to consider several factors in deviating from the presumptive child support guidelines. Specifically, the trial court failed to address the reasonable needs of the child or Husband's ability to pay the child support award. The trial court imputed income of $25,517 per year as rental income to Husband. The order was unclear as to how the trial court arrived at that amount. It appeared that the trial court imputed some income from rent payable to a partnership in which Husband and his current Wife were sole partners, however, the income that was imputed was speculative. In imputing income to Husband, the trial court failed to find that the Husband was voluntarily unemployed or underemployed as a result of bad faith or deliberate suppression of his income to avoid or minimize his child support obligation. The trial court further failed to consider Wife's income and ability to pay. Wife testified that she received approximately $4,039 per month income and she received approximately $2,000 from her parents per month in assistance. The trial court neglected to consider the $2,000 per month as a portion of Wife's income. The Court of Appeals therefore vacated the trial court's order and remanded for further hearing.

Civil Procedure

Letendre v. Letendre, No. COA11-1268 Unpublished (May 15, 2012) The parties separated in 2008, but the first child support order was not entered until March of 2011. At the hearing, the trial court ordered the Defendant to pay child support in the amount of $991.00 per month, retroactive to the date that the Plaintiff filed her motion. Three days later, the Defendant filed a Rule 60 motion to set the Order aside, arguing he had not received notice of the hearing where child support was ordered. The trial court found that there was excusable neglect on behalf of the Defendant, and set aside the Order. The Plaintiff appealed.

The court found that the Plaintiff's appeal was interlocutory, because it only required the Plaintiff to face another hearing on the

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merits, and that requirement is not a substantial right. The appeal was dismissed.

Contempt

Turner v. Turner, No. COA11-1492 Unpublished (June 5, 2012) The parties were married in 1977, and separated in 2007. The parties entered into a consent order resolving equitable distribution, alimony and attorney fees in 2010, which provided, among other things, that the Plaintiff should have a 10-acre tract of land, and that the Defendant would grant a perpetual easement to the Plaintiff so that he could access that 10-acre tract.

In 2011, the Plaintiff filed a motion to have the Defendant held in contempt for violation of the Order, specifically for failing to grant the Plaintiff an easement onto his 10-acre tract. The trial court denied the Plaintiff's motion. The Plaintiff appealed.

The Plaintiff first argued that the trial court's findings of fact were not supported by the evidence presented. The trial court made findings that the Defendant had deeded a 10.62 acre tract of land and had provided perpetual ingress and egress onto the property. However, the Plaintiff did not challenge specific findings, so the court found his argument lacked merit.

The Plaintiff further argued that the Defendant violated the consent order because the tract of land deeded to the Plaintiff was 10.62 acres, instead of 10 acres. The court disagreed that deeding more than the required number of acres placed the Defendant in contempt of the Order. The assignment of error was overruled.

The Plaintiff further argued that the Defendant caused him additional expense by placing his ingress/egress where she did. The court, in reviewing the consent order, noted that the Order was silent as to the location of the ingress/egress. Thus, the court determined that the Defendant had complied with that provision of the Order.

The Plaintiff next argued that since the consent order was ambiguous as to the location of the ingress/egress, the court should examine the parties' intent when signing the consent order. The court found this argument without merit, stating since the consent order did not provide a specific location, the location was not ambiguous, and the ingress/egress had been provided.

The Plaintiff finally argued that the trial court erred in granting the Defendant an involuntary dismissal. The Court of Appeals rejected this final argument as well, finding that the trial court had simply denied the Plaintiff's motion. The trial court's decision was affirmed.

Willis v. Willis, et al., No. COA11-1211 Unpublished (June 5, 2012) The parties were married in 1981, and separated in 2004. In 2005, they entered into a separation agreement, resolving, among other things, equitable distribution. In the agreement, the Plaintiff waived "any sum of money from life insurance policies that [Defendant] has." At that time, the Defendant had two life insurance policies. The policy at issue was the Farm Bureau policy.

The agreement was incorporated into the parties' 2006 divorce decree. The Defendant later remarried to Susan Willis; however, he died in 2009. At the time of the Defendant's death, the Farm Bureau policy still had the Plaintiff listed as the beneficiary, and had a death benefit of $34,474.04, which was paid to the Plaintiff.

In 2010, Susan Willis, through the Defendant's estate, filed a Motion for Show Cause Order and Motion for contempt against the Plaintiff for failure to remit the proceeds of the life insurance policy. The trial court found that the Order was still in effect, and that the Plaintiff could comply with the Order, but ultimately held that the Plaintiff was not in willful non-compliance with the Order. Susan Willis appealed.

Susan Willis argued that the trial court erred because counsel for the Plaintiff indicated that Susan Willis had the burden of proof at the hearing. The court agreed that the burden was not on Susan Willis, but went on to note that the Plaintiff presented evidence as to why she should not be held in contempt, and that the trial court proceeded under the appropriate burden of proof. The court determined that the evidence showing that the Defendant had "turned over" the policy to the Plaintiff prior to the entry of the 2005 separation agreement, and that Plaintiff had paid the premiums since the parties' separation indicated that the Defendant wanted the Plaintiff to have the policy. This assignment of error was overruled.

Susan Willis next argued that there was insufficient evidence to support findings of fact related to whether or not the Defendant intended to differentiate between the two life insurance policies. The court cited evidence that was sufficient to support the challenged finding.

Susan Willis next argued that there was insufficient evidence to support findings of fact related to whether or not the policy information was mailed to the Defendant's address. The court found that while there was insufficient evidence to support this finding, the remaining supporting findings were sufficient to support the trial court's judgment.

Susan Willis finally challenged the trial court's finding that the Plaintiff was not in "willful" noncompliance with the Order. The court overruled this assignment of error, citing evidence that the Defendant had plenty of time to change his beneficiary, but had not done so. The trial court's order was affirmed.

Moss v. Moss, No. COA11-1313 (Aug. 7, 2012) The parties' consent equitable distribution order provided that the Defendant would have possession of a Mercedes which was titled in the Plaintiff's name, would make all reasonable efforts to have the Plaintiff's name removed from the title within one year, would be solely responsible for costs associated with the vehicle, and would hold the Plaintiff harmless from all liability arising from the costs. The Defendant did not refinance the vehicle loan. After the Defendant took possession of the vehicle, it was repossessed and sold. After the sale, there was a deficiency judgment in the Plaintiff's name in the approximate amount of $12,000. The Plaintiff filed a contempt motion. The show cause order was signed by an Assistant Clerk of Superior court. Due to the existence of the show cause order, the trial court placed the burden of proof at the hearing upon the Defendant who was ultimately held in contempt. On appeal, the Defendant argued the trial court erred in placing the burden of proof upon her and erred in holding her in contempt.

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The Court of Appeals affirmed the trial court's order. A show cause order signed by an Assistant Clerk of Court does not shift the burden of proof in a contempt action because an Assistant Clerk is not included in the definition of a "judicial official." However, due to the Defendant's failure to object during the contempt proceeding to these issues, the Defendant waived her right to these arguments on appeal. The trial court's findings that the Defendant had the ability to comply with the equitable distribution order and that the Defendant's failure to comply was willful were supported by competent evidence.

Domestic Violence

Kennedy v. Morgan, No. COA11-1392 (June 5, 2012) In June 2011, the Plaintiff filed a complaint and motion for domestic violence protective order ("DVPO") against the Defendant, her ex-husband. The trial court entered a DVPO against the Defendant based on its finding that the Defendant harassed the Plaintiff, and caused her fear and substantial emotional distress. The trial court also found that there was a long history of abuse during the parties' marriage and that the Defendant tried to intimidate the Plaintiff through surveillance of her house. The Defendant submitted evidence that he had hired a private investigator to monitor the Plaintiff in an attempt to establish that the Plaintiff was cohabitating, and if so, to seek termination of his alimony order.

The Defendant appealed reversed the lower court's ruling and the Court of Appeals. The court noted that although domestic violence had occurred during the marriage, after the couple had divorced, there were only vague allegations of abuse stemming from Defendant's visitation with the minor children. The court added that a long history of abuse does not, in and of itself, constitute an "act" of domestic violence under N.C.G. S. Section 50B-1. Furthermore, the Plaintiff testified that she had never been physically injured by the Defendant and did not fear that the Defendant would injure her. The court emphasized that the trial court's primary basis for issuing the DVPO was the Defendant's "act" of hiring a private investigator, not the acts of domestic violence that occurred during the parties' marriage. The court found that the sole "act" of hiring a private investigator alone does not constitute harassment under N.C. G. S. Section 14-277.3A(b)(2). Similarly, hiring a private investigator is not in itself an "act" or basis for finding "substantial emotional distress" under N.C.G. S. Section 50B-1.

Equitable Distribution

McCollum v. McCollum, No. COA11-903, Unpublished (May 1, 2012) Husband and wife were married in 1996 and divorced in 2010. Wife filed an equitable distribution action. Prior to trial the parties consented to a pretrial order that contained several stipulations, narrowing the issues for trial. Following a bench trial, the trial court ordered that husband to pay wife a distributive award in the amount of $29,241.75. Husband first argues that the trial court erred in determining that motor vehicles and machinery were not assets belonging to husband's business. The court concluded that, based on the evidence, the trial court's designation that these assets were not part of the business was based on competent evidence. Husband's second argument, that his post date of separation contributions to the marital estate were not properly considered by the trial court, was found to be without merit.

Melson v. Crane, No. COA11-1237, Unpublished (May 1, 2012) Husband appealed an equitable distribution order. The husband argued that the trial court erred when it awarded an unequal distribution in favor of wife. Husband argued that the trial court did not make proper findings of fact as to why it ordered an unequal distribution. The court of Appeals noted that the record showed substantial evidence to support the trial court's unequal distribution. The court affirmed trial court's ruling.

Schweizer v. Patterson, No. COA11-1371, Unpublished (May 1, 2012) Husband appealed the trial court's order of equitable distribution in which he received a distributive award of $7,121.10. The parties entered into a pretrial order on March 19, 2010, in which the parties provided stipulated schedules covering the status and value of various pieces of property. The court held that there were discrepancies between the findings of fact and the pretrial stipulated schedules that were not otherwise supported by competent evidence. The court stressed that the trial court had discretion to determine the issues in an equitable distribution claim, but that N.C.G.S. Section 1A-1, Rule 52(a)(1) governs what to include in the order. Rule 52(a)(1) requires the trial court to "find the facts specifically and state separately conclusions of law thereon and direct entry of the appropriate judgment." The court, unable to conduct a meaningful review, reversed and remanded for further findings of fact.

Curtis v. Curtis, No. COA11-1350, Unpublished (May 1, 2012) Wife appealed the trial court's equitable distribution order. Wife made multiple arguments on appeal. The court reversed and remanded on the portions of the order related to calculating the husband's 401K plan, valuing wife's business at $5,000, and finding that the wife's personal injury settlement was marital property. The remaining issues were affirmed.

The court held that the trial court failed to properly calculate the husband's 401K plan because the trial court should have applied the coverture fraction to the accrued benefit calculated as of the date of separation. N.C.G.S. Section 5-20.1(d). The court also agreed with wife that the trial court failed to include competent evidence as to how it valued the business when the record only contained wife's denial that the business had value and no other testimony on the issue was heard. The order also stated that the wife received a personal injury settlement during the marriage and that there was a presumption it was marital property. The Court of Appeals disagreed, holding that the court is required to use an analytic approach in determining when a personal injury award is classified as separate, marital, or divisible property. The analytic approach requires the court to deter-

mine what the personal injury award was intended to replace. The part of the award that was for pain and suffering is separate property of the injured. The part that represents economic loss is marital property.

Newsome vs. Newsome, No. COA12-10, Unpublished (Aug. 7, 2012) Husband appealed an equitable distribution order awarding an unequal distribution in favor of Wife. Husband and Wife were married on Aug. 13, 1977. They separated May 1, 2007. Husband filed an absolute divorce action against Wife and Wife counterclaimed seeking equitable distribution. In a bench trial, the trial court awarded Wife approximately 74% of the marital estate. The trial court found that Husband attempted to conceal items of marital property including several vehicles, a boat, a motor, and a trailer by purportedly selling the items at a substantial reduction to his friends. The trial court also found that Husband failed to maintain the marital home during the two years subsequent to the parties' separation. The Court of Appeals found that the existence of just one distributional factor is enough to allow the trial court to order an unequal distribution. Husband contended that his acts of concealing marital property were not a distributional factor as they did not affect the value of the marital estate. The Court of Appeals disagreed and found that pursuant to N.C.G.S. Section 50-20(c), Husband's attempts to deplete the marital estate or dispose of marital property after the date of separation, but before distribution, may be considered by the trial court when making a property division. Husband further contended that the trial court erred by failing to articulate a specific value to each distributional factor. The Court of Appeals disagreed with Husband's position and found that the trial court is not required to make specific findings revealing the exact weight assigned to any given distributional factor. The Court of Appeals went further to say that it was not an abuse of discretion for the trial court to award 74% of the marital estate to Wife so long as the trial court made sufficient findings regarding the distributional factors. As the trial court made sufficient findings of fact, Husband's argument was overruled and the trial court's order was affirmed.

Kiell vs. Kiell, No. COA11-1400, Unpublished (July 17, 2012) Husband and Wife separated Aug. 28, 2003. Wife filed an action seeking equitable distribution and alimony and Husband moved to compel arbitration pursuant to a collaborative law agreement signed by the parties. The parties agreed to arbitration that would be binding except for errors of law, which would be appealable. The arbitrator made an unequal distribution of marital property and awarded alimony. The order was confirmed by the trial court as a final judgment on July 5, 2011. Wife contended that the distribution to her of 100% of a retirement account was improper. N.C.G.S. Section 50-20.1(e) allows distribution of more than 50% of the retirement account if there would be difficulty in distributing another asset, which the parties contend there would be. The Court of Appeals therefore overruled this argument. Wife further contended that the arbitrator failed to consider the tax consequences of the distribution of a securities account. The arbitrator specifically made findings that it was not likely that either party would be required to liquidate those retirement accounts and therefore any tax consequences would be speculative and hypothetical. The Court of Appeals overruled this argument. Wife next objected to the arbitrator's unequal distribution in favor of Husband in giving him a dollar-for-dollar credit against the marital estate for the amount in which he reduced the principal balance of the mortgage after the date of the parties' separation while Wife remained in the house. The Court of Appeals found that a spouse is entitled to consideration for any post-separation payments made by that spouse for the benefit of the marital estate. The Court of Appeals did find, however, that the arbitrator failed to distribute the post-separation passive increase in the value of two life insurance policies. This evident miscalculation of the divisible value of the policies must be corrected on remand. The trial court's order was therefore affirmed in part, reversed in part, and remanded.

Wright v. Wright, No. COA11-1511 (Aug. 7, 2012) The Husband was a professional football player who received three significant injuries during marriage. After separation, the Husband received a fourth significant injury which ended his ability to play football. As a result of his injuries, the Husband retired and received line of duty disability benefits (payable when unable to play) and received total permanent disability benefits (payable when e unable to sustain any type of employment). The trial court awarded the Wife 37.5 percent of the Husband's disability payments, reasoning that the line of duty benefits were analogous to a deferred compensation and that the total permanent disability payments were a benefit of the Husband's employment which was partially purchased with marital employment. The Husband appealed the award to the Wife and also argued that there was a delay of twenty-one months in entering the equitable distribution order.

The Court of Appeals remanded the portion of the order regarding the line of duty disability payments for additional findings on the analytic approach used to determine the nature of the benefits and directed the trial court to focus on the nature of the wages being replaced. The Court of Appeals reversed the award of the percentage of total permanent disability benefits, finding that the benefits were intended to replace the loss of future earning capacity and so are properly classified as separate property. Finally, the Court of Appeals concluded that the trial court did not err in entering the equitable distribution order twenty-one months after the hearing without taking additional evidence in that the determination whether the delay is prejudicial is to be done on a case-by-case analysis and Husband had shown no prejudice from the delay.

Plomaritis v. Plomaritis, No. COA11-1554 (Aug. 7, 2012) The Court of Appeals' opinion in this case contains nine pages of procedural history, which will not be summarized here; much of the recitation of procedural history addresses the nine years in which the case had been pending whereas the main issue on appeal that will be summarized here addresses the setting aside of an equitable distribution pre-trial order.

The parties entered into an equitable distribution pre-trial order setting forth the written stipulations of the parties regarding the value and distribution of certain marital assets. After the equitable distribution trial, the trial court, on its own motion and without notice to the parties, set aside the pre-trial order and entered an equitable distribution order that did not conform to the stipulations of the parties as set

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forth in the pre-trial order. The Court of Appeals analyzes the issues of form and function of a pre-trial order, addresses statutes and local rules applicable to pre-trial orders, and concludes that the pre-trial order in this case had been entered according to statutory provisions and local rules; therefore, the trial court was without authority to set it aside on its own motion and without notice to the parties. Because the stipulations contained in the pre-trial order removed certain facts and issues from dispute, the trial court erred in entering an equitable distribution order which did not conform with the pre-trial order. The Court of Appeals reversed and remanded the equitable distribution order.

Juvenile

In the matter of J.L., No. COA 11 – 1225, Unpublished (April 17, 2012) Mother appeals from the trial court's order seeking reunification efforts, changing the juvenile's permanent plan to guardianship, and appointing maternal relatives as guardians for the juvenile. The mother argued that the trial court failed to make appropriate findings of fact. The Court of Appeals affirmed the trial court's ruling, holding that the trial court had considered the statutory criteria relevant to the case, including whether the juvenile could be returned to the home within six months, whether guardianship should be established, whether the juvenile should remain in the current placement, and whether DSS had made reasonable efforts to implement the permanency plan.

In the Matter of M.A., B.A., A.A., A.J., Jr., No. COA11-1238, Unpublished (April 17, 2012) Mother and father appealed the trial court's order adjudicating the minor children as neglected. The parents contended the trial court erred by finding that the children were neglected based on insufficient evidence and by violating the respondent's due process rights by consulting a third-party before ruling on adjudication. The Court of Appeals reversed the trial court and remanded for further proceedings, holding that, after reviewing the record, the adjudication order's findings of fact recorded nearly verbatim from the allegations contained in the juvenile petition filed by DSS. The Court of Appeals could not conduct a meaningful review of the trial court's order because the trial court failed to make its own independent findings of fact based on the evidence presented at the adjudication hearing. The court noted that the factual findings must be more than a recitation of the allegations.

In the Matter of C.W., J.J.W., J.C.W., J.C.F., A.F., T.F., and I.F., No. COA11 – 1325, Unpublished (April 17, 2012) Mother appeals the trial court's ruling that all seven children were neglected and that reunification efforts were futile. The court overruled Mother's first argument that she was not given proper notice of the hearing, noting that the mother had waived the objection by not raising it at the hearing. The court agreed with mother that the trial court had erred in failing to properly consider suitable relative placement for the juveniles when the trial court entered its dispositional orders and that the trial court had failed to provide for visitation with the children. The case was remanded to the trial court to clarify the mother's visitation rights and to amend the dispositional orders to include the required findings regarding placement with relatives.

In RE: A.F., No. COA11-1358, Unpublished (April 17, 2012) Father appealed the trial court's order of a permanency planning order granting guardianship of his daughter to the child's paternal grandmother. The daughter was removed from her parents' home after she sustained second-degree burns on both feet and the back of her legs after being immersed in hot water. Parents did not seek medical treatment for the burns because they were certain child protective services would be contacted. Child was placed in custody of DSS. Father argues that the conditions that led to her removal from the home were alleviated or could have been eliminated within the foreseeable future. The Court of Appeals disagreed and affirmed the trial court's ruling, noting that the parents had failed to comply with the requirements of the trial court to get psychological evaluations and parenting assessments completed.

In the Matter of Y.B.S., No. COA11-1357, Unpublished (April 17, 2012) Parents appeal from an order concluding that their daughter was neglected and that it was in her best interest that the daughter remain in the custody of DSS. The parents mainly argued that the court heard inadmissible evidence when it determined that their daughter was sexually abused. The Court of Appeals affirmed the trial court's ruling holding that the parents failed to object properly to the evidence at the hearing.

Rule 59

Sisk v. Sisk, No. COA11-1320 (July 17, 2012) The parties' equitable distribution trial was heard by Judge Black in June and July 2008. In April 2009, the Judge met with the attorneys about the case and Defendant's attorney subsequently submitted a proposed equitable distribution order and a memorandum of law. The Judge then gave the Plaintiff's attorney the opportunity to submit a response. In July 2010 Judge Black signed an equitable distribution order. The Plaintiff filed a Rule 59 motion alleging it was improper for the Judge to sign the Defendant's proposed order. The Plaintiff then filed a motion to recuse Judge Black, which motion was granted. Judge Wilson heard the Rule 59 motion and set aside the equitable distribution order. The Defendant appealed.

The Court of Appeals held that Judge Wilson was without authority to hear the Rule 59 motion for a new trial because a judge who did not preside over a case may not rule upon a motion for a new trial. Further, the Court of Appeals held that the Plaintiff was not entitled to a new trial pursuant to Rule 59 because Judge Black's signing of the proposed order was not an irregularity which prevented a fair trial, was not misconduct of the prevailing party, was not a surprise, and did not fall within the category of "other reason" recognized as grounds for a new trial.

Separation Agreements

Marks v. Marks, No. COA11-1183 Unpublished (May 15, 2012) The parties were married in 1975, and separated in 2008. In 2009, the parties entered into a Separation Agreement and Property Settlement. In April 2010, the Plaintiff filed a complaint for divorce and equitable distribution, alleging that the written agreement did not dispose of all equitable distribution issues. The Defendant responded, alleging that the agreement did dispose of all issues. The Plaintiff amended her complaint, alleging an oral agreement between she and the Defendant regarding payment from the sale of some property, payment of health premiums, and payment of the Plaintiff's nursing school tuition.

The Defendant moved for dismissal pursuant to Rule 12(b)(6), based on the parties' written agreement. The court converted the motion to a motion for summary judgment, and granted the motion. The Plaintiff appealed.

The court reviewed the case de novo. The court cited N.C.G.S. Section 52-10.1, the requirement that any separation agreement be in writing, signed by both parties, and acknowledged by a certifying officer. The court found that the payments and property argued by the Plaintiff were marital or divisible property, and were spousal support, implicating Section 52-10.1. Further, the court found that since the agreement that the Plaintiff sought to enforce did not meet the requirements of Section 52-10.1, the agreement was void and unenforceable. The appeal was dismissed.

Termination of Parental Rights

In re: J.E.M., Jr., No. COA12-72 (June 19, 2012) Before trial, the minor's mother relinquished her parental rights and consented to adoption. In Aug. 2011, Department of Social Services ("DSS") filed a petition to terminate the parental rights of juvenile's father. At trial, the Father's counsel agreed with DSS that the Father did not contest the allegations set forth in the petition. During the adjudication phase, DSS's sole evidence was the testimony of a DSS social worker, who testified "that the allegations set forth in the petition…are true and correct." During the disposition phase, DSS offered no further evidence. The Father only offered evidence during disposition, which consisted of three witnesses.

In Nov. 2011, the trial court entered an order terminating the Father's parental rights on grounds of neglect and willful failure to pay reasonable cost of care for the juvenile. The trial court also found that termination of the Father's parental rights was in the best interest of the child. The Father appealed.

On appeal, the Father argued that the trial court erred in finding grounds to terminate his parental right on the basis of neglect. He also argued that there was no evidence before the court as to his fitness as a parent at the time of the proceeding. Since the Father did not challenge the trial court's termination of parental rights on the basis of the best interests of the child, the primary issue on appeal was whether the trial court erred in finding that DSS had met the "clear, cogent, and convincing" evidentiary standard associated with the adjudicatory phase of juvenile proceedings under N.C.G.S. Section 7B-805.

Despite previously holding that a trial court must make independent findings of fact and may not cite the allegations of the petition as its only findings of fact, the Court of Appeals affirmed the trial court decision and found that DSS had met the "clear, cogent, and convincing" standard. The court focused on the fact that the Father did not have custody of the child during the period of time at issue; thus, proving the Father's neglect at the time of the termination proceeding would be impossible. The majority opinion noted that, based upon its prior holdings, "a showing of a repetition of neglect" may be grounds for termination of parental rights. The court concluded that, in the present case, the probability of a repetition of neglect was high since the trial court found that the Father had made no effort to see his son in the five months prior to the termination hearing and had only attended one parenting class once, even though attendance at these classes was part of his case plan. The court also upheld the trial court's finding that the Father had willfully failed to pay reasonable child support. In reaching its holding, the court noted that the Father had made no child support payments, despite being physically and financially able to do so.

In her dissenting opinion, Judge Beasley concluded that evidence presented by DSS failed to meet the "clear and cogent" standard. Even though the Father did not contest DSS's case in chief, Judge Beasley concluded that the trial court had a duty to make an independent determination of the facts. Judge Beasley also concluded that the "social worker's verification [of the allegations] was not sufficient to discharge the trial court's duty to make an independent determination of the facts." Judge Beasley noted that the social worker's testimony was the only evidence offered during the adjudicatory phase and was "nearly identical" to the petition to terminate parental rights. Regarding the trial court's findings of facts that were not "verbatim recitations of the allegations," Judge Beasley concluded that the trial court erred in finding facts based on documentary evidence or dispositional testimony.

Uniform Transfer to Minors Act

Belk v. Belk, No. COA11-604 (June 5, 2012) In 2009, the Petitioner, as Guardian Ad Litem for the parties' minor child, filed for an accounting of the Respondent-Father's management of the minor's Uniform Transfer to Minors Act (UTMA) accounts. In Sept. 2010, the trial court entered judgment for the Petitioner and removed the Respondent as the custodian for the child's UTMA accounts. The trial court found that the Respondent had made multiple inappropriate withdrawals from one of the child's UTMA accounts and failed to provide the Petitioner with proper documentation. As a result, the trial court ordered the Respondent to reimburse the funds with interest from the date of the improper withdrawal, and awarded the Petitioner attorney's fees.

On appeal, the Respondent argued that: (1) an award of interest and attorney's fees for the misappropriated funds was an error; (2) the amount of the attorney's fees award was unreasonable; and (3) he had not breached his fiduciary duty by investing some of the funds in a venture capital fund. The Court of Appeals disagreed with the Respondent and affirmed the trial court's ruling. Most notably, the court upheld the award of interest and attorney's fees for the Respondent's improper withdrawal of funds from an UTMA account.

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The court held that the award of interest for the loss of appreciation "was proper as an element of damages" and the court found no error in the trial court's implementation of an 8% interest rate. In reaching its holding, the court emphasized that the trial court's award of interest was based on reimbursement for lost income to the custodial account and was not an award of "pre-judgment" interest or "interest on judgments" under N.C.G.S. Section 24-5(b). In the absence of any expressed statutory authority, the court noted that the legislative intent of North Carolina's UTMA is "to make uniform the law… among the states enacting it." Thus, the court supported its holding by citing persuasive authority in other jurisdictions. Additionally, the court emphasized the fundamental similarities between UTMAs and trusts. The court looked to and incorporated persuasive authority under the North Carolina Uniform Trust Code, under which a trustee in breach of trust is liable for "the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred."

In an another issue of first impression, the court held that "statutory authority exists . . . to tax attorney's fees against Respondent in a personal capacity as a result of his egregious conduct in breaching his fiduciary duties as a custodian under UTMA." While attorney's fees are not expressly granted under the UTMA, the court found statutory authority under N.C.G.S. Section 6-21(2), which includes a provision for attorney's fees in actions pertaining to the "construction of any will or trust agreement, or fix[ing] the rights and duties of parties thereunder." The court emphasized the functional equivalency of trusts and UTMAs by concluding that the legislative history of North Carolina's UTMA statute "indicates that custodial accounts under UTMA are to be regarded as a form of statutory trust." The court noted any other interpretation of the UTMA would result in "inequity to a minor beneficiary of an UTMA" and would make the UTMA a "hollow act," since there would be "little by way of repercussion against a custodian who engages in malfeasance contrary to his statutory duties."

Finally, the court held that petitioner's use of UTMA funds for investment in a venture capital fund was a "violation of the prudent person fiduciary standard imposed on custodians under UTMA." The court noted that the "prudent person" standard applicable to custodial investors under N.C.G.S. Section 33A-12 (b) is stricter than the "prudent investor" standard referred to in Section 36C-9-901 of the North Carolina Uniform Trust Code. •

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The Editors of Family Forum would like to thank their committee members for all of their hard work last year and for the hard work they have already put in this year. Our committee members, Len C. Mueller, A.T. Debnam, C. Thomas Currin and Ruth Bradshaw, did all of the proofreading of articles and case summaries last year and have agreed to come back again for another year.

Len C. Mueller **is a Board Certified Specialist in Family Law, Certified Family Financial Mediator and owner of The Mueller Law Firm, P.A. in Raleigh, N.C.**

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Ruth I. Bradshaw **is a partner at Halvorsen Bradshaw, PLLC in Winston Salem, NC. She exclusively practices family law. Ruth will be serving as the co-editor of Family Forum for this year.**

All of the authors who summarized the appellate cases for each issue last year have also agreed to continue writing the summaries this year. Those authors include Becky Watts, Angela McIlveen, Katie Fowler and Steve Mansbery who will be taking over for Suzanne Buckley. Suzanne has taken a new position as the executive director of a non-profit organization. Their biographies are included at the end of the case summaries. Finally, thanks to Max Rodden who did an outstanding job as our editor last year. If you would like to help with proofreading or summarizing appellate cases or if you would like to contribute an article for a future issue, we would love to have your help and/or contribution. Please contact Debra A. Griffiths at *dgriffiths@sandlindavidian.com* **or Ruth Bradshaw at** *RBradshaw@halvorsenbradshaw.com*.

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