FAMILY LAW TRAPS

RISK MANAGEMENT PRACTICE GUIDE OF LAWYERS MUTUAL

LAWYERS MUTUAL | LIABILITY INSURANCE COMPANY OF NORTH CAROLINA

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Family Law Traps

Risk Management Practice Guide of Lawyers Mutual

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LAWYERS MUTUAL LIABILITY INSURANCE COMPANY OF NORTH CAROLINA

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THE POWER OF DIVORCE

Before the entry of the divorce judgment, the family law attorney should be sure that she has asserted her client's claim for equitable distribution, in the divorce action itself or a separate pending action. The failure to apply specifically for equitable distribution prior to a judgment of absolute divorce will destroy the statutory right to equitable distribution. *Howell v. Howell*, 321 N.C. 87, 361 S.E. 2d 585 (1987); *Carter v. Carter*, 102 N.C. App. 440, 402 S.E. 2d 469 (1991); *Lutz v. Lutz*, 101 N.C. App. 298, 399 S.E. 2d 385, cert. denied, 328 N.C. 732, 404 S.E. 2d 871 (1991); Goodwin v. Zeydel, 96 N.C. App. 670, 387 S.E. 2d 57 (1990); *Lockamy v. Lockamy*, 111 N.C. App. 260, 432 S.E. 2d 176 (1993).

N.C.G.S. § 50-11(e) provides that: "[a]n absolute divorce obtained within this state shall destroy the right of a spouse to an equitable distribution of the marital property under G.S. § 50-20 unless the right is asserted prior to judgment of absolute divorce . . . ."

In order to preserve a claim for equitable distribution that will survive the divorce, the client needs to have specifically applied for the claim prior to the entry of the divorce judgment, either in the divorce action (by complaint or counterclaim) or in a separate action pending prior to the entry of the divorce. You are not saved

Before the entry of the divorce judgment, the family law attorney should be sure that she has asserted her client's claim for equitable distribution, in the divorce action itself or a separate pending action.

by words in the divorce judgment "reserving pending claims" if the claims are not pending. See *Lutz v. Lutz*, 101 N.C. App. 298, 399 S.E. 2d 385 (1991).

Additionally, if only one party asserts a claim for equitable distribution before divorce and that party later dismisses her claim after divorce, there can be no equitable distribution *See Lutz*, supra. Therefore, the attorney who relies on the other party's claim for equitable distribution without asserting his client's claim for equitable distribution prior to divorce, does so at his peril.

The divorce will cut-off rights to make claim for postseparation support and alimony.

N.C. Gen. Stat. § 50-11(c) further provides that a divorce obtained pursuant to G.S. § 50-5.1 or G.S. § 50-6 shall not affect the rights of either spouse with respect to any action for alimony or postseparation support pending at the time the judgment for divorce is granted. Applying these principles, the Court of Appeals reasoned that the rights to equitable distribution and alimony are lost after divorce, *Stegall v. Stegall*, 336 N.C. 473; 444 S.E. 2d 177 (1994).

The pleading setting forth the claim for alimony/postseparation support, therefore, must be filed and pending prior to the entry of the judgment of absolute divorce. N.C. Gen. Stat. § 50-16.2A(a) provides that the pleading must be verified and must set forth the factual basis for the relief requested. You should always include allegations as to "dependent" and "supporting" spouse and sufficient allegations regarding the parties' financial conditions and income level.

However, the pleading for alimony and postseparation support should go further and should contain some detailed facts that indicate that the plaintiff seeking alimony has some shortfall between income and expenses that the other spouse is able to address or that plaintiff will experience a shortfall. Stating the opposing party's income alone may not be enough to satisfy the pleading requirements, and the complaint should also include factual allegations of the plaintiff's needs and inability to meet those needs. *Coleman v. Coleman*, 182 N.C. App. 25, 641 S.E. 2d 332 (2007).

Don't forget to document your explanation to your client.

While it goes without saying that the best fee agreement is a written fee agreement, this is even more important when talking about documenting your agreement to obtain only an absolute divorce for your client. Explain to the client in writing that the divorce will terminate the client's rights, if any, to equitable distribution, postseparation support and alimony, if those claims are not properly asserted prior to the entry of the divorce judgment.

Many clients may not remember that you explained all of this to them when they come back later and ask you when they will get a share of their wife's pension plan or 401(k) account. If a client tells you that they only want (and only want to pay for) an absolute divorce, get them to sign an acknowledgement that states simply "I understand that I will waive my rights to alimony or equitable distribution if the claims are not requested by me at the time I file for an absolute divorce, and I am electing not to make a claim for alimony, postseparation support and/or equitable distribution."

PRACTICE TIP

Explain to the client in writing that unless claims are properly asserted prior to the entry of the divorce judgment, the divorce will terminate the client's rights to the following:

- equitable distribution
- postseparation support
- alimony

QUALIFIED DOMESTIC RELATIONS ORDER

In many domestic cases, the pension or retirement plan is often the couple's most valuable asset and the domestic lawyer needs to take specific steps to ensure that the Qualified Domestic Relations Order ("QDRO") is entered correctly and is properly served and processed with the Plan Administrator in a timely fashion. ERISA-qualified retirement or deferred compensation plans may be divided between divorcing spouses using a QDRO. The lawyer drafting or processing the QDRO would be wise to follow the following rules.

A QDRO is a special ERISA approved court order, which assigns or divides the retirement benefits between the spouses at the time of, or in anticipation of, divorce. To be accepted by the retirement plan, the court order must comply with certain specific rules. The QDRO must include the name of the pension or other retirement plan, the names and addresses of the employee and former spouse, the formula to be used or the actual amount to be paid, the method of payment, and when the payments are to begin and end. The QDRO must comply with the plan's rules for distribution of benefits and must be approved by the plan's administrator.

QDROs allow the parties to become financially disentangled while sharing the risks and uncertainty of future increases or decreases. A QDRO also eliminates the requirement for continued jurisdiction by the court and the enforcement difficulties of delayed distribution, because the QDRO allows the pension plan administrator to pay the non-employee spouse directly as either a lump sum or periodic payments in the future.

The drafting lawyer needs to be careful regarding the following "QDRO points":

1. **When representing the participant in the pension plan, remember the marital fraction: not "1/2 of the pension" but "1/2 of the marital portion of the pension."**
   N.C. Gen. Stat. §50-20(b)(3) states that a vested pension award will be "calculated as of the date of separation, and shall not include contributions, years of service or compensation which may accrue after the date of separation." *Surrette v. Surrette*, 114 N.C. App. 368, 442 S.E. 2d 123 (1994). Be sure that the QDRO specifies which accounts the benefits will come out of and in what proportion. For example, the QDRO can state that the benefits will be taken pro rata from each account according to its value. Be sure you clearly state the date of division or valuation in the QDRO, and do not forget to address what happens to gains and losses on the date of division value. If the retirement account has a loan balance, be sure the QDRO addresses how the loan balance is to be applied in calculating the amount to be divided.

In many domestic cases, the pension or retirement plan is often the couple's most valuable asset.

2. **In dividing a pension, don't forget the survivor annuity [both pre-retirement and post-retirement] - otherwise, when the participant dies, the pension dies also.**
Under most ERISA plans, if the employee dies and the QDRO does not specifically provide for death benefits, the benefits will die with the employee. Survivor benefits must be included in the QDRO for the non-employee spouse's benefits to continue after the employee's death. The QDRO should specify what happens if the spouse dies. Of course, the key is to study the Plan documents, talk to the Plan Administrator, and find out what you can do to protect the client's share from dying with the plan participant.

3. **Don't forget that the QDRO needs to be entered and formally served on the plan administrator.**
Often, attorneys get the settlement agreement signed but forget to perfect the QDRO. There is a danger if the QDRO draftsman takes too long to draft and process the order; if the employee remarries and then dies without the QDRO having been processed by the Plan Administrator, the new spouse will likely receive all the benefits that would otherwise have been assigned to the former spouse. See *Hopkins v. AT&T Global Information Solutions Company*, 105 S. 3rd 153 (1997). Also, the employee spouse might leave the employer and withdraw his plan money or obtain a loan against the former spouse's share of the account proceeds. ALWAYS, ALWAYS, ALWAYS get the QDRO entered along with the final Judgment/Consent Order; serve a certified copy of the QDRO on the Plan Administrator by certified mail, and "tickle" your calendar to follow-up with the Plan Administrator to verify its acceptance of the QDRO.

4. **Don't forget that a QDRO only applies to ERISA-qualified plans.**
Individual Retirement Accounts ("IRA") cannot be divided by QDRO; rather, a party will likely need a letter of instruction and a copy of the final divorce decree or applicable judgment to obtain a tax-deferred rollover of the IRA. Check with the financial institution holding the IRA to determine that institutions requirements for dividing an IRA. Additionally, many non-ERISA governed plans, such as plans acquired during military or government service, cannot be divided with the use of a QDRO. These non-ERISA plans often have their own special rules for domestic relations orders and, therefore, be sure you utilize the correct order to seek a division of a non-ERISA retirement plan.

PRACTICE TIP

THE QDRO MUST INCLUDE

- the name of the pension or other retirement plan
- the names and addresses of the employee and former spouse
- the formula to be used or the actual amount to be paid,
- the method of payment
- when the payments are to begin and end.

The QDRO must comply with the plan's rules for distribution of benefits and must be approved by the plan's administrator.

ASSETS AND DISCOVERY

The attorney handling a family law matter for a client has the duty to investigate fully the facts of a case and to conduct the necessary formal discovery to prepare for the representation of the client. If you don't ask, you may not be entitled to know.

For example, in the case of *Daughtry v. Daughtry*, 128 N.C. App. 737; 497 S.E. 2d 105 (1998), the Court of Appeals held that where the parties had entered into a separation and property settlement agreement and where there was no contractual language obligating a party to make a full disclosure with respect to all marital property, the failure to disclosure the existence of the asset to the other side did not constitute a breach of the agreement. Compare with *Lee v. Lee*, 93 N.C. App. 584, 378 S.E. 2d 554 (1989), where the parties to a separation agreement agreed that there had been a full disclosure of assets and the Court held that the failure to disclose the existence of an asset constituted a breach.

As a full and accurate disclosure is required only with respect to that information requested, the attorney must ask for a complete listing of assets, debts, and income information from the other side. If your client wishes to waive further discovery efforts (due to costs, desire to end the process, etc.), be sure your client acknowledges in writing that you have explained his or her right to ask for further inquiry, verification, or request for documentation or valuations from the other, and that the client is knowingly waiving further efforts for discovery.

PRACTICE TIP

The attorney must ask for a complete listing of assets, debts, and income information from the other side

RESPONSIBILITY TO VALUE ASSETS

In equitable distribution cases, the burden rests upon the party seeking distribution of marital property to place before the trial court competent evidence upon which the trial court can determine the value of the marital asset. *Johnson v. Johnson*, 230 N.C. App. 280, 750 S.E. 2d 25 (2013); *Albritton v. Albritton*, 109 N.C. App, 36, 426 S.E. 2d 80 (1993). If the attorney does not obtain and introduce at trial competent evidence of the value of an asset, the trial court cannot distribute that asset.

Often, evidence of value can be offered through the testimony of the client's own lay opinion as to value and lay opinions as to the value of property are admissible if the witness can show that he has knowledge of the property and some basis for his opinion, *Whitman v. Whitman*, 55 N.C. App. 706, 286 S.E. 2d 889 (1982). The owners of real property have generally been held to have both a knowledge and basis for the testimony as to the value of their property. *Goodson v. Goodson*, 145 N.C. App. 356, 551 S.E. 2d 200 (2001) (holding co-owner of property competent to testify as to value even though she did not know value of surrounding property).

Other types of assets, however, require a witness with knowledge or expertise in order for the trial court to place a value on the asset and, therefore, have the

ability to distribute it. For example, if you are seeking to have the opposing party's military pension plan divided between the parties, you must still present evidence on the value of the plan as of date of separation pursuant to the formula set forth in the case of *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E. 2d 591 (1994). You probably need to hire an actuary or CPA to calculate and present to the court the value of the pension plan pursuant to the Bishop formula; the mere submission of life expectancy tables and discount rates from an internet website and a request for the trial court perform certain calculations will likely not qualify as "competent evidence" of a pension plan.

See *Johnson v, Johnson*, 230 N.C. App. 280, 750 S.E. 2d 25 (2013). Additionally, efforts to value a business, and its goodwill, will likely require the use of an expert; our courts have held that the determination of the existence and value of goodwill should be made with the aid of expert testimony. *Quesinberry v. Quesinberry*, 210 N.C. App. 578, 709 S.E. 2d (2011). Therefore, in advance of trial and to be sure that the asset in question can be divided at equitable distribution, the attorney needs to determine if the value of the asset at issue can be established through the testimony of her own client or whether expert witness testimony will be required.

ALIMONY LAW

Although the alimony law changed effective October 5, 1995, we all still see plenty of pleadings asking for alimony pendente lite and raising defenses of the dependent spouse's post-date of separation adultery. In drafting pleadings, the attorney needs to be careful in pleading a cause of action under the new statute, rather than the previously repealed statute. The new statute has been described as effecting a "wholesale revision," Sally B. Sharp, Step by Step: The Development of the Distributive Consequences of Divorce in North Carolina, 76 N.C.L. Rev. 2018 (1998).

The 1995 alimony statute created: 1) postseparation support, a new category of support replacing alimony pendente lite, 2) less restrictive dependency requirements, 3) greater flexibility in determining the amount and duration of alimony, including a marked departure from a standard of living assessment, and, most significantly, 4) less emphasis on fault. While prior law entitled a dependent spouse to alimony only upon proof the supporting spouse had committed one of ten fault grounds set forth under G.S. § 50-16.2 (repealed), the 1995 alimony statute substituted marital misconduct for fault as a factor to

PRACTICE TIP

SPECIFY THE DATE WHEN AN AWARD FOR ALIMONY OR POSTSEPARATION SUPPORT IS TO TERMINATE.

Pursuant to N.C. Gen. Stat. § 60-16.9, **alimony and postseparation support shall terminate**

1. upon the date specified in the order
2. the remarriage or cohabitation of the dependent spouse
3. the death of either the supporting or dependent spouse.

be considered in the amount and duration of alimony (if any) to be awarded to the dependent spouse. *Brannock v. Brannock*, 135 N.C. App. 635, 523 S.E. 2d. 110 (1999). Marital misconduct as an alimony factor is limited to conduct which occurred prior to or on the date of the parties' separation.

In drafting orders, it is important to specify the date when an award for alimony or postseparation support is to terminate. Pursuant to N.C. Gen. Stat. § 60-16.9, alimony and postseparation support shall terminate upon the date specified in the order, the remarriage or cohabitation of the dependent spouse, the death of either the supporting or dependent spouse. In the definition of postseparation support, the statute provides that an award of postseparation support is to be paid until the earlier of either the date specified in the order of postseparation support, or an order awarding or denying alimony.

Be sure to state the specific terms for termination in the support agreement or court order/judgment. In the case of *Vittitoe v. Vittitoe*, 150 N.C. App. 400, 563 S.E. 2d 281, disc. rev. denied, 356 N.C. 314, 571 S.E. 2d 218 (2002), the trial court's postseparation support order stated that postseparation support would continue to be paid under the order "until the final determination of the alimony claim." Even though no alimony claim was pending at the entry of the parties' divorce, the court held that the husband's postseparation support obligation under the order continues because the order did not specify a termination date and there was no court order awarding or denying alimony. See also *Marsh v. Marsh*, 136 N.C. App. 663, 525 S.E.2d 476 (2000). It is therefore critically important that the actual date(s) or triggering events for termination or modification of a support obligation be specifically stated in the agreement or court order.

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DEFINITIONS AND GENERAL PROVISIONS

CUSTODY REQUIREMENTS

Uresa is by-gone days: it's the home state forever!

Don't forget to rely upon the correct statute when invoking jurisdiction in a custody case. Under the law prior to 1999, custody actions were filed under the Uniform Child Custody Jurisdiction Act (UCCJA); there were multiple statutory options upon which district court in North Carolina could exercise jurisdiction to make child custody determinations, if: (1) this State was the home state of the child; (2) it was in the best interest of the child because the child and the child's parents had a significant connection with this State; (3) the child was physically present in this State and it was necessary in an emergency to protect the child because the child had been subjected to or threatened with mistreatment or abuse; or (4) it appeared that no other state would have jurisdiction or another state had declined to exercise jurisdiction.

Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (codified in Chapter 50A)

which became effective October 1, 1999, the focus for jurisdiction became the "home state"- where the child(ren) had lived for the six-month period prior to the commencement of the proceeding. The jurisdiction of the home state was prioritized over other jurisdictional bases and, therefore, it is no longer sufficient to ask for jurisdiction in a custody action based upon significant connections with the state where North Carolina is not the home state of the child(ren).

Additionally, all custody complaints or motions in the cause must contain the information required in the current statute to invoke the court's jurisdiction in custody actions. The information requested is now set forth in N.C. Gen. Stat. § 50A-209 (formerly § 50A-9) and authorizes the court to stay the proceeding until the information required in subsection (a) has been disclosed. While failure to provide the information does not deprive the court of jurisdiction to hear the case, clearly the better practice is to provide complete jurisdictional information in the initial custody filing.

If you represent a third-party in a custody case, you have to make a special showing.

In a custody dispute between natural parents and a third person, including a grandparent, a natural parent has a "paramount constitutional right to custody and control of his or her children." *Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E. 2d 499, 503 (2001). Thus, in order to have standing to seek custody from a parent, a third party must show she has an established relationship with the child, such that she is not a stranger to the child, *Ellison v. Ramos*, 130 N.C. App. 389, 394, 502 S.E. 2d 891, 894, appeal dismissed and disc. review denied, 349 N.C. 356, 517 S.E. 2d 891 (1998). Furthermore, as between a parent and a non-parent, North Carolina courts cannot perform a "best interest of the child" analysis to determine child custody until after the natural parents are judicially determined to be unfit if a natural parent's conduct has not been inconsistent with his or her constitutionally protected status. *Petersen v. Rogers*, 337 N.C. 397, 445 S.E. 2d 901 (1994); *Price v. Howard*, 346 N.C. 68, 484 S.E. 2d 528 (1997); *Adams v. Tessener*, 354 N.C. 57, 550 S.E. 2d 499 (2001). Therefore, when representing a non-parent, third party in a custody case, it is imperative that you:

1. Allege and prove that your client has a non-stranger relationship to the child or children, which is in the nature of a parent-child relationship; and,

2. Allege and prove that:
   a. the parent(s) is unfit, or has abandoned or neglected the child(ren), and/or;
   b. the parent has acted in a manner, which is inconsistent with his or her constitutionally protected status.

Unless these requirements are met, the third party custody claim is subject to dismissal. See *Barger v. Barger*, 149 N. C. App. 224, 560 S.E. 2d 194 (2002).

PRACTICE TIP

In a custody dispute between natural parents and a third person (including a grandparent) a **natural parent has a "paramount constitutional right to custody and control of his or her children."**

A third party must show

- she has an established relationship with the child
- that the natural parents are judicially determined to be unfit

PREMARITAL AGREEMENTS

The Uniform Premarital Agreement Act (UPAA) provides that a properly executed premarital agreement is enforceable without consideration. N.C. Gen. Stat. § 52B-3. The statute provides that a premarital agreement must be in writing and signed by both parties. While there is no UPPA requirement that the premarital agreement be acknowledged before a notary public, any agreement which addresses equitable distribution rights (or the waiver or limitation thereof) should be duly executed and acknowledged. N. C. Gen. Stat. § 50-20(d). Clearly, the better practice is to have the signatures of both parties to a premarital agreement acknowledged before a notary public and to have the acknowledgment affixed to the agreement.

The UPPA provides in essence that the terms of the parties' premarital agreement may be one-sided (i.e. "unconscionable'); the agreement can still be enforced, albeit unconscionable, as long as a "full disclosure" is made (or a knowing waiver of rights to disclosure) at the time of the execution of the premarital agreement. N.C. Gen. Stat. § 52B-7 provides as follows:

A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

1. That party did not execute the agreement voluntarily; or
2. The agreement was unconscionable when it was executed and, before execution of the agreement, that party:
   i. Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
   ii. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
   iii. Did not have, or reasonably could not have had, an adequate knowledge of the property of financial obligations of the other party.

Therefore, in order to protect the validity of the premarital agreement, it is very important for the client seeking the protection of the agreement to make a complete disclosure of his or her assets, liabilities, and income prior to and at the execution of the agreement.

It is imperative that the true net worth be fully disclosed and that the disclosure be properly documented. *See Sogg v. Nevada State Bank*, 832 P.2d 781 (Nev. 1992) (where the court set aside a prenuptial agreement because the husband failed to disclose his net worth). The drafting attorney would be wise to attach written schedules of both contracting parties' assets and debts. Full disclosure includes any gifts or inheritances either party has received. In *Fick v. Fick*, 851 P.2d 445 (Nev. 1993), an antenuptial agreement was

PRACTICE TIP

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The drafting attorney may consider including provisions in the premarital agreement which require the parties to execute additional waivers after the marriage ceremony; however, follow-up must be made and the additional documents actually executed following marriage.

invalidated by the Nevada Supreme Court because the husband's attorney did not attach a schedule of his assets to the agreement before it was signed. The Fick agreement apparently made reference to a recent schedule, but the schedule was not attached to the actual agreement. The failure to attach the written schedule constituted "inadequate disclosure."

If no "full disclosure" is to be included, it is important to set forth specific language acknowledging that the parties are satisfied with the limited information available at the time of the execution of the agreement. To make sure there is a knowing waiver of rights, in addition to disclosing the spouse's financial condition, the implications of the agreement should be disclosed to each party. This is difficult if one party is not represented by counsel. To ensure that this requirement is fulfilled, each spouse should be urged to seek advice of independent counsel.

A general waiver in a premarital agreement may be ineffective to waive the spouse's ERISA rights to a share of the other spouse's qualified pension or profit-sharing plan as the party attempting to waive these benefits was not a spouse when the premarital agreement was executed. Because federal law preempts where there is a conflict, and ERISA overrides the Uniform Premarital Agreement Act, the rights of the spouse in a qualified retirement plan may only be waived in the manner prescribed by § 205 of ERISA, as amended 26 U.S.C. § 417 (a). See *Zinn v. Donaldson Company*, 799 F. Supp. 69 (D. Minn. 1992); *Nellis v. The Bowing Company*, 15 Employee Benefits (BNA) 1651 (D. Kan. 1992); *Hurwitz v. Sher*, 789 F. Supp. 134 (S.D.N.Y. 1992), aff 'd, 982 F.2d 778 (2nd Cir. 1992), cert. denied, 113 S.Ct. 2345 (1993); *Pedro Enterprises, Inc. v. Perdue*, 998 F.2d 491 (7th Cir. 1993). Pursuant to ERISA (29 U.S.C. § 1055(c) and I.R.C. § 417(a)), a spouse's waiver of pension rights is not valid unless it meets all of the following criteria:

1. The consent of waiver is in writing.
2. The writing states it "acknowledges the effect" of the waiver.
3. It either:
   (a) Recites who the beneficiary is, or
   (b) Expressly permits the spouse who has the pension benefits to waive the survivor annuity benefit and change the designated beneficiary at any time without the consent of the other spouse.
4. It is witnessed by the Plan Administrator or a Notary Public.
5. It is made within the applicable election period.

Treas. Reg. § 1.401(a)-20(1991) further provides that an agreement entered into prior to marriage does not satisfy the applicable consent requirements of §§ 401(a)(11) and 417. There are certain steps attorneys may take to eliminate the dilemma of future spouses signing premarital agreements. The drafting attorney may consider including provisions in the premarital agreement which require the parties to execute additional waivers after the marriage ceremony; however, follow-up must be made and the additional documents actually executed following marriage. The drafting attorney must be sensitive to the problems using premarital agreements to waive a future spouse's interest in Qualified Retirement Plans and must inform the client of those risks.

CHILD SUPPORT

Prospective child support is established pursuant to the North Carolina Child Support Guidelines prescribed by the Conference of Chief District Court Judges, unless a motion for a deviation therefrom is made. For purposes of computing child support, the portion of the award "representing that period from the time a complaint seeking child support is filed to the date of trial," is "in the nature of prospective child support." See *Taylor v. Taylor*, 118 N.C. App. 356, 455 S.E. 2d 442 (1995), rev'd on other grounds, 343 N.C. 50 (1996); see also *Tidwell v. Booker*, 290 N.C. 98, 225 S.E. 2d 816 (1976) (awarding prospective child support from date of filing of complaint forward and retroactive child support for period before filing of complaint). Since prospective child support is to be awarded for the time period between the filing of a complaint for child support and the hearing date, Section 50-13.4(c) applies and requires application of the Guidelines with respect to that period.

However, a request for an award of child support covering the period from the date of the parties' separation through the filing of the Complaint is classified as retroactive child support. Under the child support guidelines in effect as of August 31, 2015, a court may determine the amount of retroactive child support (a) by determining the amount of support that would have been required had the guidelines been applied at the beginning of the time period for which support is being sought, or (b) based on the parent's fair share of actual expenditures for the child's care.

The guidelines further provide that, if a child's parents have executed a valid, unincorporated separation agreement that determined a parent's child support obligation for the period of time before the child support action was filed, the court shall not enter an order for retroactive child support or prior maintenance in an amount different than the amount required by the unincorporated separation agreement. Despite the wording of the guidelines, the case law suggests that a determination of retroactive support must be based upon the child's actual past expenditures. *Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E. 2d 176 (1992). The party seeking retroactive child support may need to be prepared to present sufficient evidence of actual expenditures made on behalf of the child, and that those expenditures were reasonably necessary.

In making a claim for retroactive support, the attorney might still need to present evidence of actual past expenditures made by the client for the child's benefit during the relevant time period in the event the trial court declines to utilize the guidelines in the computation. Our courts have approved the use of a summary of expenses to determine the amount of retroactive child support, State ex rel. *Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E. 2d 591(1998).

PRACTICE TIP

Child support covering the period from the date of the parties' separation through the filing of the Complaint is classified as **retroactive child support.**

A court may determine the amount of retroactive child support

1. by determining the amount of support that would have been required had the guidelines been applied at the beginning of the time period for which support is being sought, or
2. based on the parent's fair share of actual expenditures for the child's care.

SPECIAL PERFORMANCE

Agreements between spouses, such as separation agreements, premarital agreements, or property settlement agreements, can be enforced as a contract through the remedy of specific performance. These type of "divorce-related" agreements, which have not been incorporated into a court order, are "generally subject to the same rules of law with respect to its enforcement as any other contract." *Moore v. Moore*, 297. N.C. App. 14, 252 S.E. 2d 735 (1979). In order to perfect a claim for specific performance, special pleading and proof requirements must be met.

First, the plaintiff must allege that she or he has no adequate remedy at law. A plaintiff who relies on damages to compensate for the breach of a separation agreement, which has not been incorporated into a court order generally, does not have an adequate remedy at law. *Condellone v. Condellone*, 129 N.C. App. 675, 501 S.E.2d 690 (1998—but it must be pled. As a general proposition, the equitable remedy of specific performance may not be ordered "unless such relief is feasible;" therefore courts may not order specific performance "where it does not appear that defendant can perform." *Edwards v. Edwards*, 102 N.C. App. 706, 403 S.E. 2d 530, review denied, 329 N.C. 787, 408 S.E. 2d 518 (1991).

A plaintiff seeking specific performance of the terms of a property settlement agreement must also allege and prove that he or she has performed his or her obligations under the same contract. *Cavanaugh v. Cavanaugh*, 317 N.C. App. 652, 347 S.E. 2d 19 (1986); *Harris v. Harris*, 57 N.C. App. 305, 274 S.E. 2d 489, appeal dismissed 302 N.C. 397, 279 S.E. 2d 451 (1981). All appropriate allegations should be set forth in the complaint seeking specific performance of the separation agreement or property settlement, or the complaint is subject to dismissal.

PRACTICE TIP

"Divorce-related" agreements between spouses which have not been incorporated into a court order, are generally **enforced as a contract.** These include separation agreements, remarital agreements, and property settlement agreements

DON'T SERVE AS COUNSEL FOR BOTH PARTIES

Rule 1.7 of the Revised Rules of Professional Responsibility sets forth the general rule governing conflicts of interest. Of course, generally an attorney may not represent a client if the representation of the client will be or is likely to be directly adverse to another client. CPR 298 (February 1982) provides that a lawyer may ethically represent both parties in drafting a separation or property settlement agreement where the parties agree on the terms and the lawyer has informed each party that, if negotiations break down, she must withdraw and not represent either side.

Although both parties in a domestic situation may attempt to waive the conflict as provided for in Rules 1.7 and CPR 298, allowing a husband and wife to be represented by the same lawyer for the purpose of drafting a premarital or separation and property settlement, the lawyer is ill-advised to agree to such an arrangement even though both parties initially appear to be in agreement. If the negotiations "break-down" or if a dispute between the spouses arise, the attorney would be forced to withdraw from representation of both spouses.

While it may be technically "ethical" to represent both parties in the negotiations of a premarital or post-marital agreement ... it makes no sense for the domestic practitioner to take such a professional risk.

While it may be technically "ethical" to represent both parties in the negotiations of a premarital or post-marital agreement where the provisions of Rules 1.7 are satisfied, it makes no sense for the domestic practitioner to take such a professional risk. The presence of independent counsel can have great impact on the later validity of the marital agreement. Because premarital and post-marital agreements are generally formed within a confidential relationship, our courts have held that spouses with independent counsel are usually adversaries for the purpose of negotiating premarital or post-marital agreements; as such, the confidential relationship and duty to disclose between them no longer exists, and the standard of dealing with the opposing spouse changes. If the attorney has any reason to suspect controversy between the parties in the drafting of the agreement, the attorney should insist that the other party retain counsel.

If you are representing a party in the negotiation of a premarital or post-marital agreement and the other side is unrepresented, it may be advisable to write the other side (especially if you are representing the husband) and suggest that she seek independent counsel. While this provision may disturb your client, especially if she wants to get all issues resolved as quickly and as cost effectively as possible, the need to have independent counsel to validate an agreement may outweigh the possibility that the agreement might later be set aside and declared void.

If the other party does not retain counsel, it may become necessary to deal with that person directly. Rule 4.3 of the Revised Rules of Professional Conduct outlines the course of conduct when dealing with an unrepresented party. The rule provides that, during the course of his or her representation of a client, the lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure independent counsel, if the interests of such person are, or have a reasonable possibility of being, in conflict with the interests of his or her client. The domestic attorney should be careful not to give information to the other spouse that may be perceived as giving advice to the other spouse or to be interpreting any provisions of the agreement for the other spouse. It is important that the drafting attorney have as little direct contact with the other party as possible. It may be advisable to conduct all communication with the unrepresented party in writing so that there is no question that you have not rendered legal advice or misrepresented the law or facts to the unrepresented spouse.

Where one party remains unrepresented at the time the written agreement or court order/judgment is to be finalized, the better practice in drafting the agreement is to include a provision clearly stating that the lawyer who drafted the agreement was retained to represent only one party and that the other party has been advised to seek independent counsel. It is a good idea to always include a section in the agreement that memorializes which party the lawyer represented and that the other side was given an opportunity to have independent counsel but chose not to do so. See also 2002 Formal Ethics Opinion 6, which provides that a lawyer for one of the spouses cannot prepare pleadings (such as an answer to an absolute divorce complaint) for the other, non-represented party to file pro se.